CO Rewrite
重寫《公司條例》

CB(1)722/09-10(01)

CO Rewrite

Rewrite of the Companies Ordinance

Consultation Paper

Draft Companies Bill First Phase Consultation

December 2009

Financial Services and the Treasury Bureau
www.fstb.gov.hk

ABOUT THIS DOCUMENT

1. This paper is published by the Financial Services and the Treasury Bureau ("FSTB") as part of the Companies Ordinance ("CO") rewrite exercise to consult the public on roughly half of the draft clauses of the Companies Bill ("CB"), namely Parts 1 to 2, 10 to 12 and 14 to 18 of the CB. Several complex issues are also highlighted for consultation. The second phase of the public consultation will be conducted on the remaining parts of the CB (except the part on consequential amendments) in early 2010.

2. After considering the views and comments, we aim to issue the consultation conclusions of the two phases of consultation in the second and third quarters of 2010 respectively. We aim to introduce the CB into the Legislative Council by the end of 2010. Meanwhile, we will introduce an amendment Bill into the Legislative Council in early 2010 to amend the CO ahead of the rewrite exercise to implement a number of changes.

3. A list of questions for consultation is set out for ease of reference after Chapter 9. Please send your comments to us on or before **16 March 2010**, by one of the following means:

   By mail to: Companies Bill Team
   Financial Services and the Treasury Bureau
   15/F, Queensway Government Offices
   66 Queensway
   Hong Kong

   By fax to: (852) 2869 4195

   By email to: co_rewrite@fstb.gov.hk

4. Any questions about this document may be addressed to Mr Arsene YIU, Administrative Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2528 9077 (phone), (852) 2869 4195 (fax), or arseneyiu@fstb.gov.hk (email).

5. This consultation paper is also available on the FSTB's website http://www.fstb.gov.hk/fsb and the Companies Registry's website http://www.cr.gov.hk.

6. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

7. Please note that names of respondents, their affiliation(s) and comments may be posted on the FSTB's website, the Companies Registry's website or referred to in other documents we publish. If you do not wish your name and/or affiliation to be disclosed, please state so when making your submission. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Mr Arsene YIU (see paragraph 4 above for contact details).

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ABBREVIATIONS

ACA	Australia Corporations Act 2001
AG	Advisory Group
AGM	Annual General Meeting
CB	Companies Bill
CCASS	Central Clearing and Settlement System
CGR	Corporate Governance Review
CO	Companies Ordinance (Cap 32)
CR	Companies Registry
FSTB	Financial Services and the Treasury Bureau
HKICPA	Hong Kong Institute of Certified Public Accountants
LegCo	Legislative Council
NZCA	New Zealand Companies Act 1993
Registrar	Registrar of Companies
SCA	Singapore Companies Act (Cap 50)
SCCLR	Standing Committee on Company Law Reform
SEHK	The Stock Exchange of Hong Kong Limited
SFC	Securities and Futures Commission
SFO	Securities and Futures Ordinance (Cap 571)
SMEs	Small and Medium-sized Enterprises
UK	United Kingdom
UKCA 2006	United Kingdom Companies Act 2006

EXECUTIVE SUMMARY

1. In mid-2006, the Government launched a major and comprehensive exercise to rewrite the CO. By updating and modernising the CO, we aim to make it more user-friendly and facilitate the conduct of business to enhance Hong Kong's competitiveness and attractiveness as a major international business and financial centre.

2. We conducted three public consultations in 2007 and 2008 to gauge views on a number of complex subjects. Taking into account the views received, we have prepared draft clauses of the CB for further consultation in two phases. The first phase covers Parts 1, 2, 10 to 12 and 14 to 18 of the CB. The second phase consultation, due to be launched in the first quarter of 2010, will cover Parts 3 to 9, 13 and 19 to 20. This paper will:

   (a) outline the key legislative changes proposed in the CB;

   (b) highlight several issues for consultation; and

   (c) contain explanatory notes on the relevant draft Parts.

Enhancing Corporate Governance *(Chapter 2)*

3. To enhance transparency and accountability with companies' operations, as well as to provide greater opportunity for all shareholders to engage in company business in an informed way, we will codify the standard of directors' duty of care, skill and diligence; restrict the appointment of corporate directors; improve disclosure of company information; strengthen auditors' rights; enhance shareholders' engagement in the decision-making process and foster shareholder protection in the CB.

Ensuring Better Regulations *(Chapter 3)*

4. To ensure that the regulatory regime is effective and business-friendly, we propose to introduce in the CB a number of improvements to the company incorporation and name registration procedures, the filing of information and the registration of charges. Many of these will focus on encouraging and exploiting new forms of e-communication. We will also empower the Registrar to take action on "shadow companies" and to obtain more information from companies so as to enhance enforcement of the law.

Business Facilitation *(Chapter 4)*

5. We will allow SMEs to take advantage of simplified accounting and reporting requirements, thereby saving their compliance and business costs. We will also facilitate companies to dispense with AGMs by unanimous members' consent, and simplify some of the complex rules prescribed in the CO, such as the capital maintenance rules. In addition, we will introduce cheaper and less time-consuming alternatives to court procedures to deal with more straight-forward cases, such as a statutory amalgamation procedure for wholly-owned intra-group companies.

Modernising the Law *(Chapter 5)*

6. We will update provisions in the CO which are based on old concepts that no longer meet the needs of modern business, such as the assumption of paper-based communications between a company and its members. We will also retire some antiquated concepts that no longer serve any useful purposes (such as par value of shares), modernise the language and rearrange the sequence of some of the provisions in a more logical and user-friendly order. In addition, technical changes are proposed to provide for the enabling framework for scripless securities trading.

Issues Highlighted for Consultation

7. While we welcome public views on all draft clauses of the CB, there are several specific issues which we would like to highlight for consultation:

   (a) whether the "headcount test" for approving a scheme of compromise or arrangement should be retained or abolished *(Chapter 6)*;

   (b) whether residential addresses of directors and identification numbers of directors and company secretaries should continue to be disclosed on public register *(Chapter 7)*;

   (c) whether private companies associated with a listed or public company should be subject to more stringent regulations similar to public companies for the purposes of the provisions on fair dealings by directors *(Chapter 8)*; and

   (d) whether the common law derivative action should be abolished *(Chapter 9)*.

Future Work

8. This consultation will last until 16 March 2010. A second phase consultation covering the other draft Parts of the CB will be launched in early 2010. We aim to issue the conclusions of these two phases of consultation in the second and third quarter of 2010 respectively. We will refine the CB in the light of the public comments received and introduce the CB into the LegCo by the end of 2010.

CHAPTER 1

INTRODUCTION

Background

1.1 The CO provides the legal framework which enables the business community to form and operate companies. It also sets out the parameters within which companies must operate, so as to safeguard the interests of those parties who have dealings with them, such as shareholders and creditors. As at 31 October 2009, the register of companies had 760 412 companies which were formed and registered in Hong Kong, comprising 750 294 private companies [1] and 10 118 non-private companies [2]. Meanwhile, 7 842 non-Hong Kong companies that had established a place of business in Hong Kong were also on the register.

1.2 The CO is one of the longest and most complex pieces of legislation in Hong Kong, with over 600 sections and 20 schedules. It was last substantially reviewed and amended in 1984, and is broadly in line with the UK Companies Act 1948 and some subsequent reforms, such as those contained in the UK Companies Act 1976. The SCCLR[3] was formed in 1984 to advise the Government on necessary amendments to the CO.

1.3 Over the past decade, the SCCLR and the Government have conducted several major reviews with a view to modernising the company law and upgrading its corporate governance regime, resulting in recommendations to amend various sections of the CO. In the past few years, we have implemented some of those recommendations by means of several amendment bills.[4]

1.4 The piecemeal approach to amending the CO, however, has its limitations. A comprehensive rewrite of the CO is needed to modernise our company law to further enhance Hong Kong's status as a major international business

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1 A private company is defined under section 29(1) of the CO to mean a company which by its articles:
(a) restricts the right to transfer its shares;
(b) limits the number of its members to 50; and
(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.

2 Any company other than a private company is a non-private company. They are also commonly referred to as public companies. Public companies are subject to tighter regulation, such as the requirement to submit annual accounts to the Registrar.

3 Members of the SCCLR include representatives of the SFC, the Hong Kong Exchanges and Clearing Limited and relevant government departments, as well as individuals from relevant sectors or professions such as accountancy, legal and company secretarial. Please see http://www.cr.gov.hk for further information.

4 A brief summary of the recent reviews and legislative amendments can be found in FSTB, "Appendix I: Summary of Recent Reviews of Company Law and Amendments to the Companies Ordinance", *Consultation Paper on Companies Ordinance Accounting and Auditing Provisions* (March 2007) (available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/cocap32_e.pdf).

and financial centre. With the support of the LegCo, the FSTB launched a comprehensive rewrite of the CO in mid-2006.

The Guiding Principles and Benefits of the Rewrite

1.5 The rewrite exercise is guided by the following key principles:

- **Catering for SMEs - "think small first"**

  The provisions of the CO should be reframed and aligned with special regard to the needs of private companies, particularly SMEs. We aim to reduce the compliance costs of companies, particularly private companies and SMEs.

- **Enhancing corporate governance**

  The rewrite aims to strengthen corporate governance, taking into account the interests of stakeholders, such as members, directors, creditors and auditors. Various provisions, including those regarding directors' conflicts of interest and members' rights, will be reformed. In general, public companies should be subject to enhanced regulation, where appropriate.

- **Complementing Hong Kong's role as an international business and financial centre**

  The rewrite will benchmark Hong Kong against other comparable jurisdictions such as the UK, Australia and Singapore in general while taking into account Hong Kong's unique business environment and our close economic relationship with the Mainland.

- **Encouraging the use of information technology**

  We aim to promote the use of information technology, particularly in facilitating communications between companies and their shareholders as well as members of the public, and in encouraging environmentally friendly practices.

1.6 The rewrite will improve the structure of the parts and sections and enhance the clarity of the provisions so as to make the law more accessible to users.[5] It will also help modernise the CO and take forward reforms in respect of those areas which have not been reviewed previously, such as the capital

[5] An information paper on the drafting of legislation was prepared by the Law Drafting Division, Department of Justice for a meeting of the Panel on Administration of Justice and Legal Services of the LegCo held on 15 December 2009. The paper is available on the LegCo's website at http://www.legco.gov.hk.

maintenance provisions. Antiquated concepts, such as the concept of "par value" and the underlying assumption of paper-based communications between a company and its members, will be changed, updated or simplified. We believe that the reform will lead to enhanced market confidence in incorporating and registering companies to undertake business in Hong Kong.

Progress Made

1.7 In view of the extensive nature of the rewrite exercise, we have adopted a phased approach by tackling the core company provisions which affect the daily operation of live companies in Hong Kong in the first phase. The winding-up and insolvency-related provisions, which are mainly administered by the Official Receiver's Office, will be reviewed in the Phase Two of the rewrite. Those parts of the CO concerning prospectuses will be dealt with in a separate review by the SFC and will be transferred from the CO to the SFO in due course.

1.8 We consider it important to gauge the views of stakeholders and the general public in the process of the rewrite. In this connection, we have benefited from the advice of the SCCLR, as well as that of four dedicated AGs and the Joint Government/HKICPA Working Group to review the accounting and auditing provisions of the CO.[6] We have also commissioned an external legal consultant[7] to study and formulate proposals on certain complex areas of the CO, including share capital and debentures, distribution of profits and assets and registration of charges.

1.9 We conducted three public consultations in 2007 and 2008 to gauge views on more complex subjects, including:

(a) accounting and auditing provisions;

(b) company names, directors' duties, corporate directorship and registration of charges; and

(c) share capital, capital maintenance regime and court-free merger procedure.

1.10 The consultation papers and consultation conclusions are available on the

[6] The AGs were comprised of representatives from relevant professional and business organisations, government departments, regulatory bodies, academics and members of the SCCLR. The terms of reference and memberships of the AGs and Joint Government/HKICPA Working Group can be found at http://www.fstb.gov.hk/fsb/co_rewrite/eng/advisorygroup/advisorygroup.htm.

[7] Dr Maisie Ooi from the National University of Singapore was appointed the consultant for the consultancy study on the parts of the CO covering share capital, capital maintenance rules, registration of charges, debentures and remaining provisions in Part II of the CO. She is assisted by several experts from the UK, New Zealand and Singapore.

CO rewrite website.[8] The final proposals have been incorporated into the draft clauses of the CB which we now issue for further public consultation.

Future Work

1.11 Given that the draft CB is lengthy, we are conducting the public consultation on the draft clauses in two phases. The first phase covers Parts 1 to 2, 10 to 12 and 14 to 18. The second phase covers Parts 3 to 9, 13 and 19 to 20. The framework of the draft CB indicating the Parts to be covered in each phase is at **Appendix 1**. The second phase consultation paper and draft clauses will be issued in early 2010 for a three-month consultation. We will revise the draft CB, taking into account the comments received during the consultations. Our aim is to introduce the CB into the LegCo by the end of 2010.

1.12 Meanwhile, in order to tie in with the launch of CR's services for electronic incorporation of companies and filing of documents in late 2010/early 2011, we will introduce a Bill to amend the CO in early 2010. We will also make use of the opportunity to introduce a number of technical amendments to the CO ahead of the rewrite.[9]

Outline of Consultation Paper

1.13 This consultation paper should be read together with the Consultation Draft of Parts 1 to 2, 10 to 12 and 14 to 18 of the CB being published in parallel. It comprises the following:

- **Chapters 2 to 5** outline how the key legislative changes proposed in the CB will contribute to the following objectives:

  (a) enhancing corporate governance (*Chapter 2*);

  (b) ensuring better regulation (*Chapter 3*);

  (c) business facilitation (*Chapter 4*); and

  (d) modernising the law (*Chapter 5*).

- **Chapters 6 to 9** highlight specific issues for consultation. They are:

[8] http://www.fstb.gov.hk/fsb/co_rewrite.

[9] The proposed amendments are summarised in the LegCo Panel on Financial Services paper CB(1)1829/08-09(01) available at http://www.legco.gov.hk/yr08-09/english/panels/fa/papers/fa0611cb1-1829-1-e.pdf.

(a) the "headcount test" for approving a scheme of compromise or arrangement (*Chapter 6*);

(b) disclosure of directors' residential addresses and identification numbers of directors and company secretaries (*Chapter 7*);

(c) treatment of private companies associated with a listed or public company for the purposes of the provisions on fair dealings by directors (*Chapter 8*);

(d) whether the common law derivative action should be abolished (*Chapter 9*).

- A **list of all the questions** for consultation will be set out after Chapter 9.

- **Explanatory notes** on the draft clauses of Parts 1 to 2, 10 to 12 and 14 to 18.

Seeking Comments

1.14 As the proposed changes will have significant implications for company directors, management, shareholders, investors, creditors, and relevant professionals, we would like to invite public comments on the draft clauses and the specific questions raised in Chapters 6 to 9, so that we can further refine the CB before introducing it into the LegCo. Any other views on how the CB should be improved to meet Hong Kong's needs will also be welcome.

CHAPTER 2

ENHANCING CORPORATE GOVERNANCE

2.1 The SCCLR conducted an overall review of corporate governance in Hong Kong (CGR) in 2000 to 2004.[10] Major recommendations arising from the CGR to enhance shareholders' remedies, including the introduction of a statutory derivative action and enhancement of shareholders' access to company records, were implemented in July 2005 by means of the Companies (Amendment) Ordinance 2004. Some other recommendations of the CGR, such as the proposal to set up a body with authority to investigate financial statements and enforce necessary changes to the companies' financial statements, have been implemented through other legislative initiatives.[11] The remaining recommendations that would require legislative changes are being taken forward in the CO rewrite.

2.2 In the course of the rewrite, the SCCLR has further explored a number of corporate governance issues. The key proposals include:

(a) codifying the standard of directors' duty of care, skill and diligence with a view to clarifying the duty under the law and providing guidance to directors;

(b) restricting the appointment of corporate directors by requiring every private company to have at least one natural person as director so as to enhance transparency and accountability;

(c) providing greater transparency and improving disclosure of company information, such as new requirements for listed and certain unlisted companies to prepare a directors' remuneration report and business review;

(d) strengthening auditors' rights, such as providing auditors with a right to require information from a wider group of persons;

(e) enhancing shareholders' engagement in the decision-making process, such as reducing the threshold requirement for shareholders to demand a poll from 10% to 5% of the total voting rights; and

(f) fostering shareholder protection, such as introducing more effective rules to deal with directors' conflicts of interests and enabling

[10] Two consultation papers on proposals made in the CGR and the final recommendations are available at http://www.cr.gov.hk/en/standing/consultation.htm.

[11] The Financial Reporting Council Ordinance (Cap 588) was enacted in 2006.

shareholders of a company to commence a statutory derivative action on behalf of a related company.

2.3 We believe that the above proposals will ensure greater transparency and accountability within the company's operations and greater opportunity for all shareholders to engage in company business in an informed way.

Strengthening Accountability of Directors

Codifying directors' duty of care, skill and diligence

2.4 The issue of whether directors' general duties (including fiduciary duties[12] and duty of care, skill and diligence) should be codified was put to public consultation in the second quarter of 2008. Responses were highly divided. We conclude that it would be premature to go down the route of comprehensive codification at this stage.[13]

2.5 Nevertheless, we see some merit in clarifying the directors' standard of care, skill and diligence as proposed by some respondents. The standard in the old case law[14] focusing on the knowledge and experience which a particular director possesses is too lenient nowadays. Other comparable jurisdictions like the UK have developed a so-called "mixed objective/subjective test" with an objective standard of care expected of directors and a subjective test looking at the personal attributes of a particular director on top of the objective standard.[15]

2.6 In the absence of a clear authority under the common law in Hong Kong in this respect, there is some uncertainty as to how far the "mixed objective/subjective test" will be applied by the Hong Kong courts. We therefore recommend introducing a statutory statement on the duty of care, skill and diligence in the CB (**Clause 10.13**) to clarify the law and provide guidance to directors.

2.7 We believe that the adoption of the statutory statement would be conducive to enhancing corporate governance in Hong Kong. We propose that the statutory statement should replace the corresponding common law rules and equitable principles as the retention of such rules and principles may result in dual standards and hinder the development of the statutory provision.

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[12] Fiduciary duties that apply to directors include: (i) duty to act in good faith in the interests of the company, (ii) duty to exercise powers for proper purpose, (iii) duty to refrain from fettering his own discretion, (iv) duty to avoid conflicts of duty and interest, and (v) duty not to compete with the company. They arise from equitable principles.

[13] See FSTB, *Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges* (December 2008), paragraphs 17 to 20 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

[14] The subjective test is based on Re City Equitable Fire Insurance Co Ltd [1925] Ch 407 at 428.

[15] Section 174 of the UKCA 2006.

Restricting the appointment of corporate directors

2.8 Since 1985, all public companies and private companies which are members of a group of companies of which a listed company is a member have been prohibited from appointing a body corporate as their director, whereas other private companies can continue to have corporate directors.

2.9 After consulting the public in the second quarter of 2008, we propose to restrict corporate directorship by requiring every company to have at least one natural person as its director after a grace period as in the UK.[16] We believe this will strike an appropriate balance between enhancing corporate governance and transparency and the legitimate commercial need for flexibility. It should also be able to meet the anti-money laundering and counter-terrorist financing concerns of the Financial Action Task Force to a large extent.

Improving Transparency and Disclosure of Company Information

Directors' remuneration report[17]

2.10 In recent years, there has been increasing public concern over the remuneration of directors, particularly those of listed companies. The SCCLR has recommended raising the level of transparency in respect of directors' remuneration packages so as to enhance accountability to members.

2.11 We propose that a separate directors' remuneration report should be prepared by:

(a) all listed companies incorporated in Hong Kong; and

(b) unlisted companies where holders of not less than 5% of the total voting rights of all the members so request.

2.12 The directors' remuneration report should cover various types of benefits given to the individual directors by name, including the basic salary, fees, housing and other allowances, benefits in kind, pension contributions, bonuses, payment for loss of office and long-term incentive schemes including share options. It should be approved by the board of directors and signed on behalf of the board by a director. With the exception of service contracts, the information in the report should be subject to audit requirements.

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[16] See **Clause 10.5** of the CB and paragraphs 2 to 4 of Explanatory Notes on Part 10.

[17] Provisions will be included in Part 9 of the CB to be covered in the second phase consultation paper.

2.13 We propose that detailed provisions on directors' remuneration report should be prescribed in subsidiary legislation so as to facilitate regular updating in the future. The subsidiary legislation will be prepared in due course in consultation with the SFC and SEHK to ensure that the requirements on the directors' remuneration report will be in line with similar rules applicable to all listed companies under the Listing Rules.

Business review[18]

2.14 We propose that public companies and those private and guarantee companies that are not eligible for preparing simplified accounts and simplified directors' reports (see paragraphs 4.2 to 4.4 below) should be required to prepare a more analytical and forward-looking business review as part of the directors' report. Specifically, the business review should include, among other things:

(a) a fair review of the business of the company;

(b) a description of the principal risks and uncertainties facing the company;

(c) particulars of any important events affecting the company which have occurred since the end of the financial year;

(d) an indication of likely future developments in the business of the company; and

(e) a balanced and comprehensive analysis of the development, performance or position of the business of the company and, to the extent necessary for an understanding thereof, include:

(i) analysis using financial key performance indicators; and

(ii) if having a significant impact on the company,

- a discussion on the company's environmental policies and performance, including compliance with the relevant laws and regulations; and

- an account of the company's key relationships with employees, customers, suppliers and others, on which its success depends.

[18] Provisions will be included in Part 9 of the CB to be covered in the second phase consultation paper.

2.15 The proposed requirement to include in the business review information relating to environmental and employee matters that have a significant impact on the company is in line with international trends to promote corporate social responsibility.

2.16 We expect the new requirement to prepare a business review will not impose a significant burden on private companies as only a small number of larger private companies where the shareholders have not opted for the simplified accounts and simplified directors' report would be subject to that requirement. Detailed provisions on the directors' report including business review will be stipulated in subsidiary legislation to be made after the CB is passed by the LegCo, so as to facilitate regular updating in the future.

Measures to enhance the timeliness and transparency of company information and proceedings

2.17 The CB will introduce a number of measures to enhance the timeliness and transparency of company information and proceedings. For example:

(a) a comprehensive set of rules for proposing and passing written resolutions will be introduced in Part 12.[19] This is expected to benefit shareholders of SMEs in particular, as SMEs often use written resolutions for their decision-making; and

(b) members of a company will be given a right to inspect voting records and documents (including proxies and voting papers) after a general meeting so as to improve the transparency of the voting process.[20]

Strengthening Auditors' Rights[21]

2.18 In view of the increasingly important functions that auditors are required to perform on the corporate governance front, we propose to strengthen auditors' rights in the following aspects:

(a) auditors will be provided with qualified privilege for statements made in the course of their duties as auditors and in respect of their ceasing to hold office as auditors under the CO. Auditors will not, in the absence of malice on their part, be liable to any action for defamation at the suit of any person in respect of any oral or written statement which they make in the course of their duties as auditors and in respect of their ceasing to hold office as auditors;

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[19] See paragraphs 4 to 7 of Explanatory Notes on Part 12.
[20] See paragraphs 19 to 20 of Explanatory Notes on Part 12.
[21] Provisions will be included in Part 9 of the CB to be covered in the second phase consultation paper.

(b) auditors will be empowered to require from a wider range of persons, including, among others, the employees of the company and the officers and employees of its Hong Kong subsidiaries, and any person holding or accountable for any of the company's or subsidiaries' accounting records,[22] to provide them with information, explanations or other assistance as they think necessary for the performance of their duties as auditors;

(c) where a holding company has a subsidiary undertaking which is not a company incorporated in Hong Kong, the auditor may also require the holding company to obtain from the relevant persons or parties, such as the undertaking concerned or the officer, employee or auditor of the undertaking, such information, explanations or other assistance as the auditor may reasonably require for the purposes of his duties as auditor; and

(d) an outgoing auditor[23] will be required to provide a statement of any circumstances connected with his ceasing to hold office that he considers should be brought to the attention of the members or creditors of the company or a statement of no such circumstances.

Enhancing Shareholders' Engagement in Decision-making Process

2.19 Shareholders have a key role to play in driving company performance and economic prosperity. We aim to promote wider participation of shareholders and ensure that they are informed and involved. The Bill will introduce a number of measures to enhance shareholders' rights in the decision-making process. These include, among others:

(a) providing members with a right to propose a resolution to be moved at a meeting which they have requested to be convened;[24]

(b) requiring companies to circulate at their expense members' statements relating to the business of general meetings and proposed resolutions for AGMs, if they are received in time for sending together with the notice of the meeting;[25]

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[22] The auditors' current rights to information as set out in sections 133(1) and 141(5) of the CO are considered to be too restrictive. For example, under section 133(1), only a Hong Kong subsidiary and its auditor have the duty to give information and explanation. Under section 141(5), the auditor may request only the officers of the company, but not company employees, for information and explanation.

[23] An "outgoing auditor" covers an auditor who ceases to hold office owing to removal from office, resignation or not being reappointed upon expiration of the term of office. The right is broader than the current right of a resigning auditor under section 140A of the CO to make a similar statement.

[24] See paragraphs 8 to 9 of Explanatory Notes on Part 12.

[25] See paragraphs 10 to 13 of Explanatory Notes on Part 12.

(c) lowering the threshold requirement for the right to demand a poll from 10% to 5% of the total voting rights;[26] and

(d) clarifying the rights of a proxy and enhancing members' rights to appoint proxies, such as removing the restriction for a proxy to vote on a show of hands unless provided by the articles, and enhancing shareholders' rights to appoint multiple proxies.[27]

2.20 The use of new information technology will facilitate timely access to company information by shareholders and their communications with the company. The CB will introduce rules to facilitate communications between a company and its members in electronic form or by means of a website. All companies, subject to members' approval, will be able to use electronic communications with members as a default position, permitting companies to use email and websites to communicate with their members. Individuals will be able to request communication in paper form if they wish.[28]

2.21 To keep up with technological development, the CB will also permit a company to hold a general meeting at two or more places using any audio-visual technology that enables the members of the company to exercise their right to speak and vote at the meeting.[29]

Fostering Shareholder Protection

2.22 We will reform the rules in the CO on directors' self-dealing and connected transactions involving directors to make them more effective. On the one hand, we will remove restrictions that are excessive or unnecessary. For example, there will be a general members' approval exception permitting all companies to make loans or enter into similar transactions in favour of their directors or connected persons, if those transactions are approved in a general meeting.[30] We will also decriminalise provisions which restrict loans and similar transactions in favour of directors and connected persons (section 157H of the CO) to avoid the danger of over-deterrence as civil remedies are more appropriate for cases involving directors' duties of loyalty.[31]

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[26] See paragraphs 16 to 18 of Explanatory Notes on Part 12.

[27] See paragraphs 21 to 24, 40 to 41 of Explanatory Notes on Part 12.

[28] See paragraphs 36 to 37 of Explanatory Notes on Part 12 and paragraphs 7 to 16 of Explanatory Notes on Part 18.

[29] See paragraphs 14 to 15 of Explanatory Notes on Part 12.

[30] In the case of public companies, disinterested members' approval will be required. We are consulting in Chapter 6 on whether any private companies associated with a public or listed company should be subject to the same requirement.

[31] See paragraphs 6 to 12 of Explanatory Notes on Part 11.

2.23 On the other hand, more stringent rules will be introduced to plug possible loopholes and to safeguard the interests of minority shareholders.[32] These include:

(a) requiring companies to keep directors' service contracts available for members' inspection and requiring members' approval for director's long-term employment exceeding 3 years;

(b) extending the loss of office payment provisions to include payment to a connected person and payment by a company to a director of its holding company;

(c) requiring members' approval for substantial property transactions; and

(d) widening the ambit of disclosure currently under section 162 of the CO, for example, to cover "transactions" and "arrangements" instead of just "contracts", and to disclose the "nature and extent" of one's interest instead of just disclosing the "nature" of the interest.

2.24 While shareholder remedies under the CO have been substantially enhanced in 2005 as noted in paragraph 2.1 above, there is room for further improvement. In addition to consolidating all existing provisions concerning shareholder remedies into a distinct part (Part 14) of the CB, some changes are proposed to improve the operation of the unfair prejudice remedy and statutory derivative action, including:

(a) extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions";

(b) enhancing the court's discretion in granting relief in cases of unfair prejudice; and

(c) allowing a member of a company to bring a statutory derivative action on behalf of a related company ("multiple derivative action").[33]

2.25 We are consulting in Chapter 9 below whether there is still a need to preserve the common law derivative action as a shareholder remedy.

[32] See Explanatory Notes on Part 11.
[33] See Explanatory Notes on Part 14.

CHAPTER 3

ENSURING BETTER REGULATION

3.1 To ensure that the regulatory regime is effective and business-friendly, the Government will introduce a number of improvements to the company incorporation and name registration procedures, the filing of information, and the registration of charges. Many of these will focus on encouraging and exploiting new forms of e-communication. We will also enhance enforcement against "shadow companies"[34] by empowering the Registrar to act on court orders by directing a "shadow company" to change its name and to substitute its name with the company registration number if the company fails to comply with the direction. Meanwhile, we will also improve the effectiveness of the enforcement regime by giving the Registrar power to obtain documents, records and information for enforcement of certain provisions in the CB and the power to compound certain offences under the CB, and refining the definition of "officer who is in default".

Electronic Company Incorporation

Introducing electronic incorporation and expediting company name approval process

3.2 Starting from late 2010/early 2011, the CR will introduce in phases new services for electronic incorporation of companies and delivery of documents. As noted in paragraph 1.12 above, legislative amendments will be introduced into the LegCo in early 2010 to tie in with the implementation of the new electronic services. Such amendments will cover, among other things, the use of digital signatures and passwords, and signing of the incorporation form and issuance of the certificate of incorporation by electronic means.

Company Name Registration

Expediting company name approval process

3.3 As part and parcel of the company incorporation process, we will introduce changes to the company name registration system with a view to expediting the company name approval process. At present, the performance pledge for incorporation of companies is four working days. Most of the

[34] These refer to those companies incorporated in Hong Kong at the CR with names which are very similar to existing and established trademarks or trade names of other companies and pose themselves as representatives of the owners of such trademarks and/or trade names or produce counterfeit products bearing such trademarks or trade names.

processing time is spent on scrutinising proposed company names to ensure that they are not objectionable for various reasons.[35] To expedite the company name registration system, we will bring forth the approval of company names prior to the company incorporation process, whereby a company name would be accepted for registration if it satisfies certain preliminary requirements, namely, that it is not identical to another name on the register and does not contain words or expressions on a specified list.[36] Thereafter, if the company's name is found to be objectionable as being offensive, likely to give the impression of a government connection or contrary to the public interest upon further checking, the Registrar will be empowered to direct within a specified period the company in question to change its name and to substitute its name with the company registration number if the company fails to comply with the direction. The revised procedures would shorten the company incorporation processing time from four to one working day. The legislative changes will be incorporated into the CB.

Empowering the Registrar to act on a court order requiring an infringing company to change its name

3.4 At present, the Registrar has only very limited power under the CO to deal with "shadow companies". There have been strong requests in recent years from the business community especially trademark/brand name owners in Hong Kong to strengthen our company name registration system to tackle possible abuses by "shadow companies". A proposal to enhance enforcement against "shadow companies" was put forward for public consultation in the second quarter of 2008.[37] Under the proposal, the Registrar would be empowered to act on a court order requiring a company to change its name by directing the "shadow company" to change its name, or substituting its name with the company registration number if the company fails to comply with the direction. The proposal received overwhelming support from the respondents. The amendments will be incorporated into the amendment Bill to be introduced into the LegCo in early 2010.

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[35] For example, a proposed company name must not be identical to the name of an existing company, its use must not constitute a criminal offence nor be offensive or contrary to the public interest. In addition, names that would be likely to give the impression that the company is connected with the Central People's Government or with the Hong Kong Government or any department of either Government or that contain certain words or expressions such as "Chamber of Commerce" and "Trust" require official approval.

[36] Separately, we will review the list of words and expressions in the Companies (Specification of Names) Order in consultation with relevant Bureaux as some of the words may be outdated and should no longer be regulated (e.g. "Municipal" and "Building Society").

[37] The consultation conclusions were issued in December 2008 and are available at www.fstb.gov.hk/fsb/co_rewrite.

Ensuring Accuracy of Information on the Public Register

Clarifying and enhancing the Registrar's powers in relation to registration of documents and keeping of the register

3.5 We will clarify and enhance the Registrar's powers to help ensure the accuracy and timeliness of information on the public register.[38] The new measures will include:

(a) clarifying that the Registrar's powers to specify the form of documents and the form of delivery include requirements as to authentication and the manner of delivery of documents;

(b) giving the Registrar a power to refuse registration of documents if the document is not properly delivered or is unsatisfactory;

(c) empowering the Registrar to withhold the registration of an unsatisfactory document and request the person who delivered the document to take certain remedial actions, such as producing further information or evidence;

(d) empowering the Registrar to require a company or its officers to resolve inconsistencies in information on the register or to provide updated information; and

(e) empowering the Registrar to annotate information on the register to provide supplementary information, such as the fact that the document in question has been replaced or corrected.

Introducing a new court-based procedure for removing from the register information that is inaccurate, forged or derived from anything invalid, ineffective or done without the authority of the company

3.6 At present, it is unclear if the court has general inherent jurisdiction to order the Registrar to remove information which has been provided in compliance with statutory requirements. There is no clear means for a company to remove from the register information which has been placed on the register but subsequently proves to be inaccurate and misleading. As the Registrar is not in a position to determine whether a piece of information is inaccurate or forged, we will introduce a new court-based procedure for the removal of such information. The Registrar will, upon an order of the court, rectify or remove any material on the register that derives from anything invalid or ineffective or that is done without the authority of the company.[39]

[38] See paragraphs 2 to 9 and 12 to 13 of Explanatory Notes on Part 2.
[39] See paragraphs 10 to 11 of Explanatory Notes on Part 2.

Streamlining Regulation

3.7 We have looked for ways to streamline existing regulatory requirements in the CO which no longer serve any practical purpose or overlap with other regulatory measures. Some examples are cited below.

Abolishing the licence system for keeping a branch register of members outside Hong Kong

3.8 Under section 103 of the CO, a company is required to apply and pay for an annual licence if it wishes to keep its register of members in a place at or near which it transacts its business outside Hong Kong. This licence system will be abolished. Instead, if a company transacts business outside Hong Kong, it may keep at such a place a branch register of its members resident there provided that a notice is given to the Registrar of the address where the branch register is kept.

Removing the share qualification requirement for directors

3.9 Section 155 of the CO requires that a director who has not satisfied his share qualification provision in accordance with the company's articles shall do so within a prescribed period. If he does not do so or if a director ceases to retain his share qualification, the director is deemed to have vacated his office. Any unqualified person who acts as a director after the expiration of the prescribed period is liable to criminal sanction.[40]

3.10 The share qualification requirement was originally designed to ensure that directors would act in the interests of the company. However, it is now uncommon for companies to require directors to have or obtain a number of qualifying shares. The criminal penalty provision is also outmoded. The similar requirement in the UK has been repealed.[41] We will remove the requirement in the CB.

Removing disclosure requirements in the Tenth and Eleventh Schedules of the CO that duplicate with financial reporting standards

3.11 The Tenth Schedule of the CO comprises a detailed list of disclosure requirements as to the contents of the balance sheet and profit and loss account. The schedule is now out of date as a result of the significant developments in financial reporting, which are reflected in the Hong Kong Financial Reporting Standards. The Eleventh Schedule of the CO comprises a list of relatively simple disclosure requirements regarding the contents of the balance sheet of companies applying section 141D of the CO.

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[40] The maximum penalty is a Level 3 fine and a daily default fine of $200.

[41] Section 291 of the UK Companies Act 1985 was repealed by section 1295 of the UKCA 2006.

There is an overlap between the Eleventh Schedule and the SME-Financial Reporting Standard.

3.12 In order to avoid any potential conflicts between the applicable financial reporting standards and the Tenth and Eleventh Schedules respectively, the Tenth and Eleventh Schedules will be repealed except for a small number of public interest or corporate governance disclosure requirements which are not covered by the applicable financial reporting standards.[42] Companies will be required to continue to follow the overriding principle that their accounts must give a true and fair view of their state of affairs and will be required to state in their accounts as to whether the accounts have been prepared in accordance with the applicable accounting standards, and the particulars of and the reasons for any departure from those standards.

Registration of Charges

3.13 Taking into account the public's views received during the consultation conducted in the second quarter of 2008[43], we will introduce a number of changes to the registration of charges regime in the CB.[44] These will include:

(a) updating the list of registrable charges, including expressly providing that a charge on an aircraft or any share in an aircraft is registrable and removing the requirement for registration of a charge for the purpose of securing any issue of debentures;

(b) replacing the automatic statutory acceleration of repayment in section 80(1) of the CO with a right for the lender to demand immediate repayment of the amount secured by the charge, should a company fail to register a charge within the prescribed time;

(c) making both the prescribed particulars of the charge and the instrument creating or evidencing a charge registrable and open to public inspection, in order to streamline the registration process and enhance transparency; the same also applies to the application for registration of repayment / release and the supporting evidence thereof; and

(d) shortening the period to register a charge from 5 weeks to 21 days.

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[42] Such disclosures include auditors' remuneration (which applies to companies other than those preparing simplified accounts), the aggregate amount of any outstanding loans to directors and employees to acquire shares in the employing company made under the authority of sections 47C(4)(b) and (c) of the CO and information regarding a company's ultimate parent undertaking required under section 129A of the CO.

[43] See footnote 37 above.

[44] Provisions will be included in Part 8 of the CB to be covered in the second phase consultation paper.

Improving the Enforcement Regime

Giving the Registrar powers to obtain documents, records and information for the enforcement of certain provisions

3.14 Currently, the CR has limited investigatory powers under the CO and has encountered difficulty in performing its regulatory role. In the interest of promoting compliance with provisions under the CB and enhancing the enforcement regime, we intend to empower the CR to obtain documents, records and information to ascertain whether certain acts or omissions by a company or its officers would give rise to the following offences in the CB:

(a) giving the CR false or misleading information in connection with an application for the deregistration of a company; and

(b) making a false, misleading or deceptive statement knowingly or recklessly in any return, report, certificate, balance sheet or other document, required by or for the purposes of any provision of the CB.[45]

The provisions have a strong public interest dimension because any default would impair the integrity of the CR's register and adversely affect the interests of third parties.

3.15 The powers include requiring the company, its officers and any other person who is reasonably believed to be in possession of the relevant documents or records, to produce the documents and records and to provide information and explanation on them.[46]

Updating provisions on company investigations

3.16 Currently, the CO provides for two forms of investigation into the affairs of a company authorised by the Financial Secretary:

(a) formal investigations (known as "inspections") where the Financial Secretary appoints an inspector with extensive powers to conduct the investigation (sections 142 to 150); and

(b) preliminary fact finding, where the Financial Secretary or a person authorised by him may require a company and its present or past directors and employees etc. to produce the company's books and papers and provide explanation of them (sections 152A to 152F).

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[45] Based on the offences under section 291AA(14) and section 349 of the CO.

[46] Provisions will be included in Part 19 of the CB to be covered in the second phase consultation paper.

3.17 Over the past 38 years, there have been 38 appointments of inspectors under the CO, the most recent one was *Peregrine Investments Holdings Ltd* and *Peregrine Fixed Income Ltd* case in 1999-2000 where the Financial Secretary appointed the inspector upon the recommendation of the SFC for an investigation, having regard to the narrow scope of SFC's powers prevailing at that time. Since the SFO came into operation in 2003, the SFC has greater investigatory powers and is able to impose a broader range of sanctions under the SFO. The need for invoking the CO to investigate a listed company has greatly diminished. No preliminary enquiry under section 152A has ever been undertaken since the relevant sections were added in 1984.

3.18 Although the CO investigation regime is now very rarely used, we believe that the two forms of investigation should be retained to give the Financial Secretary "reserve" powers to investigate into the affairs of a company formed or operating in Hong Kong in case there are appropriate grounds to do so in the future. Some updating of the provisions will be made, mainly in the light of similar provisions in the SFO and the Financial Reporting Council Ordinance which are more modern. The significant changes include:

(a) giving the Financial Secretary express powers to define the terms of the appointment of an inspector, limit or expand the scope of an inspection and suspend an inspection at his discretion pending criminal proceedings or otherwise. Provisions will also be added to deal with situations like the resignation or replacement of an inspector and the revocation of an inspector's appointment by the Financial Secretary;

(b) providing an express obligation to inform or remind a person required to assist of the limitations on the use of self-incriminating evidence in proceedings;

(c) giving protection to persons who volunteered information to facilitate investigation by granting immunity from liability for disclosure; and

(d) enhancing the confidentiality of information obtained from an investigation and defining more clearly how such information might be disclosed to other regulatory authorities.[47]

Empowering the Registrar to compound specified offences

3.19 The majority of companies in Hong Kong are SMEs. In many cases, filing defaults may be due to oversight. Nevertheless, we believe that criminal

[47] Provisions will be included in Part 19 of the CB to be covered in the second phase consultation paper.

sanctions should be retained as the last resort.

3.20 To enhance compliance, the Registrar will be given a new power to compound, at her discretion, certain offences under the CB. This means that the Registrar may offer a person who is reasonably suspected of having committed an offence an opportunity to avoid prosecution of that offence by paying an amount to the Registrar as a compounding fee and, where appropriate, remedying the breach constituting the offence within a specified period. If that person accepts such an offer and complies with the terms of such offer, no prosecution will be initiated against him for that offence.

3.21 Compoundable offences will be set out in a Schedule to the CB and generally confined to those offences which are:

(a) related to non-compliance with filing obligations and with obligations for affixture of names or the like;

(b) punishable only by a fine or a fine and a daily default fine (i.e. not by imprisonment); and

(c) triable summarily only.[48]

Replacing the phrase "officer who is in default" with "responsible person" and refining the definition to strengthen the enforcement regime

3.22 Many offence provisions under the CO punish not only a company but also those officers[49] of the company who are in default. An "officer who is in default" is currently defined under section 351(2) of the CO as "any officer of the company, or any shadow director of the company, who knowingly and wilfully authorizes or permits the default, refusal or contravention mentioned in such provision".

3.23 To strengthen the enforcement regime, the following changes will be made to the definition:

(a) replacing the reference to "knowingly and wilfully authorizes or permits the default, refusal or contravention" with "authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention", thus lowering the threshold for a breach or contravention and extending it to negligent acts or omission;

[48] Provisions will be included in Part 20 of the CB to be covered in the second phase consultation paper.

[49] Under section 2(1) of the CO, "officer", in relation to a body corporate, includes a director, manager or secretary.

(b) extending the punishment to an officer of a corporate officer which commits an offence as an officer who is in default, where the first mentioned officer has caused the corporate officer to be in default; and

(c) using the term "responsible person" in place of "officer who is in default" [50].

Adjusting the penalties for offences

3.24 There are three types of penalties provided in the CO, namely, imprisonment, fines and daily default fines[51]. Where appropriate, adjustments will be made to the maximum penalties as prescribed for offences under the CO to ensure consistency and adequate deterrent effect. For instance, the maximum penalties of similar offences applicable to Hong Kong companies and non-Hong Kong companies will be aligned.

3.25 Currently, offences which are punishable by the same level of fine may be subject to different daily default fines. For example, the daily default fines for offences which are punishable by a Level 3 fine range from $200 to $700. Adjustments will be made so that each applicable level of fine will only carry one corresponding amount of daily default fine in the CB as follows[52]:

Level of fine	**Maximum fine amount**	**Proposed daily default fine**
Level 3	$10,000	$300
Level 4	$25,000	$700
Level 5	$50,000	$1,000
Level 6	$100,000	$2,000
Maximum fine amount above $100,000		$2,000

[50] See paragraphs 7 to 12 of Explanatory Notes on Part 1.

[51] A daily default fine is applicable to certain offences where the offender is liable, in addition to a lump sum fine and imprisonment (if any), to a fine each day on which the default, refusal or contravention continues. See section 351(1A)(d) of the CO.

[52] Please note that the amount of daily default fine is only a maximum amount that may be imposed for continued contravention of an offence. The court has discretion to order an amount of such fine well below the maximum in the light of the circumstances of the case.

CHAPTER 4

BUSINESS FACILITATION

4.1 One of the guiding principles of the rewrite exercise is to cater for the needs of SMEs. The Government believes that SMEs should generally be allowed to take advantage of simplified accounting and reporting requirements, thereby saving their compliance and business costs. Another means to save costs is to facilitate companies to dispense with AGMs by unanimous members' consent. We have also looked into ways to simplify some of the complex rules prescribed in the CO, such as the capital maintenance rules. In some cases, the solution involves introducing cheaper and less time-consuming alternatives to court procedures to deal with more straight-forward cases. The new measures include a court-free procedure for reduction of capital based on the solvency test and a court-free statutory amalgamation procedure for wholly-owned intra-group companies. Such alternative procedures should save costs and time.

Saving Costs

Allowing more private companies and small guarantee companies to take advantage of simplified reporting requirements[53]

4.2 At present, section 141D of the CO provides that a private company (other than a company which is a member of a corporate group, a banking company, a deposit-taking company, an insurance company, a stock-broking company, a shipping company or an airline company) may, with the written agreement of all the shareholders, prepare simplified accounts in respect of one financial year at a time.[54] These companies may also prepare simplified directors' reports.

4.3 We will relax the restrictive qualifying criteria to enable more private companies (including those which are members of a group of companies) to prepare simplified financial and directors' reports to save business and compliance costs. The relaxation will be along the following lines:

(a) a private company (other than a banking company, a deposit-taking company, an insurance company, or a stock-broking company) that

[53] Provisions will be included in Part 9 of the CB to be covered in the second phase consultation paper.

[54] The simplified accounts are prepared in accordance with the SME Financial Reporting Standard issued by the HKIPCA.

qualifies as a "small company" [55] will be allowed to prepare simplified financial and directors' reports automatically without any requirement for shareholders' consent;

(b) other private companies may also prepare simplified financial and directors' reports, if shareholders holding at least 75 % of the total voting rights agree in writing and no other shareholder object. The agreement will remain in force until the agreement is revoked by a shareholder;

(c) the current prohibition for a private company which has any subsidiary or is a subsidiary of another company formed and registered under the CO to prepare simplified accounts and reports will be removed. In addition, a private company which is the holding company of a group of private companies may prepare simplified group accounts provided that the criteria of a "small group" [56] or the shareholders' consent requirement are met; and

(d) the current prohibition which prevents a company that owns and operates ships or aircraft engaged in the carriage of cargo between Hong Kong and a place outside Hong Kong from relying on section 141D will be removed. It is considered to be an anachronism which is no longer appropriate.

4.4 We believe that small guarantee companies should be allowed to take advantage of the simplified reporting and disclosure requirements applicable to private companies. Nevertheless, the total assets and number of employees may not be suitable criteria to distinguish large guarantee companies from small ones. We suggest using a total annual revenue of not more than HK$25 million as a bright line rule for guarantee companies. Those guarantee companies with a total annual revenue of HK$25 million or less can take advantage of the simplified accounting and reporting requirements.

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[55] A company is considered to be a 'small company' if it satisfies at least two of the following conditions:
- Total annual revenue of not more than HK$ 50 million.
- Total assets of not more than HK$ 50 million at the balance sheet date.
- No more than 50 employees.

The details will be set out in subsidiary legislation.

[56] A group of companies will qualify as a "small group" in a year if it satisfies at least two of the following conditions:
- Aggregate total annual revenue of not more than HK$50 million net for that year.
- Aggregate total assets of not more than HK$50 million net at the balance sheet date.
- No more than 50 employees.

The detailed criteria will be formulated in consultation with the HKICPA and prescribed in subsidiary legislation.

Allowing companies to dispense with AGMs by unanimous members' consent.

4.5 For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome. In order to simplify the decision-making process, all companies will be allowed to dispense with AGMs if unanimous members' consent is obtained, and that dispensation should be in force unless a member, by notice, requires an AGM to be held in a particular year, or until the dispensation is revoked by passing an ordinary resolution to that effect.[57] A company is also not required to hold an AGM if the company has only one member.

4.6 At present, there is an exception under section 111(6) of the CO for a company to dispense with AGMs if everything that is required to be done at the meeting is done by way of a written resolution or resolutions in accordance with section 116B. The written resolution procedure will be retained in case a company might wish to dispense with an AGM on a specific occasion by a written resolution.

Facilitating Business Operation

Introducing an alternative court-free procedure for reduction of capital based on solvency test[58]

4.7 At present, the CO only allows reduction of share capital by a court sanction procedure, save for the re-designation of the nominal value of shares to a lower amount. Shareholders must agree by special resolution, and the court, after settling the list of creditors and considering creditor objections (if any), has to be satisfied that alternative protections are in place.

4.8 We will introduce a court-free procedure based on a cash flow solvency test[59], as an alternative process in addition to the current rules. The new procedure should be faster and cheaper and will be applicable to all companies.

Allowing all companies to purchase their own shares regardless of the source of funds, subject to a solvency test[60]

4.9 The current rules on buy-backs in the CO, which distinguish between financing a purchase out of distributable profits or the proceeds of a new issue of shares and that out of capital, are fairly complex and restrictive. Also, financing by payment out of capital based on a solvency test is

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57 See paragraphs 25 to 27 of Explanatory Notes on Part 12.

58 Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

59 Generally following the approach in section 47F(1)(d) already provided in the CO in relation to the case of financial assistance.

60 Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

currently provided as an exception available to private companies only. We will streamline the rules and allow all companies to fund buy-backs regardless of the source of funds, subject to a solvency requirement.

Streamlining financial assistance provisions

4.10 Section 47A of the CO imposes broad prohibitions (subject to certain exceptions) on a company and its subsidiaries giving financial assistance to a third party for the purpose of acquiring shares in the company. The rules on financial assistance and the exemptions that are available are overly complex. Also the prohibitions are so wide that it is generally accepted that they are capable of capturing potentially beneficial, or at least innocuous transactions. As a result, companies may spend a disproportionate amount of time and money structuring transactions in such a way that they do not contravene the prohibition. We will attempt to streamline the financial assistance provisions in a manner similar to the NZCA.[61] Nevertheless, as the reformed rules may still be considered to be difficult for companies to comprehend and apply, and the mischief arising from financial assistance can arguably be tackled effectively by rules other than those for financial assistance, we will also consult on the alternative of abolishing the rules in the second phase consultation paper to be issued in early 2010.

Introducing a court-free statutory amalgamation procedure for wholly-owned intra-group companies[62]

4.11 The current procedure for amalgamation by means of a court-sanctioned scheme of compromise or arrangement under sections 166 to 167 of the CO is both complex and costly. We will introduce a voluntary, court-free option to simplify the amalgamation process for intra-group companies, thereby reducing business costs. To minimise the risk of the new statutory procedure being abused, we propose to confine it only to an amalgamation either between a holding company with one or more of its wholly-owned subsidiaries or between two or more wholly-owned subsidiaries of the same holding company, where minority shareholders' interests would normally not be an issue. For amalgamations involving insolvent companies or companies not within the group, the existing requirement for court sanction should be retained so as to ensure that their terms are just and fair to all shareholders and creditors.

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[61] See sections 76 to 80 of the NZCA. Provisions will be included in Part 5 of the CB to be covered in the second phase consultation paper.

[62] Provisions will be included in Part 13 of the CB to be covered in the second phase consultation paper.

4.12 As a safeguard for creditors, the board of directors of each amalgamating company must make statements to verify the solvency of the amalgamating company as well as the amalgamated company.

Introducing a new procedure of "administrative restoration" of dissolved companies by the Registrar

4.13 Presently under section 291 of the CO, a company can be struck off the register by the Registrar if the company is not in operation or carrying on business. There have been some cases where a company struck off seeks to be restored on the ground that, contrary to the Registrar's belief, it was actually in operation or carrying on business at the time of its striking off. This may occur because a company fails to file its annual returns, moves without notifying the CR of a change of registered office and is unaware of the proposed strike-off. While restoration is often straightforward in such circumstances as it is unlikely to be contested, it still requires an application to the court. We will introduce a simplified administrative restoration procedure to allow companies to be restored to the register in straightforward cases without the need for recourse to the court.[63]

Making the keeping and use of a common seal optional

4.14 Section 93(1)(b) the CO stipulates that every company "shall have as its common seal a metallic seal on which it shall have its name engraven in legible characters". The use of the common seal by companies is required generally for executing deeds (particularly in conveyancing transactions), and, for the purposes of sections 71, 73 and 73A of the CO, in issuing a certificate as evidence of title to shares, a share warrant and sealing securities.[64]

4.15 We consider that where the seal is not used, the CB should provide for the requirements governing the mode of due execution of documents to facilitate companies entering into and executing business transactions and contracts which are increasing rapidly in volume and value. In this respect, we will allow a company to execute a document as a deed without using a common seal.[65] Companies can still use a common seal if they wish. This gives flexibility to companies which would have the option of either retaining or dispensing with the common seal.

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[63] See paragraphs 14 to 17 of Explanatory Notes on Part 15.

[64] Please note that the CB will remove the power of a company to issue share warrants, see paragraph 5.7 below. An "official seal" which is a facsimile of the common seal with the addition of the word "securities" or "證券" may be used for sealing securities.

[65] We are considering the mode of due execution of documents without using a common seal. Provisions will be included in Part 3 of the CB to be covered in the second phase consultation paper.

CHAPTER 5

MODERNISING THE LAW

5.1 Some of the provisions in the CO are based on old concepts that no longer meet the needs of modern business. An obvious example is the underlying assumption of paper-based communications between a company and its members. As noted in paragraph 2.20 above, the CB will facilitate communications between a company and its members by electronic means. In addition, we will take the opportunity of the rewrite to retire some antiquated concepts that no longer serve any useful purposes such as par value of shares and authorised capital. Moreover, we will modernise the language and re-arrange the sequence of some of the provisions in a more logical and user-friendly order so as to make the CB more readable and comprehensible.[66] We will also introduce technical changes to provide for the enabling framework for scripless trading by removing, or providing exceptions to, the limitations arising from the provisions on scrip-based shares presently found in the CO.

Share Capital

Retiring the concept of par value[67]

5.2 The current rules relating to share capital require companies having a share capital to have a par value ascribed to their shares. Par value is an antiquated concept which may arguably give rise to one or more of the following practical problems:

(a) unnecessarily complex accounting system;

(b) inhibits raising of new capital;

(c) unnecessary work for share registries and added costs; and

(d) being misleading to the unsophisticated investor.[68]

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66 See footnote 5 above.

67 Provisions will be included in Part 4 of the CB to be covered in the second phase consultation paper.

68 See FSTB, *Consultation Paper on Share Capital, the Capital Maintenance Regime and Statutory Amalgamation Procedure* (June 2008), paragraphs 2.1 to 2.8 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

5.3 In a public consultation conducted in the third quarter of 2008, the majority of the respondents supported the proposal to abolish the par value regime and to adopt a mandatory system of no-par.[69] We will adopt a mandatory system of no-par for all companies with a share capital, subject to a transition period (tentatively 24 months from the date the CB is passed by the LegCo) in case companies wish to review their documents before the conversion is effected.

5.4 Other changes arising from the move to a no-par environment include:

(a) to provide a legislative deeming provision for the amalgamation of the existing share capital amount with the amount of share premium (and also capital redemption reserve) immediately outstanding in a company's account before the migration to no-par share capital;

(b) to preserve substantially the currently permitted uses of the share premium for the amount standing to the credit of the share premium account before the migration to no-par, so as to avoid hardship to companies arising from any loss of the permitted uses of share premium that they enjoyed prior to the migration to no-par;

(c) to provide a statutory deeming provision to preserve contractual rights defined by reference to par value;

(d) to repeal the power of a company to convert shares into "stock"[70] which no longer serves any practical purpose while allowing stock created before the commencement of the CB to be reconverted into paid-up shares;

(e) to apply the merger relief to the amount in excess of the subscribed capital of the acquired company attributable to the shares acquired or cancelled. Group reconstruction relief will apply to the excess of the consideration for the shares over the base value of the assets transferred; and

(f) to allow capitalisation of profits with or without an issue of shares, issuance of bonus shares without the need to transfer amounts to share capital, consolidation and subdivision of shares, and make appropriate provisions in relation to redeemable shares.

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[69] The consultation conclusions were issued in February 2009 and are available at www.fstb.gov.hk/fsb/co_rewrite.

[70] 'Stock' is a fund that has a nominal value equivalent to that of the total of the shares so that a member, instead of holding particular identified shares of 100 shares of $10 each numbered 1 to 100, holds $1000 stock.

Removing the requirement for authorised capital[71]

5.5 Authorised capital is the maximum amount, usually specified in monetary terms, that a company is permitted by its constitutional document[72] to raise by issuing shares. The protection against dilution which authorised capital is thought to provide is far from absolute as most companies are able to increase the authorised capital by an ordinary resolution.

5.6 We will remove the requirement for authorised capital as it no longer serves any useful purpose. Nevertheless, companies can still be given the option to retain the provision for authorised capital in the company's Articles of Association, or to delete or amend it by resolution. If retained, the authorised capital will be deemed to be specified in terms of number of shares to be issued instead of monetary value. The companies may vary or abolish the restriction by ordinary resolution.

Removing the power of company to issue share warrants

5.7 Companies are permitted to issue share warrants to bearer under section 73 of the CO, provided the same is authorised by the company's articles. Share warrants are rarely issued by companies nowadays and are considered to be undesirable from the perspective of anti-money laundering. Consequently, the ability for a company to issue share warrants will be removed in the CB. Nevertheless, existing share warrants should be grandfathered, without setting any time limit for surrender of the warrants.[73]

Enabling Scripless Securities Trading

5.8 The SFC is currently working with the SEHK and the Federation of Share Registrars on the operational model for the proposed scripless environment, with a view to putting forward proposals for public consultation in late 2009. The limitations arising from the provisions on scrip-based shares in the CO will have to be removed to enable the scripless holding and trading of shares and debentures issued by, among others, Hong Kong incorporated listed companies.

5.9 To tie in with the scripless securities market reform, technical amendments to the CO will be introduced into the LegCo in early 2010. The proposed amendments will be commenced only when the market has agreed to, and is

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[71] Provisions will be included in Part 4 of the CB to be covered in the second phase consultation paper.

[72] Under the CO, the constitutional document of a company formed in Hong Kong are the Memorandum of Association and Articles of Association. A company's authorised capital is set out in its Memorandum of Association. We will propose in the CB that a company incorporated in Hong Kong will only be required to have Articles of Association. The Memorandum of Association will be abolished and essential information contained in a Memorandum of Association can be set out in the Articles of Association.

[73] Provisions will be included in Part 4 of the CB to be covered in the second phase consultation paper.

ready to implement, an operational model for a scripless securities market. The CB will also incorporate those technical amendments.[74] Further legislative amendments including amendments to the SFO would be pursued as necessary as the operational model takes shape.

[74] Provisions will be included in Part 4 of the CB to be covered in the second phase consultation paper.

CHAPTER 6

"HEADCOUNT" TEST FOR APPROVING A SCHEME OF COMPROMISE OR ARRANGEMENT

6.1 A recent court case[75] has drawn public attention to the current requirement under section 166(2) of the CO, namely, in order for a compromise or arrangement between a company and its members or creditors (hereinafter referred to as "a scheme") to be approved at a meeting ordered by the court under section 166(1), a majority in number of those who cast votes in person or by proxy at the meeting must have voted in favour of the compromise or arrangement. Some commentators and market practitioners have argued that the "majority in number" requirement or "headcount" test, which is originally intended to protect the minority interests in a scheme of arrangement, deviates from the "one share one vote" principle and is prone to be circumvented by share splitting. The background to the headcount test and the policy options for reforming it are set out below. The Government would like to hear the views of various stakeholders before taking a final view.

Background

Current Position

6.2 Section 166 provides that where a scheme is proposed between a company and its members or creditors or any class of them, the court may, on the application of the company, or any member or creditor, order a meeting of the members or creditors of the company or a class of them to be summoned in such manner as the court directs. The section also provides that if the statutory majority of members, or creditors, or a class of them agree to any scheme of arrangement, the scheme shall, if sanctioned by the court, be binding on all members, or creditors, or a class of them as the case may be, and also on the company.

6.3 In recent years, section 166 has been used in the following circumstances:

(a) listed companies changing their status to that of a private company (privatisation);

[75] *Re PCCW* Ltd, HCMP 2382/2008 and CACV 85/2009.

(b) listed companies in liquidation selling their listing status; and

(c) a group of companies reorganising to create a new holding company.

6.4 Under section 166(2), the procedure to sanction a scheme involves the following:

(a) an application, usually by the company ex-parte, is made to the court for an order that a meeting be summoned pursuant to section 166(1);

(b) at least a majority in number of the members, creditors, or the relevant class, present and voting in person or by proxy in favour of the scheme (headcount test);

(c) that number must hold at least three-fourths in value of the holdings (or claims in the case of creditors) of those present and voting in person or by proxy ("share value" test); and

(d) the proposals, if approved by the requisite majority, may be sanctioned by court.

6.5 The law implies that the court has the discretion not to sanction a scheme even though it has been approved under both the share value test and the headcount test (for instance, where there is doubt that the process has been unfairly administered, such as where the approval under the headcount test was achieved by share splitting).[76] Nonetheless, the court does not have the jurisdiction to sanction a scheme where the headcount test had not been passed even in the event that share splitting has increased the headcount of members opposing the scheme.

6.6 Apart from complying with section 166 of the CO, any person who seeks to use a scheme to acquire or privatise a listed company must also comply with the Code on Takeovers and Mergers ("Takeovers Code") issued by the SFC under the SFO. Under the Takeovers Code, there are additional requirements to protect the interests of minority shareholders, including:

(a) under Rule 2 of the Takeovers Code, an independent board committee comprising all non-executive directors who have no conflict of interest in the scheme has to be established to give advice to disinterested

[76] *Re PCCW Ltd*, CACV 85/2009.

shareholders about its recommendation of voting. The independent board committee would seek advice from an independent financial adviser who will set out its recommendation and the details of its analysis of the merits of the scheme in its letter to the independent board committee reproduced in the scheme document; and

(b) Rule 2.10(b) of the Takeovers Code stipulates that the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares, i.e. shares not held by the controlling shareholders or their connected parties. This requirement, which renders an additional safeguard for minority shareholders, is not provided in other jurisdictions adopting similar rules on takeovers and mergers such as the UK, Australia and Singapore.

6.7 A table summarising the thresholds under section 166 of the CO and the Takeovers Code is at **Appendix 2**.

Other Jurisdictions

6.8 Other common law jurisdictions such as the UK, Australia, Singapore, Bermuda and Cayman Islands, all have legislative provisions similar to section 166 of the CO, including the headcount test. The headcount test originated from the days when the procedure applied only to insolvent company schemes with creditors, presumably to place a check on the ability of creditors with large claims to carry the day. When the provision was extended to non-insolvent schemes with members in 1900, the composition of the required majority remained unchanged.[77]

6.9 In the UK, the Company Law Review Steering Group ("CLRSG") has reviewed the "majority in number" requirement (i.e. headcount test) under section 425(2) of the UK Companies Act 1985. The CLRSG recommended that the test should be abolished as the widespread use of nominees had made it an irrelevant test, and that no other meeting of members of a company required a majority otherwise than by reference to value or voting powers.[78] However, the UK Government did not adopt the

[77] UK Company Law Review Steering Group, *Modern Company Law: Completing the Structure* (November 2000), paragraph 11.34.

[78] *Ibid.* See also UK Company Law Review Steering Group, *Final Report on Modern Company Law for a Competitive Economy* (July 2001), paragraph 13.10.

recommendation in the UKCA 2006 as it considered that the headcount approval was still an important investor safeguard.[79]

6.10 In Australia, in order to tackle the problem of share splitting by parties opposing a scheme, section 411(4) of the ACA was amended in December 2007 to give the court a discretion to approve a members' scheme if it was approved by a 75 percent majority in value even though approval by a majority in number of those members present and voting at the scheme meeting was not obtained. The reasons for the amendment, as stated in the Explanatory Statement to the Exposure Draft of the Corporations Amendment (Insolvency) Bill 2007, were that:

> *"A members' scheme could be defeated by parties opposed to the scheme engaging in 'share splitting', which involves one or more members transferring small parcels of shares to a large number of other persons who are willing to attend the meeting and vote in accordance with the wishes of the transferor. By splitting shares to increase the number of members voting against the scheme, an individual or small group opposed to the scheme may cause the scheme to be defeated. This may occur even though a special majority is achieved in terms of voting rights attaching to share capital, and if the share split had not occurred, the majority of members were in favour of the scheme."*

6.11 The Australian Corporations and Markets Advisory Committee has recently conducted a review of various matters relating to members' schemes, including whether the headcount test in a members' scheme should be removed. A consultation paper was issued in June 2008.[80] So far, no decision has been made by the Australian Government.

Concerns

6.12 Recently, there has been some public debate concerning the headcount test and the issue of share splitting. Some commentators have suggested that the headcount test should be removed.[81] Their main arguments are:

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79 *Hannigan and Prentice – The Companies Act 2006 – A Commentary* (Butterworths, 2007), paragraph 8.76.

80 Corporations and Markets Advisory Committee (CAMAC), *Members' Schemes of Arrangement – Discussion Paper* (June 2008) ("CAMAC Discussion Paper").

81 See, for example, Civic Party, *Policy Proposals to the SFC in relation to the various issues arising from the PCCW Privatisation Scheme of Arrangement under s. 166 of the CO* (12 February 2009) (available at http://www.civicparty.hk/cp/pages/cpnews-e.php?p=10) and Webb-site.com, *Vote-rigging plan for PCCW meeting* (1 February 2009) (available at http://www.webb-site.com/articles/pccwrig.asp).

(a) the headcount test is inconsistent with the "one share one vote" principle in other provisions dealing with shareholder meetings in the CO[82];

(b) as a very large proportion of shares in listed companies are held by nominees and custodians, the headcount test is not indicative of the decisions of the beneficial owners of the shares (see paragraph 6.14 below);

(c) the headcount test requirement attracts attempts to manipulate the outcome of the vote (for or against a scheme) by share splitting.

6.13 At present, shares in listed companies can be held in the following ways:

(a) within the CCASS,[83] in which case the shares are registered in the name of HKSCC Nominees Limited and the investor holds only a beneficial interest in them, i.e. his name does not appear in the Register of Members ("ROM"); or

(b) outside CCASS, in which case the shares are registered in the name of the investor (or his nominee, if he chooses to hold the shares through a nominee), i.e. the name of the investor (or his chosen nominee) appears in ROM.

6.14 A vast majority of investors have chosen to hold their shares within CCASS through their brokers, banks or custodians, mainly because that facilitates electronic trading and transfer of their shareholdings within CCASS. However, this has given rise to concerns about the exercise of voting rights by beneficial owners. The concerns may be summarised as follows:

(a) Investors holding shares through CCASS are in effect disenfranchised unless they take the step in (b) or (c) below;

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[82] The other exception in the CO that makes reference to a similar headcount test is under section 114 which concerns the extension of the length of notice for calling meetings.

[83] CCASS is a computerised book-entry settlement system. Shares in CCASS are registered in the name of HKSCC Nominees Limited, which is a nominee of Hong Kong Securities and Clearing Company Limited, which in turn is a recognised clearing house under the SFO. Investors who hold their shares within CCASS may hold them directly as investor participants or indirectly through brokers/banks/custodians that are CCASS participants. As of June 2009, HKSCC Nominees Limited held approximately 72% of all issued shares of companies listed in Hong Kong (i.e. irrespective of whether they are incorporated in Hong Kong or not) and its holdings represented some 48% of market capitalisation.

(b) Beneficial owners of shares may request (directly as investor participants or indirectly through their brokers, banks or custodians that are CCASS participants) Hong Kong Securities and Clearing Limited to authorise themselves or another person to act as a corporate representative so as to attend and vote at a meeting in respect of the number and class of shares they own. However, it appears that many beneficial owners have chosen not to express their views; and

(c) As an alternative, a beneficial owner may choose to withdraw their shareholdings from CCASS and become a registered shareholder, but this would involve considerable processing time and cost. In gist, they must first apply to withdraw their shares from CCASS and the process may take a few days (depending on the availability of the required denomination of the share certificates to be withdrawn). Share certificates thus withdrawn from CCASS will be in the name of HKSCC Nominees Limited. They must then be re-registered with the share registrar in the investor's (or his nominee's) name and this normally takes 10 days (although the share registrars also offer an expedited service, where operationally feasible, at a higher charge). There is also a charge for both withdrawal from CCASS and re-registration with the share registrar[84].

6.15 The SFC, the SEHK and the Federation of Share Registrars have scheduled to conduct a consultation shortly on a proposed operational model for implementing a scripless securities market in Hong Kong. It is understood that the proposed model will provide options for investors to hold shares in their own names within CCASS without the need to hold physical certificates. This could help enhance shareholder transparency and facilitate shareholder participation (for instance, facilitating individual shareholders to vote at company's meetings and to receive corporate information). However, if the widespread use of nominees/custodians continues, the concerns about beneficial owners exercising voting rights would remain.

Policy Options for Members' Schemes of Listed Companies

6.16 In view of the above concerns, we have considered **three possible options** for dealing with the headcount test in respect of members' schemes of listed

[84] Hong Kong Securities and Clearing Limited charges $3.50 per board lot of shares withdrawn from CCASS and share registrars generally charge $2.50 for each certificate to be re-registered or issued, whichever is greater.

companies, namely, (a) no change to the status quo, (b) retain the headcount test but give the court discretion to dispense with the test, or (c) abolish the headcount test. The arguments for or against each of the options are set out in paragraphs 6.17 to 6.22 below. In considering these policy options, we believe that the following factors should be taken into account:

(a) whether the drawbacks of applying a headcount test have outweighed its intended benefits; and

(b) whether there is sufficient safeguard for small shareholders and creditors if the headcount test is removed.

Option 1: no change

6.17 An argument for retaining the headcount test is that it gives minority shareholders an opportunity to have a significant say in the future nature and structure of a company under a scheme.[85] It may reduce the possibility of schemes being oppressive to, or ignoring the interests of, minority shareholders, particularly under a provision like section 166, whereby a sanctioned scheme has the capacity to bind all members or creditors including the dissenting or apathetic ones.[86] We also note that the headcount test has been retained in most other common law jurisdictions including the UK, Australia and Singapore as well as some off-shore jurisdictions such as Bermuda and Cayman Islands.

6.18 A contrary view is that the headcount test places significant veto power in the hands of small shareholders, out of proportion to their financial involvement in the company. It can result in a group of persons, who together have contributed only a small proportion of the company's equity capital, having the capacity to block a scheme that is supported by shareholders who have contributed a much larger portion of equity. This may deter companies from proposing a scheme, given the time and cost involved in preparing the documentation and holding a shareholder meeting. By contrast, the outcome of a vote by shares may be easier to predict.[87] There are also practical concerns over the difficulties for beneficial owners to express their views in a headcount test as outlined in paragraph 6.14 above.

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85 CAMAC Discussion Paper, paragraph 4.2.4.

86 This view is shared by the Court of Appeal in its judgment in *Re PCCW* case, CACV 85/2009, see in particular Rogers VP and Barma J's remarks in paragraphs 40 and 177 respectively.

87 CAMAC Discussion Paper, paragraph 4.2.4.

Option 2: retain the headcount test but give the court discretion to dispense with the test

6.19 Another option is to refine the legislation so as to enable the court to look into the true headcount position both for and against the proposal in cases where there is reason to believe that the apparent headcount either way is not fairly reflective of the class concerned.[88] A possible model for legislative amendment may be section 411(4) of the ACA mentioned in paragraph 6.10 above. The proposed amendment will give the court a discretion to make an order that the requirement for a majority of members present and voting (i.e. the headcount test) may be dispensed with.

6.20 It is expected that the court would only exercise the discretion to disregard the headcount test in circumstances where there is evidence that the result of the vote has been unfairly influenced by activities such as share splitting.[89] Nevertheless, there may be concern over the uncertainty as to when the court would exercise its discretion. Companies may still be deterred from proposing a members' scheme, given the time, cost and uncertainty involved.

Option 3: abolish the headcount test

6.21 The main arguments for abolishing the headcount test have been set out in paragraphs 6.12 to 6.15 above. One should also note the difference in the shareholding structure between Hong Kong and other jurisdictions like the UK and Australia which retain the headcount test. Both the UK and Australia have implemented a scripless market albeit to different degrees and both have a higher percentage of publicly traded shares being held by institutional investors than in Hong Kong.[90] This may explain why disenfranchisement of individual beneficial owners in the headcount test is less a concern in those jurisdictions.

6.22 If the headcount test for members' schemes of listed companies is to be abolished, there may be a concern over the adequacy of safeguards for minority shareholders under the CO or the Takeovers Code. The CO is not the appropriate tool to provide safeguards specifically for minority

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88 CACV 85/2009, paragraph 192.

89 Explanatory Statement to the Exposure Draft of the Australian Corporations Amendment (Insolvency) Bill 2007.

90 Institutional investors play a more active role in corporate governance and they may be more willing to express their views through brokerage firms, banks and custodians even if they are beneficial owners.

shareholders of listed companies. As noted in paragraph 6.6(b) above, the Takeovers Code already stipulates that the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares. This requirement already renders an additional safeguard for minority shareholders beyond similar rules in comparable common law jurisdictions. If any additional safeguard is considered necessary, it should be tackled separately by the SFC and the Takeovers Panel through the normal consultation process on Takeovers Code amendments.

Question 1

In respect of members' schemes of listed companies, which of the following options do you prefer? Please explain the reasons.

Option 1: retain the headcount test;

Option 2: retain the headcount test but give the court a discretion to dispense with the test; or

Option 3: abolish the headcount test.

Policy Options for Members' Schemes of Non-Listed Companies

6.23 Private companies with a small shareholder base are unlikely to use a scheme for reorganisation. Members' schemes among public non-listed companies are also uncommon. If either Option 1 (retention) or Option 2 (retention but give the court a discretion to dispense with the test) for members' schemes of listed companies is adopted, we believe the same approach should apply to members' schemes of non-listed companies. It should be noted that the court's discretion applies to both listed and non-listed companies under section 411(4) of the ACA in Australia.

6.24 If Option 3 (abolition) is adopted in respect of members' schemes of listed companies, there may be conflicting arguments as to whether the same should apply to non-listed companies. On the one hand, as using nominees to hold shares is much less common in non-listed companies, the case for abolishing the headcount test in respect of members' schemes of non-listed companies may appear to be less persuasive. On the other hand, one may

still argue for abolition of the test on the grounds of inconsistency with the "one share one vote" principle and the potential problem of share splitting.

6.25 If there is public support for abolishing the headcount test in respect of members' schemes of non-listed companies, a further question is whether any additional protection for small shareholders is needed. On the one hand, since non-listed companies do not commonly use the scheme provisions in section 166 of the CO and the court already has a general discretionary power to reject a scheme that improperly prejudices the interests of small shareholders, there does not appear to be a strong case for introducing any alternative safeguard in place of the headcount test. On the other hand, some may believe that certain additional protection would be useful because small shareholders often lack resources in making representations before the court.

6.26 We have considered the possibility of codifying the requirement of Rule 2.10(b) of the Takeovers Code (i.e. the number of votes cast against the resolution shall not be more than 10% of the voting rights attached to all disinterested shares) and extending it to members' schemes of non-listed companies. However, we do not favour such an approach. There may be difficulties in defining "disinterested shares" in the absence of administration by the SFC. Moreover, as the majority of non-listed companies are private companies having a small number of shareholders, the application of Rule 2.10(b) may give too strong a veto power to a few shareholders.

Question 2

(a) If your answer to Question 1 is Option 3, do you think that the headcount test should also be abolished in respect of members' schemes of non-listed companies?

(b) If your answer to (a) is yes, do you think that some form of additional protection should be provided for small shareholders? If so, what should such protection be?

Policy Options for Creditors' Schemes

6.27 Some similar factors come into play in the headcount test of members' schemes and creditors' schemes. Like share splitting in members' schemes, there is a possibility of manipulation of the outcome of voting by assigning part of one's debts to other persons. Nevertheless, certain considerations may be different. These include:

(a) it is possible in a creditors' scheme for major creditors to buy out the debts from small creditors to ensure the smooth sailing of a proposed scheme in a creditors' meeting;

(b) it is less likely for small creditors who oppose a proposed scheme to manipulate the outcome of voting by assigning part of their debts to other persons because of the difficulty in finding assignees who are willing to take on the debts especially as the chance of recovery as small creditors is relatively slim; and

(c) those creditors who are not satisfied can always petition to the court for the winding up of the company where the court may stay the process.

The problems arising from the headcount test are thus less evident in the creditors' scheme.

6.28 If Option 1 (retention) is adopted in respect members' scheme, there seems no reason for treating creditors' schemes differently. If Option 2 is adopted in respect of members' schemes, we are not inclined to extend the court's discretion to cover creditors' schemes in view of paragraph 6.27(b) above. It is noted that the court's discretion to dispense with the headcount test in section 411(4) of ACA only applies to members' schemes and not creditors' schemes.

6.29 If Option 3 (abolition) is adopted in respect of members' schemes, we are open to and would appreciate views on whether creditors' schemes should be treated differently. There are both arguments for and against abolishing the headcount test in respect of creditors' schemes. Some may see the headcount test as a means to ensure that the voices of small creditors (including employees who are owed wages or other entitlements by the company) are heard. On the other hand, some query the need for a headcount test as small creditors already stand in a better position than

minority shareholders as they can always petition to court for winding-up in the last resort.

6.30 We have incorporated views expressed by the SCCLR to facilitate discussion on this topic.

Question 3

If your answer to Question 1 is Option 2 or Option 3, do you think that the same approach should apply to creditors' scheme?

CHAPTER 7

DISCLOSURE OF DIRECTORS' RESIDENTIAL ADDRESSES AND IDENTIFICATION NUMBERS OF DIRECTORS AND COMPANY SECRETARIES

7.1 At present, directors and secretaries of companies incorporated or registered in Hong Kong (including non-Hong Kong companies) are required by the CO to provide their residential addresses and identity card or passport numbers ("identification numbers") to the CR for incorporation and registration purposes. Such information is considered important for regulatory authorities or relevant stakeholders (such as shareholders, creditors and liquidators) to locate the directors and company secretaries, particularly in cases where service of documents and legal proceedings is involved. However, as such information is available on the CR's register or can be inspected and copied by members of the public, by paying a small fee, there may be concerns over data privacy and possible abuses. While we consider that there is no longer a need to require company secretaries to disclose their residential address, we would like to hear public views before deciding on the disclosure of directors' residential addresses and identification numbers of directors/ company secretaries.

Background

Current Position

7.2 There are various sections in the CO which require the disclosure of and provision for inspection of information covering residential addresses and identification numbers of directors and secretaries of a company incorporated in Hong Kong, namely:

(a) section 14A stipulates that an incorporation form submitted to the Registrar should contain, among other information, the usual residential address and identification number of each of the prospective directors and the prospective company secretary;

(b) section 158 requires every company to keep a register of its directors and secretaries, containing such particulars such as their names, usual residential addresses and identification numbers, and to allow the inspection of the register by members of the company free of charge and by non-members upon the payment of a fee; and also every company must send to the Registrar such information containing the

particulars specified in the register within 14 days from the appointment of a new director/secretary or from the occurrence of any change in the particulars of the company's directors/secretaries that are contained in the register;

(c) section 158C stipulates that the Registrar shall keep and maintain an index of directors of companies containing their name, address and latest particulars. The index is open for inspection by any person upon the payment of a prescribed fee;

(d) sections 107 and 109 require every company to submit a return to the Registrar annually containing all particulars of its directors and secretaries that are required to be kept in the register of the company; and

(e) section 305 provides that any person may inspect a copy of documents kept by the Registrar subject to the payment of a fee.

7.3 Non-Hong Kong companies registered under the CO are subject to similar requirements as stipulated under sections 333, 333C, 334 and 335 of the CO.

7.4 In the interest of protection of personal data in public registers, section 305 of the CO has been amended so that the purposes for which documents kept or maintained by the Registrar under the CO are made available for public inspection are stated in sub-section (1A). The CR has also implemented various measures to comply with the requirements of the Personal Data (Privacy) Ordinance (Cap 486), including stating a Personal Information Collection Statement in each specified form, its homepage and information leaflets to publicise the purposes of the register and the collection of personal data.

Concerns

7.5 While there are occasional complaints to the CR concerning the disclosure of personal data of directors/company secretaries in the public register, there have not been major problems thus far concerning the misuse of personal data. Nevertheless, as it is now relatively easy to access the personal data through the Internet and as there is increasing public concern over protection of personal data, there is a case to review the need for disclosure of directors/company secretaries' personal data on the public register.

Other Jurisdictions

7.6 Other comparable jurisdictions such as the UK, Australia and Singapore have provisions in their company law governing the disclosure of personal data of directors and company secretaries to the public. These provisions are summarised below.

Singapore

7.7 Singapore adopts a disclosure regime very similar to that in Hong Kong. The identification and usual residential addresses of directors and the identification of company secretaries are disclosed in the public register[91].

Australia

7.8 The ACA requires the personal particulars of new directors and company secretaries, including their name, date and place of birth and usual residential address to be lodged with the Australian Securities and Investments Commission ("ASIC") (there is, however, no requirement for a passport number or other identification). Such information collected is on the public register kept by the ASIC and available for public inspection. Section 205D(2) of the ACA, however, allows a director/company secretary to have an alternative address to be substituted for his usual residential address if the ASIC determines, upon application of the director, that including his residential address in the public register will put at risk the director or his family members' personal safety.[92]

7.9 A person taking advantage of the alternative address provisions is still required to lodge with the ASIC notice of his usual residential address (as well as any change in the address subsequently) and information concerning his usual residential address may be disclosed to the court for purposes of enforcing a judgment debt ordered by the court.

The UK

7.10 In the UK, the issue of disclosure of directors and company secretaries' residential addresses had been reviewed and hotly debated in its recent company law review. As there had been a number of cases of directors of companies, and in some cases members of their families, being harassed or

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91 Section 173 of the SCA.

92 Another alternative condition is the director/secretary's name is already on an electoral roll under the Commonwealth Electoral Act 1918 but this is not directly relevant to our consideration.

intimidated by extremists (e.g. animal rights activists), the UK Companies Act was amended twice in the past decade:

(a) in 2002, a scheme of confidentiality orders was introduced to protect those directors and company secretaries who could show that they were at serious risk of violence and intimidation. A director or company secretary might apply to the Secretary of State for a confidentiality order. If the order is granted, he might substitute the usual residential address with a service address in the public register although the order would have no retrospective effect (i.e. the authority was not obliged to remove an address from existing records);

(b) there were concerns that the scope of protection was not wide enough, for example, it did not protect directors of companies whose customers or suppliers became controversial.[93] Under the UKCA 2006[94], every director is given the option of providing a service address for the public record with the residential address being kept on a separate record to which access is restricted to specified public authorities and credit reference agencies.[95] Existing addresses already on the public record would be purged upon application.[96] Similar protection is provided for directors' residential addresses in respect of overseas companies.[97] Meanwhile, the requirement to file the company secretaries' residential addresses has been abolished.

Considerations

Company secretaries' residential addresses

7.11 We will maintain the existing requirement in section 154 of the CO that a company secretary, being an individual, should ordinarily reside in Hong Kong.[98] However, unlike directors, company secretaries do not owe fiduciary duties to the company and are not personally subject to legislation relating to disqualification. There does not seem to be any strong

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93 For example, the supplier or customer of a company may be alleged of being engaged in controversial practices such as using forced or child labour or infringing animal rights.

94 Sections 240-246 of UKCA 2006.

95 Section 243 of UKCA 2006. "Public authority" includes any person or body having functions of a public nature and "credit reference agency" means a person carrying on a business comprising the furnishing of information relevant to the financial standing of individuals, being information collected by the agency for that purpose.

96 Section 1088 of UKCA 2006. The UK government explained that since pre-2003 information is held on microfiche, it is therefore particularly difficult to remove and since many existing records held on a microfiche are of poor quality, the purging process will be likely to cause loss of information, not just that which is intended to be removed from the public record.

97 Section 1055 of UKCA 2006.

98 See **Clause 10.24(4)** of the CB.

justification for continuing the requirement for a company secretary's residential address to be publicly available. Under the CB, company secretaries may file a service address.

Directors' residential addresses

7.12 There may be conflicting arguments as to whether the residential addresses of directors should continue to be publicly available. Some may prefer adopting either the Australian or the UK approach to restrict public access to directors' residential addresses as a means for protection of personal data.

7.13 On the other hand, there are arguments for maintaining the current disclosure requirement, including:

(a) directors of a company are personally subject to legislation relating to disqualification, fraudulent trading, and other enforcement and regulatory actions but are not always contactable through the registered office. It is in the public interest that regulatory and enforcement agencies, and also stakeholders such as creditors and liquidators, be able to contact directors easily through their residential addresses, in particular when the company is being wound up or dissolved;

(b) unlike in the UK where extremists' harassment and intimidation of directors of certain "controversial" companies has become a social concern, that is not a phenomenon or issue in the Hong Kong society;

(c) there would be considerable practical problems involved in following either the Australian or the UK approaches. The Australian approach requires discretion as to whether particular addresses should or should not be placed on the public record. The CR staff would be put in a very difficult position to assess claims of personal safety risks. The scheme could easily be abused by those who do not have any genuine claim of safety risks;

(d) the UK approach also presents tremendous practical challenges. First, it would be a considerable challenge for the CR to maintain a confidential register for a single category of information and to ensure that it is kept up to date. Many directors might fail, inadvertently or otherwise, to inform the CR of changes in their residential addresses. Second, it would be difficult for the CR to decide who should have access to information in the confidential register. If access is only

confined to public authorities and credit reference agencies, some current legitimate data users like creditors and liquidators will be disadvantaged. On the other hand, if the net is cast wide (e.g. covering also shareholders, creditors, employees who are owed outstanding entitlements and liquidators), the CR would have difficulty in handling numerous requests for access to the confidential register. We understand that the UK Companies House has encountered practical difficulties in handling such requests even though access to their confidential register is fairly restrictive; and

(e) another major practical difficulty is how to deal with the numerous existing records of directors' residential addresses embedded in a huge number of documents filed with the CR over the past decades. These documents are kept either as scanned copies or microfiche. The removal of residential addresses would mean deleting the text from every public record held with the CR while retaining the information for the confidential register. Moreover, it would be wholly impracticable for the information stored on microfiche to be removed. The UK has tried to contain the problem by removing data only upon application. The workload would still be considerable if there is a large number of applications coming in at roughly the same time.

7.14 We have to strike a balance between protection of personal data and the need to allow access to such data by relevant stakeholders for legitimate purposes. Having considered the pros and cons of retaining the current disclosure regime and adopting the UK or Australian approaches, we are inclined to retaining the current regime. Nevertheless, we would like to listen to the views of all the stakeholders before taking a final view.

Question 4

(a) Do you agree that directors' residential address should continue be made available for inspection on the public register?

(b) If your answer to (a) is in the negative, do you think that either:

(i) the Australian approach (paragraphs 7.8 and 7.9); or

(ii) the UKCA 2006 approach (paragraph 7.10(b)) should be adopted?

(c) If you consider that either the Australian or the UKCA 2006 approaches should be adopted, do you have any suggestions on how to tackle the practical problems highlighted in paragraph 7.13(c) to (e) above?

Identification numbers of directors and company secretaries

7.15 There may also be conflicting arguments on whether identification numbers of directors and company secretaries should continue to be available for public inspection. The arguments for maintaining the status quo are:

(a) in view of the fact that different persons having the same name are quite common in Hong Kong, restricting access to identification numbers may deprive the public of a means of uniquely identifying individuals, and might make it easier for the dishonest to escape creditors or otherwise engage in fraudulent activity. The option of masking 3 or 4 digits of an identification number would not serve the purpose of identifying a person as there are cases of persons with the same name having similar identity card numbers;

(b) misuse of identification numbers is not perceived to be a major problem in Hong Kong;

(c) similar to the problem regarding directors' residential addresses cited in paragraph 7.13(e) above, purging of or masking certain digits from all identification numbers embedded in existing records filed with the CR would present an insurmountable practical problem; and

(d) it would be difficult for the CR to decide who should have access to the full identification numbers. Other than public and regulatory authorities who may need full identification numbers for enforcement actions, some private parties such as liquidators may also need the information for legitimate purposes.

7.16 On the other hand, there are arguments for masking certain digits in identification numbers at least in respect of new records of directors/company secretaries on the public register. These arguments are:

(a) there is a risk that personal identification numbers could be misused as identity card numbers are often used in electronic or telephone transactions involving the verification of the identity of an individual;

(b) purging of past records could be undertaken by a phased approach if this cannot be accomplished in one go; and

(c) the CR can issue guidelines on who can have access to the full identification numbers upon application. If necessary, the guidelines can be put on a statutory basis.

7.17 We would like to hear public views on whether public availability of identification numbers is a major problem before deciding on the way forward.

Question 5

(a) Do you think that there is a need to mask certain digits from the identification numbers of new records of directors and company secretaries on the public register?

(b) If your answer to (a) is yes, do you have any views on how to deal with personal identification numbers on existing records?

CHAPTER 8

REGULATING DIRECTORS' FAIR DEALINGS OF PRIVATE COMPANIES ASSOCIATED WITH A LISTED OR PUBLIC COMPANY

8.1 Currently, a private company that is a member of a group of companies which includes a listed company (a "relevant private company"[99]) is in essence treated in the same manner as a public or listed company in the CO in respect of prohibitions on loans, quasi-loans and credit transactions in favour of directors or directors of its holding company or another company controlled by one or more of its directors.[100] The relevant private companies are thereby subject to more stringent restrictions than other private companies. In Part 11 of the CB, we propose relaxing the prohibitions on public companies in respect of these transactions. A new exemption will be introduced to enable public companies to make a loan, a quasi-loan or enter into a credit transaction in favour of a director or connected entity subject to disinterested members' approval.[101] Private companies will generally continue to be subject to less stringent regulations. There are, however, different views as to whether private companies associated with a public or listed company should be subject to more stringent restrictions similar to a public company. We would like to hear the public's views on this matter, before taking a final view.

Background

8.2 Sections 157H and 157HA of the CO deal with prohibitions on loans, quasi-loans and credit transactions in favour of directors, directors of a holding company and certain connected persons and exceptions to these prohibitions. Public companies and relevant private companies are subject to more stringent restrictions than other private companies in the following aspects:

(a) they are subject to additional prohibitions relating to quasi-loans and credit transactions[102];

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99 See section 157H(10) of the CO.

100 The prohibitions are extended to cover certain connected persons (e.g. spouse, child and step-child) of the directors in the case of listed companies and relevant private companies.

101 See paragraphs 24 to 27 of Explanatory Note on Part 11.

102 Sections 157H(3) and (4), which was introduced in 2003 to include more modern forms of credit, prohibits public companies and relevant private companies from making quasi-loans or entering into credit transactions in favour of their directors or other persons specified in the section.

(b) the prohibitions are extended to making loans, quasi-loans to or entering into credit transactions with persons connected with a director[103]; and

(c) they are not eligible for the members' approval exception in section 157HA(2) under which other private companies may be exempted from the prohibitions on making loans to a director etc. if the transaction is approved by members at a general meeting.

8.3 A relevant private company may be a subsidiary, holding company or fellow subsidiary of a listed company. This can include a private company owned by a holding company of a listed company although the private company falls outside the listed group under the Listing Rules.[104]

8.4 The SCCLR has recommended that the general exception of members' approval to the prohibitions on loans and similar transactions currently applicable to private companies other than "relevant private companies" should be extended to all companies (see paragraphs 7 to 9 of the Explanatory Notes on Part 11 for details). Nevertheless, as a safeguard against possible abuse by those in control, public companies will be subject to the requirement of disinterested members' approval, i.e. the resolution of a public company is passed only if every vote in favour of the resolution by the specified interested members is disregarded (see paragraphs 24 to 27 of the Explanatory Notes on Part 11). We have to consider whether "relevant private companies" should be subject to the same disinterested members' approval requirement as well as the additional restrictions stated in paragraph 8.2(a) and 8.2(b) above. Other than abolishing the concept of "relevant private company" and treating all private companies in the same manner, four possible options are set out below for consideration.

Options

Option 1: Retaining the concept of "relevant private company"

8.5 It may be argued that a private company associated with a listed company should continue to be subject to tighter regulation, given that a more stringent regulation of such private companies is desirable to further protect the interests of the shareholders, particularly minority shareholders of the

[103] It should be noted that the additional prohibitions do not apply to a public non-listed company unless it is a member of a group of companies which includes a listed company, see section 157H(8) of the CO.

[104] c.f. the terms "group" and "subsidiaries" as defined in Chapter 1 of the Main Board Listing Rules. A "group" means the issuer or guarantor and its subsidiaries, if any, and "subsidiaries" includes the meaning attributed to it in section 2 of the CO and any entity which is or will be accounted for and consolidated in the audited consolidated accounts of another entity as a subsidiary pursuant to the applicable financial reporting standards.

listed companies. It is also noted that there is similar concept of "relevant private companies" in the UK CA 2006 where "companies are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate".[105] The concept of "companies associated with a public company" in the UK is therefore similar to that of "relevant private companies" in Hong Kong. The only difference between Hong Kong and the UK approaches is that the Hong Kong provisions refer to a group of companies in which a member is a "listed" company whereas the UK model refers to companies which are in the same group as a "public" company. Notwithstanding the disinterested members' voting requirement, the extension of the members' approval exception to "relevant private companies" is already a relaxation of the existing law.

Option 2: Extending the concept of "relevant private company" to cover companies associated with non-listed public companies

8.6 As an alternative to Option 1, instead of covering private companies which are in the same group as a "listed company", we can consider following the UK approach which covers companies associated with a "public company" instead. This would extend the extra protection of shareholders of listed companies to shareholders of non-listed public companies. Nevertheless, the impact is likely to be insignificant as the number of non-listed public companies is relatively small in Hong Kong.

Option 3: Modifying the concept of "relevant private company" by disapplying it to private companies having a common holding company with a listed/public company

8.7 The current definition of "relevant private company" does not only cover private companies which are subsidiaries or holding companies of a listed company, but also any private company which has a common holding company with a listed company. This means that tighter restrictions are imposed on a private company whose holding company happens to be a majority shareholder of a listed company. There is some doubt as to whether this is justified because the listed company and its public investors have no interests in such a private company although the two companies happen to have a common majority shareholder which is a company. It can be argued that such a private company should be excluded from the concept of "relevant private company".

8.8 On the other hand, we note that any loss suffered by the sibling private company may indirectly impact on the listed company depending on the

[105] Section 256(b) of UKCA 2006.

circumstances. For instance, where the listed company had provided security for the private company's liabilities under other transactions, the damage to the financial position of the private company can trigger the listed company's liabilities. It may therefore be argued that more stringent regulation of any private company in a group containing a listed company seems justified.

Option 4: Modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company

8.9 Another alternative is to modify the concept of "relevant private company" to cover only the subsidiaries of a public company, whether listed or unlisted. The rationale is that the shareholders of all types of public companies should be given the same level of protection and it is fair and justified to include subsidiaries of all public companies in view of the number of shareholders that may be involved.[106] Where the private company is the subsidiary, then any loss suffered by the private company (as a result of the quasi-loans, etc.) impacts on the shareholders of the listed/public holding company since the subsidiary is an asset of the holding company and there would be a diminution in the holding company's assets, with flow-on effects for the shareholders of the holding company. On the other hand, if the holding company is a private company, any loss suffered by the holding company would not have the same type of impact on the position of the minority shareholders of the listed/public company subsidiaries. Meanwhile, targeting only subsidiaries will avoid casting the net too wide to cover private companies whose holding company happens to be a majority shareholder of a listed company. As noted in paragraph 8.7 above, there is some doubt as to whether such private companies should be subject to tighter restrictions.

Question 6

On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, which of the following options do you prefer?

Option 1: "relevant private companies" as defined in section 157H(10) of the CO should continue to be subject to more stringent regulations similar to public companies (including restrictions relating to quasi-loans and credit transactions, restrictions

[106] It is noted that private companies associated with a public company are subject to tighter regulation under the UKCA 2006. See sections 198(1), 200(1) and 201(1) of the UKCA 2006.

relating to connected persons and disinterested members' approval requirement);

<u>Option 2</u>: extending the concept of "relevant private company" to cover companies associated with non-listed public companies;

<u>Option 3</u>: modifying the concept of "relevant private company" by disapplying it to private companies having a common holding company with a listed/public company;

<u>Option 4</u>: modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company; or

<u>Option 5</u>: abolishing the concept of "relevant private companies", i.e. all private companies should be subject to the same treatment.

Any other option (please elaborate)?

CHAPTER 9

COMMON LAW DERIVATIVE ACTION

9.1 We need to consider if the existing right to take a common law derivative action ("CDA") as preserved under section 168BC(4) of the CO should be abolished in Part 14 of the CB.

Background

Current Position

9.2 Shareholder remedies provisions were substantially revised by the Companies (Amendment) Ordinance 2004 with a view to enhancing legal remedies available to members of a company. One of the significant changes was to provide a new statutory derivative action (SDA) procedure that may be taken on behalf of a company by a member of the company in Part IVAA of the CO. By section 168BC(4), the right to take a CDA was specifically preserved.

9.3 At present, section 168BC(1) only allows a member of a specified corporation (i.e. a Hong Kong or a non-Hong Kong company) to bring or to intervene into an action on behalf of the company in respect of "misfeasance" (i.e. fraud, negligence, default in complying with any statutory provision or rule of law or breach of duty) committed against the company. In response to the comments made by the Court of Final Appeal in *Waddington Limited v Chan Chun Hoo and Others*[107] that the scope of the SDA should be extended to cover "multiple" derivative actions, the Government intends to amend the relevant provisions in the CO through a Companies (Amendment) Bill to allow also a member of an associated company of the specified corporation[108] to take a SDA (see also the Explanatory Notes on Part 14 below).

Concerns

9.4 There had not been major concerns over preserving the right to take a CDA after the introduction of the SDA in the CO. However, in its judgment, the Court of Final Appeal suggested that once the legislation had been extended to cover multiple derivative actions, there seemed no need to retain the CDA. The CDA had been preserved mainly because of concerns that its abolition

[107] (2008) 11 HKCFAR 370.

[108] An "associated company" in relation to a specified corporation means any company that is the specified corporation's subsidiary or holding company, or a subsidiary of that specified corporation's holding company.

might deprive shareholders of companies incorporated outside Hong Kong of common law rights which would otherwise be available to them. But the Court of Final Appeal was of the view that such concerns were unfounded because if the question whether a derivative action would be available to such a company was a question of substantive law, then such a question together with the rules of internal management would be governed by the law of the place of incorporation of the company and not by the common law of Hong Kong.

Considerations

9.5 The question of whether the CDA should continue to be preserved after the extension of the SDA to cover multiple derivative actions has been considered by the SCCLR recently. The SCCLR recommended that the public should be consulted before a final view is taken on the issue. The main arguments for and against the abolition of the CDA are set out below for reference:

Arguments for abolishing CDA

9.6 The arguments for abolishing the CDA are:

(a) it is unusual in an international context for both the SDA and the CDA to co-exist. In Australia, Canada, New Zealand and the UK, the statutory regime has replaced the common law regime; and

(b) co-existence of the SDA and the CDA is a source of confusion and complication. The continued existence of two parallel regimes will serve no discernible purpose. One of the major reasons given for such an arrangement is to allow members of non-Hong Kong companies to bring a CDA in Hong Kong in circumstances where the rules on standing and internal management in the law of the place of incorporation would allow such members to bring an action. The reason is based on the view that the rules on derivative actions are procedural rules which are governed by the *lex fori* (i.e. Hong Kong law, for present purposes). If the CDA is abolished in Hong Kong, then members of the foreign company would not be able to bring a CDA in Hong Kong even though the law in the place of incorporation would have allowed that. This view is arguable but may not be correct, as suggested in the *Waddington* case.

Arguments for preserving CDA

9.7 The arguments for preserving the CDA are:

(a) to preserve the ability of members of foreign companies to bring a CDA in Hong Kong, if indeed the correct view is that the rules on derivative actions are procedural rules and are governed by the *lex fori*, while the law of the place of incorporation governs the right of a shareholder to bring a CDA. There are a large number of companies incorporated outside Hong Kong but with Hong Kong resident shareholders, which have no place of business in Hong Kong and therefore are not non-Hong Kong companies within the meaning of Part XI of the CO. These foreign companies are therefore not within the definition of "specified corporation" and not able to bring a SDA. To abolish the common law right for these foreign companies may deprive their shareholders of rights they currently enjoy, because even if the law of incorporation of such companies gives analogous rights to a CDA, they would not be enforceable in the courts of Hong Kong if the CDA were to be abolished. Indeed a CDA may be needed as a fall back position for those non-Hong Kong companies who may bring a SDA pursuant to CO section 168BC, but whose relevant internal management rules do not match the definition of "misfeasance" in CO section 168BB;

(b) the abolition of the CDA may create unnecessary difficulties for the Hong Kong shareholders of these foreign companies to seek derivative actions in the Hong Kong courts, even though the Hong Kong courts may, under the principle of *forum conveniens*, consider themselves to be the natural and appropriate forum for resolving the issues, as there is nothing in Hong Kong under the Rules of the High Court to regulate such derivative actions;

(c) the co-existence arrangement has been in place for over four years. It has not caused any major legal problem, notwithstanding the comments made by the Court of Final Appeal in the *Waddington* case. In particular, if not because of the co-existence arrangement, applicants in a case like the *Waddington* case would not have been able to bring a "multiple" derivative action. In any event, there are safeguards in the

CO to prevent duplicative CDA and SDA under CO section 168BE and section 168BC(5) and these safeguards will be preserved in the CB; and

(d) there are still uncertainties as to what other issues about derivative actions may arise in the future or how some uncertainties of the SDA provision will be resolved. It is therefore safer to keep the CDA at this stage. In any event, it will be safer to maintain the CDA so that members of Hong Kong or non-Hong Kong companies will not be in any way prejudiced or be deprived of any beneficent developments at common law.

Question 7

Do you consider that the common law derivative action currently preserved in section 168BC(4) of the CO should be abolished in the CB?

LIST OF QUESTIONS FOR CONSULTATION

Question 1 In respect of members' schemes of listed companies, which of the following options do you prefer? Please explain the reasons.

Option 1: retain the headcount test;

Option 2: retain the headcount test but give the court a discretion to dispense with the test; or

Option 3: abolish the headcount test.

Question 2 (a) If your answer to Question 1 is Option 3, do you think that the headcount test should also be abolished in respect of members' schemes of non-listed companies?

(b) If your answer to (a) is yes, do you think that some form of additional protection should be provided for small shareholders? If so, what should such protection be?

Question 3 If your answer to Question 1 is Option 2 or Option 3, do you think that the same approach should apply to creditors' scheme?

Question 4 (a) Do you agree that directors' residential address should continue be made available for inspection on the public register?

(b) If your answer to (a) is in the negative, do you think that either:

(i) the Australian approach (paragraphs 7.8 and 7.9); or

(ii) the UKCA 2006 approach (paragraph 7.10(b)) should be adopted?

(c) If you consider that either the Australian or the UKCA 2006 approaches should be adopted, do you have any suggestions on how to tackle the practical problems highlighted in paragraph 7.13(c) to (e) above?

Question 5 (a) Do you think that there is a need to mask certain digits from the identification numbers of new records of directors and company secretaries on the public register?

(b) If your answer to (a) is yes, do you have any views on how to deal with personal identification numbers on existing records?

Question 6 On the assumption that a new disinterested members' approval exception to prohibitions on loan and similar transactions in favour of directors and their connected persons will be introduced in respect of public companies, which of the following options do you prefer?

Option 1: "relevant private companies" as defined in section 157H(10) of the CO should continue to be subject to more stringent regulations similar to public companies (including restrictions relating to quasi-loans and credit transactions, restrictions relating to connected persons and disinterested members' approval requirement);

Option 2: extending the concept of "relevant private company" to cover companies associated with non-listed public companies;

Option 3: modifying the concept of "relevant private company" by disapplying it to private companies having a common holding company with a listed/public company;

Option 4: modifying the concept of "relevant private company" to cover only private companies which are subsidiaries of a listed/public company; or

Option 5: abolishing the concept of "relevant private companies" , i.e. all private companies should be subject to the same treatment.

Any other option (please elaborate)?

Question 7 Do you consider that the common law derivative action currently preserved in section 168BC(4) of the CO should be abolished in the CB?

Appendix 1

FRAMEWORK OF DRAFT COMPANIES BILL

Part		First Phase	Second Phase
1	Preliminary	✓	✓
2	Registrar of Companies and Register	✓	
3	Company Formation and Related Matters, and Re-registration of Company		✓
4	Share Capital		✓
5	Transactions in relation to Share Capital		✓
6	Distribution of Profits and Assets		✓
7	Debentures		✓
8	Registration of Charges		✓
9	Accounts and Audit		✓
10	Directors and Secretaries	✓	
11	Fair Dealing by Directors	✓	
12	Company Administration and Procedure	✓	
13	Arrangements, Amalgamation, and Share Acquisition on Takeovers and on Share Repurchases		✓
14	Remedies for Protection of Companies' or Members' Interests	✓	
15	Dissolution by Striking Off or Deregistration	✓	

16	Non-Hong Kong Companies	✓	
17	Companies not Formed, but Registrable, under this Ordinance	✓	
18	Communications To and By Companies	✓	
19	Investigation		✓
20	Miscellaneous		✓

SCHEME OF COMPROMISE OR ARRANGEMENT — THRESHOLDS UNDER THE COMPANIES ORDINANCE AND TAKEOVERS CODE

CO / Takeovers Code	Test	Threshold
CO s 166(2)	Headcount	**Majority in number** of the members, creditors, or the relevant class, present and voting in person or by proxy at the meeting of members or creditors.
CO s 166(2)	Share value	**75% in value** of the members, creditors, or the relevant class, of those present and voting in person or by proxy at the meeting of members or creditors.
Takeovers Code Rule 2.10	Voted disinterested shares	**75% of the votes attaching to the disinterested shares** that are **cast** either in person or by proxy at a duly convened **meeting of the holders of the disinterested shares.**
Takeovers Code Rule 2.10	No substantial objection of disinterested minorities	Number of votes cast against the scheme at the meeting of the holders of the disinterested shares is **not more than 10 % of the votes attaching to all disinterested shares**.
CO s 166(1) and case law	Court sanction	In exercising its power of sanction the court must be satisfied with the following matters: (a) compliance with the statutory provision; (b) the class of members is fairly represented and the statutory majority are acting bona fide and not coercing

CO / Takeovers Code	Test	Threshold
		the minority in order to promote interests adverse to those of the class; and (c) the scheme may reasonably be approved by an intelligent and honest man of that class acting in respect of his interest.

EXPLANATORY NOTES ON THE DRAFT PARTS

PART 1

PRELIMINARY

Introduction

1. Part 1 is an introductory part that sets out the title of the new Ordinance, its commencement date, and the interpretation and definitions of various terms and expressions that are used throughout the Ordinance, including the types of companies that can be formed under the Ordinance and the meaning of terms such as subsidiaries, parent companies, parent undertaking and subsidiary undertaking, etc. Part 1 will be further reviewed in the course of preparing the draft provisions of the CB for the second phase consultation in early 2010.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Reducing the types of companies that can be formed to five, namely, (i) private companies limited by shares; (ii) public companies limited by shares; (iii) private unlimited companies with a share capital; (iv) public unlimited companies with a share capital; and (v) guarantee companies that do not have share capital; and

  (b) Replacing the phrase "officer who is in default" with "responsible person" and refining the definition to strengthen the enforcement regime (such as lowering of the threshold for a breach or contravention by removing wilfulness as an element of the offence, inclusion of negligent acts or omissions and expansion of the categories of persons to be caught).

Significant Changes

(a) Types of companies formed under the CO

Background

2. At present, under the combined effect of sections 4(2) and (4) and section 29 of the CO, eight different types of companies can, in theory, be formed according to their capacity to raise funds from outside sources, the ability of members to freely transfer their shares and the methods by which the liability of members are determined. They are:

   (a) private companies limited by shares;

   (b) non-private companies limited by shares;

   (c) private companies limited by guarantee without share capital;

   (d) non-private companies limited by guarantee without share capital;

   (e) private unlimited companies with a share capital;

   (f) non-private unlimited companies with a share capital;

   (g) private unlimited companies without share capital; and

   (h) non-private unlimited companies without share capital.

3. Based on the SCCLR's recommendations[1], we propose to streamline the types of companies along the following lines:

   (a) the category of unlimited companies without share capital (i.e. (g) and (h) in paragraph 2 above) should be abolished because it is very unlikely that such type of companies will be formed in the future and there is currently no such company on the register;

[1] See SCCLR, *Report of the Standing Committee on Company Law Reform on the Recommendations of a Consultancy Report of the Review of the Hong Kong Companies Ordinance* (February 2000), paragraph 5.78 (available at http://www.cr.gov.hk/en/standing/docs/Rpt_SCCLR(E).pdf) and SCCLR, "Chapter 4: Types of Company and Definitions of Private and Public Companies", *2006-07 Annual Report*, (available at http://www.cr.gov.hk/en/standing/docs/23anrep_e.pdf).

(b) companies limited by guarantee should become a separate category of companies (i.e. (c) and (d) in paragraph 2 above will be merged into one category of companies limited by guarantee without share capital). They should be treated in a manner similar to public companies with appropriate modifications. For example, like public companies, all guarantee companies should be required to file annual reports and audited accounts;

(c) non-private companies should be renamed "public companies" which are defined to mean companies other than private companies or guarantee companies. No change should be made to the definition of private companies in section 29 of the CO;

4. As a result, the types of companies permissible under the new CO will be reduced to five, namely:

(a) private companies limited by shares;

(b) public companies limited by shares;

(c) private unlimited companies with a share capital;

(d) public unlimited companies with a share capital; and

(e) companies limited by guarantee without share capital.

Proposal

5. **Clause 1.9** defines an unlimited company and **Clause 1.7** defines a company limited by shares. Under the definitions, both types of companies must be companies having a share capital. **Clause 1.10** sets out the required characteristics of a private company which are the same as those currently provided under section 29 of the CO (i.e. a company is a private company if its articles restricts members' rights to transfer shares, limits the number of members to 50, and prohibits any invitation to the public to subscribe for any shares or debentures), but clarifies that a private company must have share capital. **Clause 1.11** provides that a company is a public company if it has a share capital and is neither a private company nor a guarantee company.

6. **Clause 1.8(1)** provides that a company is a company limited by guarantee if it does not have a share capital and if the liability of its members is limited by the company's constitution to the amount that the members undertake to contribute to the assets of the company in the event of its being wound up. **Clause 1.8(2)** makes it clear that a company limited by guarantee and having a share capital formed on or before 14 February 2004 under the CO, will be regarded as a guarantee company under the CB although it has a share capital.

(b) Replacing the phrase "officer who is in default" with "responsible person" and refining the definition to strengthen the enforcement regime

Background

7. Many offence provisions under the CO punish not only a company but also every officer of the company who is in default. The phrase "officer who is in default" is currently defined by section 351(2) as meaning any officer of the company, or any shadow director of the company, who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in relevant provisions of the CO.

8. There are a few problems with this definition. They are:

(a) the present formulation of "officer who is in default" does not cover negligence of officers; and

(b) where a company having a corporate officer commits an offence, the present provision does not punish, in addition to such corporate officer who has caused the default, any officer or shadow director of such a corporate officer who has caused the corporate officer to be in default.

9. In view of the above deficiencies, we consider it necessary that the enforcement regime under the new CO should be strengthened. In this respect, we propose to follow section 1121(3) of the UKCA 2006 by replacing the reference to "knowingly and wilfully authorises or permits the default, refusal or contravention" with "authorises or permits, participates in, or fails to take all reasonable steps to prevent, the contravention", thus lowering the threshold for a breach or contravention and extending it to negligent acts or omission. We propose also to extend the punishment to

an officer of a corporate officer of a company who has caused the default where such corporate officer commits an offence as an "officer in default", similar to section 1122(2) of the UKCA 2006. In view of these proposed changes, the term "responsible person" is, in our view, a better name than "officer who is in default".

Proposal

10. For the reasons stated in paragraph 9, a new term "responsible person" will be used in the new CO to replace the phrase "officer who is in default". **Clause 1.3(2)** defines a person as a "responsible person" of a company or non-Hong Kong company if he is an officer or shadow director of the company or non-Hong Kong company who authorises or permits, participates in, or fails to take all reasonable steps to prevent the contravention or failure in question.

11. **Clause 1.3(3)** extends the scope of responsible person of a company or non-Hong Kong company to cover an officer or shadow director of a body corporate that is an officer or shadow director of the company or non-Hong Kong company. Where the body corporate is liable as a responsible person, an officer or shadow director of the body corporate who caused the default will also be liable as a responsible person of the company or non-Hong Kong company.

12. The proposals will strengthen the enforcement regime in relation to breaches of obligations, or contraventions of requirements, under the CO by an officer (including shadow director) of a company or a non-Hong Kong company.

PART 2

REGISTRAR OF COMPANIES AND REGISTER

Introduction

1. Part 2 deals with the general functions and powers of the Registrar. It groups the existing provisions relating to the office of the Registrar and the register being maintained by the Registrar under a distinct part and expressly states the functions of the Registrar. The amendments introduce new provisions, which aim primarily at providing the Registrar with necessary powers to maintain and safeguard the integrity of the register, having regard to the development of the CR's information system which will enable the electronic delivery of documents to or by the Registrar. In addition, some of the CR's existing administrative practices will be put on a statutory footing to improve transparency and provide greater clarity in relation to the CR's operations.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Clarifying and enhancing the Registrar's powers in relation to the registration of documents, such as specifying requirements as to the authentication of the documents to be delivered to the CR and manner of delivery and withholding registration of unsatisfactory documents pending further particulars; and

  (b) Clarifying and enhancing the Registrar's powers in relation to the keeping of the register, such as rectifying typographical or clerical errors, making annotations, and requiring a company to resolve any inconsistency or provide updated information; and

  (c) Introducing a new court-based procedure for removing from the register information that is inaccurate, forged or derived from anything invalid, ineffective or done without the authority of the company.

Significant Changes

(a) Clarifying and enhancing the Registrar's powers in relation to the registration of documents

Background

2. At present, under section 2A of the CO, the Registrar has the power to specify the form of documents to be delivered to the CR. Moreover, under section 347 of the CO, the Registrar may accept the information delivered to her in a form approved by her. This will enable documents to be delivered to the CR in electronic form after the CR's new information system comes on stream in late 2010/early 2011. Nevertheless, it would be desirable if the Registrar's powers to specify the form of documents and the form of delivery is clarified to include requirements as to authentication and the manner of delivery of documents.

3. Under section 348 of the CO, the Registrar may refuse to register a document if it is manifestly unlawful or ineffective, or is incomplete or altered; or any signature on the document, or digital signature accompanying the document is incomplete or altered. It is not entirely beyond doubt whether the grounds for refusal could cover cases, for example, where the information contained in it is internally inconsistent or inconsistent with information already on the register. It is proposed that the grounds of refusal should be set out in clearer terms. In addition, the current right of a person aggrieved by the Registrar's decision to refuse registration to appeal to the court under section 348(3) should be limited to situations where the document is regarded as unsatisfactory. Where the Registrar refuses to receive the document (for reasons other than that the document is regarded as unsatisfactory) or where the document is not properly delivered, no right of appeal is proposed on the grounds that the Registrar's decision is mostly based on objective considerations.

Proposal

4. **Clause 2.12** gives the Registrar a power to specify requirements about form, authentication and manner of delivery of documents, including the physical form and means of communication, the format and the address to which they are to be sent, and where appropriate, technical specification. **Clause 2.12(5)(a)** empowers the Registrar to require the document to be in hard

copy form, electronic form or any other form. But **Clause 2.12** does not empower the Registrar to require a document to be delivered to the Registrar only by electronic means (see **Clause 2.12(6)**). The power to require delivery by electronic means lies with the Financial Secretary with regulations made under **Clause 2.15**.

5. **Clause 2.17** makes it clear that if the Registrar refuses to accept a document under certain circumstances, the document is to be regarded as not having been delivered to the Registrar for registration. **Clause 2.18** empowers the Registrar to refuse to register a document delivered to her if the document is not properly delivered or is unsatisfactory. If the Registrar refuses to register a document, the document is to be regarded as not having been delivered to the Registrar for registration. Under **Clause 2.21**, the Registrar may send a notice of the refusal and the reasons for the refusal to the person who delivered the document for registration. **Clause 2.19** further provides that the Registrar may withhold the registration of an unsatisfactory document and request the person who delivered the document to take certain remedial actions within a specified period, such as producing further information or evidence, amending or completing the document or applying for a court order. The conditions for a document to be considered as "properly" delivered to the Registrar and the situations where a document is considered to be unsatisfactory are set out in **Clause 2.11** and **Clause 2.16** respectively.

(b) Clarifying and enhancing the Registrar's powers in relation to the keeping of the register

Background

6. Regarding the power on the part of the Registrar to rectify any documents on the register, the Registrar presently adopts an administrative measure to accept the filing of "amended" documents and explanatory or correction letters from companies to rectify documents containing errors. It would be preferable for such power to be put on an express statutory footing.

7. It is proposed that the following powers be provided for expressly:

(a) power to annotate information on the register to provide supplementary information such as the fact that the document in question has been replaced or corrected; and

(b) power to request companies or their officers to resolve inconsistencies in information on the register or to provide updated information.

Proposal

8. **Clause 2.24** gives the Registrar power to, either on her own initiative or on an application by a company, rectify a typographical or clerical error contained in any information on the register. If the rectification is made upon an application by a company, the Registrar may rectify the error by registering a document showing the rectification delivered by the company. **Clause 2.27** provides that the Registrar may make a note in the register for the purpose of providing information in relation to such a rectification.

9. **Clause 2.22** enables the Registrar to notify a company of an apparent inconsistency in the information on the register and to require it to take steps to resolve the inconsistency within a specified period. **Clause 2.23** empowers the Registrar to require a person to update his or her information on the register. Under both clauses, failure of the company and every responsible person concerned to comply with the Registrar's requirements is an offence.

(c) Introducing a new court-based procedure for removing information on the register that is inaccurate, forged or derived from anything invalid, ineffective or done without the authority of the company

Background

10. At present, it is unclear if the court has general inherent jurisdiction to order the Registrar to remove information which has been provided in compliance with statutory requirements. There is no clear means for a company to remove from the register information which has been placed on the register but subsequently proves to be inaccurate and misleading. As the Registrar is not in a position to determine whether a piece of information is inaccurate or forged, a new court-based procedure for ensuring that such information can be removed is called for.

Proposal

11. **Clause 2.25** provides that the court may, on application by any person, direct the Registrar to rectify any information on the register or to remove

any information from it, if the court is satisfied that the information is inaccurate or forged, or derives from anything that is invalid or ineffective or that has been done without the company's authority. When making an order of removal of any information from the register, the court may make any consequential order that appears just with respect to the legal effect, if any, to be accorded to the information by virtue of its having appeared on the register.

Other Changes

(a) Registrar empowered to issue guidelines

12. **Clause 2.6** provides that the Registrar may issue guidelines indicating the manner in which the Registrar proposes to perform any function or exercise any power, or providing guidance on the operation of any provision of the CB. The guidelines are not subsidiary legislation, but may be admissible in evidence in any legal proceedings if they are relevant to determine a matter in issue. Non-compliance with them would not of itself result in any civil or criminal liability, but may be relied on by any party to any legal proceedings as tending to establish or negate the matter to which they are relevant.

(b) Registrar may agree with a company that documents to be delivered by the company for registration would be delivered by electronic means on terms specified in the agreement

13. **Clause 2.14** provides that the Registrar may agree with a company that documents to be delivered by the company for registration would be delivered by electronic means on such terms as specified in the agreement. The clause allows the Registrar to agree with a company detailed arrangements or requirements (e.g. electronic payment of fees) for the electronic delivery of documents to the Registrar. The clause is different from **Clause 2.12** which sets out the general provisions for the Registrar to require documents to be delivered in electronic form and/or, by electronic means.

(c) Financial Secretary may make regulations requiring delivery of documents to the Registrar by electronic means

14. **Clause 2.15** provides that the Financial Secretary has a new power to provide for electronic delivery of documents by regulations subject to the approval of LegCo. This allows for flexibility for the future introduction of electronic delivery of certain classes of documents.

(d) Registrar to certify delivery or non-delivery of documents

15. **Clause 2.31** provides that the Registrar may, on his or her initiative or on request by a person upon payment of a fee, issue a certificate as to whether a document has or has not been delivered to the CR on a particular date for registration. The certificate shall be admissible as prima facie evidence of the fact of delivery or non-delivery of the document in question in any proceedings but will not be taken as evidence of compliance or non-compliance with an obligation under the Bill.

(e) Rules on discrepancy between an original and a certified translation of a document delivered to the Registrar

16. The Registrar may, from time to time, receive documents in a language other than English or Chinese, such as documents comprising the constitution from a non-Hong Kong company. Such documents are required to be accompanied by a certified translation. **Clause 2.34** sets out the rule where there is a discrepancy between the document and its certified translation. It provides that the company cannot rely on the translation where there is a discrepancy as against a third party whereas a third party may rely on the translation if he has actually relied on the translation and has no knowledge of the true contents of the document.

17. The new rule aims at promoting the accuracy of translations submitted by companies and at protecting members of the public from being misled by any discrepancy in a translated document on the register.

PART 10

DIRECTORS AND SECRETARIES

Introduction

1. Part 10 deals with directors and secretaries of a company. It mainly reorganises, with some modifications, the existing provisions of the CO relating to the appointment, removal and resignation of directors and secretaries, and directors' liabilities. The Part also introduces a new statutory statement on directors' duty of care, skill and diligence. Some miscellaneous provisions concerning directors and secretaries under sections 119, 153B, 153C, 154B and 156 of the CO are restated in **Division 5** (Miscellaneous provisions relating to directors and secretaries). These include provisions on directors' vicarious liability for the acts of their alternates, the avoidance of acts done by a person in a dual capacity as director and secretary, prohibition of undischarged bankrupts from acting as director, recording of minutes of directors' meetings, the status of such minutes as evidence of proceedings at the meetings and provision of written records of decisions of sole directors of private companies. Provisions concerning fair dealing by directors are covered in Part 11.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Restricting corporate directorship in private companies;

  (b) Enabling the Registrar to give directions to a company relating to the appointment of directors and secretaries;

  (c) Codifying directors' duty of care, skill and diligence;

  (d) Setting out rules on indemnification of directors against liabilities to third parties; and

  (e) Requiring ratification of conduct of directors by disinterested shareholders' approval.

Significant Changes

(a) Restricting corporate directorship in private companies

Background

2. Since 1985, all public companies and private companies which are members of a group of companies of which a listed company is a member have been prohibited from appointing a body corporate as their director, whereas other private companies can continue to have corporate directors.

3. In April 2008, we consulted the public on whether corporate directorship should be abolished altogether in Hong Kong, subject to a reasonable grace period, or should be restricted by requiring every company to have at least one natural person as its director, as in the UK. The respondents' views were diverse.[1] In view of the equally strong opinions on the need to enhance corporate governance and transparency and the legitimate commercial need for flexibility, the UK approach appears to strike an appropriate balance between the two. We therefore recommend its adoption.

Proposal

4. **Clause 10.5** implements the proposal to restrict corporate directorship in private companies by requiring a private company (other than one within the same group of a listed company) to have at least one director who is a natural person. The existing provision in section 154A of the CO prohibiting a public company and a private company within the same group of a listed company from appointing a body corporate as their director is restated in **Clause 10.4**.

[1] See FSTB, *Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges* (December 2008), paragraphs 26 to 29 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

(b) Enabling the Registrar to give directions to a company relating to the appointment of directors and secretaries

Background

5. At present, the CO requires a private company to have at least one director and a public company at least two directors.[2] In default, the company and every officer in default are liable to a fine. In addition, every company should appoint a secretary though there is no offence provision for failure to appoint one.[3]

6. We consider provisions empowering the Registrar to give direction to the company requiring it to appoint a director or secretary useful for better enforcement of the requirement relating to the appointment of directors and secretaries. There are similar provisions in the UK and Singapore.[4]

Proposal

7. **Clause 10.6** introduces a new provision to enable the Registrar to give directions to a company requiring it to appoint a director or directors in compliance with the statutory requirements. Non-compliance with the direction is an offence. The company and every responsible person will be liable to a fine.

8. Currently, failure to comply with the appointment requirement would immediately lead to an offence. With the introduction of **Clause 10.6**, there seems to be no need to retain the offence provisions relating to the appointment of directors in sections 153(3) to (4) and 153A(3) to (5) of the CO.

9. **Clause 10.26** introduces a similar provision to enable the Registrar to give directions to a company requiring it to appoint a secretary in compliance with the statutory requirements. Non-compliance with the direction will be an offence. The company and every responsible person will be liable to a fine.

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2 Sections 153 and 153A of the CO.
3 Section 154 of the CO.
4 Sections 156 and 272 of the UKCA 2006 and Section 145(7) of the SCA.

(c) Codifying directors' duty of care, skill and diligence

Background

10. At present, the general duties of directors in Hong Kong are mainly found in case law.[5] They can be classified into two broad categories, namely fiduciary duties[6] and duty of care, skill and diligence.[7]

11. The issue of whether directors' general duties should be codified was raised for public consultation during April to June 2008. Responses were highly divided. We concluded that it would be premature to go down the route of comprehensive codification at this stage.[8]

12. Nevertheless, we see some merit in clarifying the directors' standard of care, skill and diligence as proposed by some respondents. The standard in the old case law focusing on the knowledge and experience which a particular director possesses is too lenient nowadays. Other comparable jurisdictions such as the UK have developed a so-called "mixed objective/subjective test" with a minimum objective standard of care expected of all directors and a subjective test looking at the personal attributes of a particular director that can raise the standard expected of the director above the minimum objective standard. In the absence of a clear case authority in Hong Kong in this respect, there is some uncertainty as to how far the test will be applied by the Hong Kong court under the common law. We therefore recommend introducing a statutory statement on the duty of care, skill and diligence along the lines of section 174 of the UKCA 2006 to clarify the law and provide appropriate guidance to directors.

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5 Other sources of directors' duties can be found in the company's memorandum and articles of association, directors' contracts with the company, specific provisions under the statutes (e.g. the CO) or the Listing Rules.

6 Fiduciary duties that apply to directors include: (i) duty to act in good faith in the interests of the company, (ii) duty to exercise powers for proper purpose, (iii) duty to refrain from fettering his own discretion, (iv) duty to avoid conflicts of duty and interest, and (v) duty not to compete with the company. Such fiduciary duties arise in equity.

7 Duty of care, skill and diligence requires directors to exercise reasonable care, skill and diligence in the performance of the functions and the exercise of the powers of the directors. The duty arises both in equity and from the common law principles of negligence.

8 See FSTB, Consultation Conclusions on *Company Names, Directors' Duties, Corporate Directorship and Registration of Charges* (December 2008), paragraphs 17 to 20 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

Proposal

13. **Clause 10.13(1) and (2)** defines the standard of care, skill and diligence as the standard that would be exercised by a reasonably diligent person with:

    (a) 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

    (b) the general knowledge, skill and experience that the director has.

14. Paragraph (a) provides an objective test whereas paragraph (b) a subjective test. The objective test is the minimum standard. It can be adjusted upwards to reflect any special skill, knowledge and experience possessed by a particular director but cannot be adjusted downwards to accommodate someone who is incapable of attaining the basic standard of what can reasonably be expected of the reasonably diligent person carrying out the same function.

15. **Clause 10.13(4)** provides that the statutory duty has effect in place of the corresponding common law rules and equitable principles as the retention of the latter may result in differing standards and hinder the development of the statutory provision.

16. **Clause 10.13(5)** provides that **Clause 10.13** (directors' duty to exercise reasonable care, skill and diligence) applies to a shadow director as it applies to a director. "Shadow director" is defined in **Clause 1.2(1)** to mean, in relation to a body corporate, a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act.

17. The corresponding section in the UK is section 170(5) of the UKCA 2006 which provides that the statutory general duties of directors (which comprise both fiduciary duties and duty of care, skill and diligence) apply to shadow directors where, and to the extent that, the common law rules or equitable principles which they replace so apply. The subsection was enacted against the background of the decision in the case of *Ultraframe* which indicated that directors' fiduciary duties might not also apply to

[9]. It was so drafted to allow the law to develop as the UK government was of the view that the law was unclear on the subject and it was right to leave this undeveloped area of law to the courts.[10]

18. Section 170(5) of the UKCA 2006 is not adopted in **Clause 10.13(5)** as we consider that the case of *Ultraframe* and the UK government's concern are basically on directors' fiduciary duties instead of on the duty of care, skill and diligence and therefore, it is not necessary to adopt the complicated concept under section 170(5) of the UKCA 2006.

19. Directors have powers to manage a company's business and exercise the company's power and thereby owe a duty of care, skill and diligence to the company in the performance of the functions and the exercise of the powers of directors. There is little common law authority on the application of directors' duty of care, skill and diligence to shadow directors. We consider that it is the right approach to subject shadow directors to the same statutory duty of care, skill and diligence as a duly appointed director, because anyone who interferes in the affairs of a company to the extent that makes him fall within the definition of a shadow director must take on the same responsibilities and duties as those of a director. This indeed tally with the other provisions relating to directors in the Companies Bill which extend to shadow directors the same prohibitions and obligations imposed on directors (see, for example, clauses 11.7, 11.32, 11.46, 11.54, 11.66, 11.68 and 11.69).

20. **Clause 10.14** preserves the existing civil consequences of breach (or threatened breach) of the statutory duty. The remedies for breach of the statutory duty will be exactly the same as those that are currently available following a breach of the common law rules and equitable principles that the statutory duty replaces.

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[9] *Ultraframce (UK) Ltd v Fielding* [2005] EWHC 1638(Ch) at [1284] and [1286]: the mere fact that a person falls within the statutory definition of shadow director is not enough to impose on him the same fiduciary duties to a company as are owed by a *de jure* or *de facto* director and the facts must go further and suggest that there is a fiduciary relationship.

[10] Hansard (House of Commons cols 525 to 526, 6 July 2006).

(d) Setting out the rules on indemnification of directors against liabilities to third parties

Background

21. A director may incur liabilities to third parties in the course of performing his duties. The law regulating his right to be indemnified against such liabilities is not found in the CO but in case law,[11] which is fairly difficult for lay directors to understand. Practitioners have raised concerns over the absence of statutory provisions confirming the ability of companies to provide indemnities for liabilities incurred by directors to others in the course of performing their duties.

22. The uncertainty over the right to be indemnified against liabilities to third parties may deter competent persons from accepting directorships and is therefore undesirable. We note that the UK has reformed the law on directors' liability in recent years. In view of the recent increase in legal actions against directors personally and the costs of lengthy court proceedings, the UK has permitted indemnification of directors against most of the liabilities to third parties, so as to maintain a diverse pool of qualified individuals willing to assume directorship and a willingness of directors to take informed and rational risks.[12] To enhance transparency, any such permitted indemnity provision should be disclosed in a directors' report and made available for inspection by shareholders. The UK has also removed the prohibition on a company to exempt a non-director officer (i.e. a manager or company secretary) from, or to indemnify him against, any liability for the reason that it is ultimately a matter for the board to determine the conditions of employment of senior employees. We see merit in following the UK approach in setting out and clarifying the rules. Some technical amendments are also proposed to improve the existing provisions in section 165 of the CO.

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[11] Section 165 declares void any provision in a company's articles or in any contract with the company or otherwise, exempting a director or any other officer from, or indemnifying him against, any liability to the company or a related company in respect of any negligence, default, breach of duty or breach of trust in relation to the company or a related company. Indemnification of directors' liability to third parties is not prohibited but subject to the common law rules.

[12] See UK Department of Trade and Industry, *White Paper on Company Law Reform* (March 2005), page 23.

Proposal

23. **Clause 10.16** extends the current prohibition under section 165(1) of the CO to include any indemnity provided by a related company.[13] This is intended to close a loophole under that sub-section which does not prohibit a company from providing an indemnity for a director of a related company. Consequential to the change in **Clause 10.16**, **Clause 10.17** extends the scope of liability insurance allowed to cover the directors of a related company.

24. **Clause 10.18** defines the scope of permitted indemnities against liability incurred by a director to third parties. It provides that any indemnity must not cover the following:

(a) criminal fines or penalties imposed in respect of non-compliance with any requirement of a regulatory nature;

(b) liability incurred in defending criminal proceedings in which the director is convicted;

(c) liability incurred in defending civil proceedings brought by the company or a related company in which judgment is given against the director; and

(d) liability incurred in connection with an application for relief in which the Court of First Instance refuses to grant the director relief.

25. **Clause 10.19** adds a new provision to require a company which provides any permitted indemnity to its directors to disclose it in the directors' report. **Clauses 10.20** and **10.21** further require the company to make the permitted indemnity provision available for inspection by its shareholders and to provide a copy to any shareholder on request and upon the payment of a fee to be prescribed in subsidiary legislation.

[13] The term "related company" under section 165 of the CO has been changed to "associated company" in the CB. The definition is essentially the same.

(e) Requiring ratification of conduct of directors by disinterested shareholders' approval

Background

26. At present, the ratification of acts or omissions of directors is subject to the common law rules, which generally require shareholders' approval to release the directors from their fiduciary duties in a general meeting. Ratification would have the effect of barring the company from bringing actions against the director for damages it suffered as a result of the ratified act or omission, albeit it might not prevent dissenting minorities from pursuing unfair prejudice claims or statutory derivative claims.

27. The UK has introduced a significant change to its law on the ratification of conduct of directors by adding a disinterested shareholders' approval requirement.[14] The new requirement aims to prevent conflicts of interests, in particular, possible manoeuvring of the rule by majority shareholders to ratify any unauthorised conduct of directors appointed by them. We recommend following the UK approach in this respect.

Proposal

28. **Clause 10.22** provides that any ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company must be approved by resolution of the members of the company disregarding votes in favour of the resolution by the director, any entity connected with him and any person holding shares of the company in trust for him or for the connected entity. This preserves the current law on ratification with an additional requirement of disinterested shareholders' approval.

[14] See section 239 of the UKCA 2006. Any decision by a company to ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company must be taken by the members (but not the directors), and without reliance on the votes in favour of the resolution by the director (if he is also a member of the company) or any member connected with him.

Other Changes

(a) Minimum age requirement for appointment as director

29. **Clause 10.7** generally restates the existing minimum age requirement for appointment as director under section 157C of the CO, i.e. the age of 18 years or above. In addition, two new provisions are added:

(a) Sub-clause (2) – to provide for the consequence of contravention of the requirement; and

(b) Sub-clause (3) – to clarify that the minimum age requirement does not exempt an underage director from criminal prosecution or civil liability if he or she purports to act as director, or acts as a shadow director, although he or she could not, by virtue of the section, be validly appointed as a director .

Clause 10.7(3) aims to deter any company from appointing underage directors in order to exploit their immunity from prosecution or the reluctance of enforcement authorities to pursue young persons.

(b) Validity of acts of directors

30. **Clause 10.9** restates with modifications part of section 157 of the CO to provide that the acts of a director shall be valid notwithstanding any defect that may afterwards be discovered relating to his appointment or qualification etc. It does not, however, restate the similar provision regarding the validity of the acts of a manager. We are of the view that, as there is no provision in the CO governing the appointment and qualifications of a manager, the validity of the acts of managers should best be left to be dealt with by the common law rules.

PART 11

FAIR DEALING BY DIRECTORS

Introduction

1. Part 11 covers fair dealing by directors and deals with particular situations in which a director is perceived to have a conflict of interest. It governs transactions involving directors or their connected entities which require members' approval (namely loan transactions, long-term service contracts, substantial property transactions and payments for loss of office), and covers disclosure by directors of material interests in transactions, arrangements or contracts.

2. Part 11 introduces a definition of "connected entity" and introduces new statutory provisions requiring members' approval for director's long-term employment and for substantial property transactions entered into by a company. It also restates relevant sections of the CO, namely sections 157H to 157J (prohibition of loan transactions with directors and other persons), sections 163 to 163D (requirement for company's approval for loss of office payments to directors) and section 162 (disclosure by directors of material interests in contracts) with some changes.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Expanding the prohibitions on transactions to cover a wider category of persons connected with a director;

  (b) Introducing new exemptions from prohibitions on loans and similar transactions in favour of directors and connected entities;

  (c) Repealing the criminal sanction provisions in section 157J of the CO;

  (d) Extending the application of the prohibitions on payments for loss of office;

  (e) Requiring members' approval for a director's employment exceeding 3 years and requiring a company to keep directors'

service contracts available for members' inspection;

(f) Requiring members' approval for substantial property transactions;

(g) Requiring disinterested members' approval in the case of public companies; and

(h) Widening the ambit of disclosure currently under section 162 of the CO.

Significant Changes

(a) Expanding the prohibitions on transactions to cover a wider category of persons connected with a director

Background

3. At present, there are individual sections in the CO which extend the application of the relevant prohibition provisions to persons connected with a director. For example, in the case of loan transactions, section 157H(8) and (9) of the CO extends the references to "director" in section 157 to a spouse, child and step-child (including illegitimate child) under the age of 18, and specified categories of trustees and partners, and section 157H(2)(c), (3)(c) and (4)(c) extends the prohibition provisions to a company in which a director holds a controlling interest. We consider that the current references are not comprehensive enough to cover all parties who are closely associated with directors. Taking into account similar provisions in the UKCA 2006[1], we consider it necessary to expand the prohibitions on transactions to cover a wider category of persons connected with a director.

Proposal

4. In Part 11, there are a number of prohibitions on transactions with an entity connected with a director or past director. In particular, a public company must not make a loan or quasi-loan etc. to, or enter into a credit transaction etc. as creditor for, a connected entity (**Clauses 11.18 and 11.19**), and a company must not make payment to a connected entity for a director's loss

[1] Sections 252 to 255 of the UKCA 2006.

of office (**Clauses 11.37 to 11.39**). **Clauses 11.2 to 11.4** provide that an entity connected with a director or past director of a company means:

(a) a family member;

(b) an associated body corporate;

(c) a specified category of trustees;

(d) a specified category of partners.

5. The categories of person classified as "connected entity" are broader than those currently under the CO. For example, **Clause 11.3** defines "family members" to cover a director's child, step-child and adopted child of any age whereas under the CO, only a director's child and step-child under the age of 18 are caught. The proposed definition in **Clause 11.3** also covers any other person (whether of a different sex or the same sex) with whom the director or past director lives as a couple in an enduring family relationship.

(b) Introducing new exemptions from prohibitions on loans and similar transactions in favour of directors and connected entities

Background

6. The decision whether to make a loan is normally taken by the directors. Section 157H of the CO prohibits, subject to certain exceptions, a company from entering into any direct or indirect loan transactions in favour of its directors, directors of its holding company or any of their connected persons. These rules are intended to protect shareholders and creditors. However, there are situations in which the prohibitions may not serve any meaningful purpose. For example, where the directors hold all or a majority of the shares and creditors are not prejudiced. There are exemptions from prohibitions under section 157HA of the CO which apply to all companies.[2] In addition, a private company, which is not a member of a group which includes a listed company, is exempted from the prohibitions if the loan transaction is approved by shareholders in general meeting.[3]

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[2] Exceptions for intra-group transactions (section 157HA(1)), funds to meet company expenditure incurred (section 157HA(3)(a)), home loan (section 157HA(3)(b)), hire or lease on not more favorable terms (section 157HA(3)(c)) and ordinary business transactions (section 157HA(6) and (7)).

[3] Section 157HA(2) of the CO.

7. The exceptions are fairly complex. Members' approval is a simple method of ensuring compliance but is currently applicable only to private companies not associated with a listed company. The narrow application of the members' approval exception is arguably too restrictive. For example, private companies owned by majority shareholders of a listed company cannot rely on the exception even though they might not be regarded as a member of the listed group under the Listing Rules.[4] To facilitate business operation, there is a case to extend the members' approval exception to all other companies. Nevertheless, the new exemption would have to contain appropriate safeguards for minority shareholders. In the case of public companies, we propose that the transactions must be approved by disinterested members (see section (g) below). As regards private companies within the same group of a listed company, we ask in Chapter 8 of the Consultation Paper whether they should also be subject to the requirement of disinterested members' approval.

Proposal

8. **Clauses 11.16 to 11.20** provide generally that a company must not make a loan, a quasi-loan or enter into a credit transaction in favour of a director of the company or of its holding company without the prescribed approval of members.[5] The prohibitions are extended to persons connected with a director (connected entities) in the case of public companies.

9. Two new exceptions from prohibiting a company from making a loan are also introduced :

(a) exception for small loan, quasi-loan and credit transaction (**Clause 11.21**);

(b) exception for funds to meet expenditure, incurred or to be incurred by a director, on defending proceedings or in connection with an investigation or regulatory action (**Clauses 11.23 and 11.24**).

These new exceptions are subject to conditions as to financial limit and requirements as to repayment.

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[4] c.f. the terms "group" and "subsidiaries" as defined in Chapter 1 of the Main Board Listing Rules. "Group" means the issuer or guarantor and its subsidiaries, if any, and "subsidiaries" includes the meaning attributed to "subsidiary undertaking" in the 23rd Schedule of the CO and any entity which is or will be accounted for and consolidated in the audited consolidated accounts of another entity as a subsidiary pursuant to the applicable financial reporting standards.

[5] "prescribed approval of members" is defined in clause 11.11.

(c) Repealing the criminal sanction provisions in section 157J of the CO

Background

10. Section 157J of the CO provides for criminal sanction where there is a breach of section 157H (prohibition of loans, etc., to directors and other persons) and imposes the penalty of a fine and imprisonment. The liability extends to the company and directors who wilfully permitted or authorised the transaction and other persons who knowingly procured the company to enter into the transaction.

11. In the UK, the UKCA 2006 decriminalised the provisions which restrict loans etc. to directors and connected persons. The criminal sanction was therefore abolished. The rationale is that there is a danger of over-deterrence if criminal sanctions are attached to general directors' duties of loyalty rather than closely defined wrongdoing, and that enforcement of such duties should be a civil matter for the companies.[6] We agree with the rationale.

Proposal

12. We are of the view that the civil consequences under **Clause 11.29** are sufficient and the criminal sanction provisions in section 157J of the CO should be repealed.

(d) Extending the application of the prohibitions on payments for loss of office

Background

13. It is unlawful under sections 163 to 163D of the CO to make payments to directors or past directors of a company, as compensation for loss of office or as consideration for retirement from office, without the company's prior approval. However, since the provisions only apply to payments to directors or past directors of the company, there are concerns that such payments can be made indirectly via other parties, thus defeating the purpose of the prohibition provisions.

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[6] UK Company Law Review Steering Group, *Modern Company Law: Completing the Structure* (November 2000), paragraphs 13.4 and 13.36.

Proposal

14. We consider there is a need to plug any loophole in the case of payments via other parties by extending the loss of office payment provisions to include:

    (a) payment to an entity connected with a director or past director of a company or of its holding company (**Clause 11.32(3)**);

    (b) payment by a company to a director of its holding company (**Clause 11.37(2)**).

15. Section 163A of the CO only applies to situations where a payment for loss of office is made to a company's director or past director in connection with a transfer of a company's undertaking or property. **Clause 11.38(2)** extends the provisions to include a transfer of the undertaking or property of the company's subsidiary.

16. Section 163B of the CO only applies to a payment for loss of office made to a company's director or past director in connection with certain types of transfers of shares as provided in section 163B(1). By virtue of **Clause 11.32(1)** (definition of "takeover offer" for Division 3)[7] and **Clause 11.39(1)**, the prohibitions in connection with a share transfer are extended to include all transfers of shares in a company or in its subsidiary resulting from a takeover offer.

(e) Requiring members' approval for a director's employment exceeding 3 years and requiring a company to keep directors' service contracts available for members' inspection

Background

17. At present, there is no provision in the CO requiring members' approval for long-term employment of a director or requiring a company to keep directors' service contracts available for members' inspection. There is a risk that directors may arrange for themselves long-term employment with their companies which entrenches them in office or makes it too expensive for the company to remove them from office before their contract expires (as the director might be entitled to damages for the company's breach of

[7] "Takeover offer" means a takeover offer within the meaning of Part 13 of the Companies Bill, draft clauses of which will be released for consultation in the second phase consultation for the Companies Bill.

contract arising from the early termination). Also there is a lack of transparency in relation to directors' service contracts.

Proposal

18. **Clause 11.50** requires the approval of the members of a company and / or of its holding company for any contracts under which the guaranteed term of employment of a director with the company, or of employment of its holding company's director within the group, exceeds or may exceed 3 years.

19. **Clauses 11.52 and 11.53** require a company to keep available directors' service contracts, or a written memorandum of terms of any such contract if the contract is not in writing, for members' inspection and copying. Non-compliance with these provisions will be an offence. The company and every responsible person will be liable to a fine.

(f) Requiring members' approval for substantial property transactions

Background

20. There is currently no specific provision in the CO which requires members' approval for a company to enter into a transaction for the purchase of a major asset from a director or the sale of such an asset to a director. In the UK, provisions requiring members' approval were introduced by the Companies Act 1980 in response to reports of fraudulent asset stripping by directors. The SCCLR has recommended the enactment of provisions based on the relevant sections in the UK.[8]

Proposal

21. **Clause 11.59** provides that a company shall not enter into arrangements where it acquires a substantial non-cash asset from or sells such an asset to a director of the company or of its holding company or a person connected with such directors, unless with the approval of the members of the company and / or of its holding company. However, the arrangement may be entered into by the company conditional on such approval being obtained.

[8] Sections 190 to 196 of the UKCA 2006 (formerly under sections 320 to 322 of the UK Companies Act 1985). See SCCLR, *Annual Report 2003 / 2004*, pages 14 to 16.

The company is not subject to any liability by reason of a failure to obtain the members' approval for the conditional arrangement.

22. Non-cash asset is defined in **Clause 11.55** to mean any property other than cash and any reference to an acquisition of a non-cash asset includes the creation or extinction of an estate or interest in, or a right over, any property and also the discharge of a liability of any person, other than a liability for a liquidated sum.

23. **Clause 11.56** sets out the thresholds for triggering the operation of the substantial property transaction provisions. For a private company or a company limited by guarantee, the value of a non-cash asset is substantial if it exceeds 10% of the company's asset value and is over $100,000, or exceeds $1,500,000. For a public company, the value is substantial if it exceeds 10% of the company's asset value and is over $750,000, or exceeds $10,000,000.

(g) Requiring disinterested members' approval in the case of public companies

Background

24. Currently, except for some specified transactions[9], there is no provision in the CO restricting members' rights to vote or requiring members to abstain from voting in relation to transactions in which they have an interest. For listed companies, the Listing Rules provide generally that, when a transaction or arrangement of an issuer is subject to shareholders' approval under the provisions of the Listing Rules, any shareholder that has a material interest in the transaction or arrangement shall abstain from voting on the resolution approving the transaction or arrangement at the general meeting.[10]

25. The SCCLR has recommended disinterested members' voting for connected transactions to ensure procedural fairness. The recommendation does not apply to private companies.[11]

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9 Sections 49BA(1)(c) and (5), 49D(4) and (6), 49E(2) and (3), 49F(2) and (3), 49L(2) (purchase or redemption of the company's own shares) and 163D(4)(c) (payment to director for loss of office or retirement) of the CO.

10 The chapters of the Listing Rules which deal with notifiable transactions and connected transactions impose additional requirements relating to abstention from voting by interested persons at a general meeting.

11 SCCLR, *Annual Report 2003 / 2004*, pages 14, 15, 25 and 26.

Proposal

26. **Various clauses in Divisions 2 to 5,** which set out the requirements for members' approval for the four types of prohibited transactions covered by Part 11[12], have incorporated the disinterested members' voting requirement for public companies.[13] The clauses provide that if the company concerned is a public company, the resolution of such a company is passed only if every vote in favour of the resolution by the interested members is disregarded.

27. Whose voting right shall be restricted will depend on which type of prohibited transaction is in issue. In general, the members whose right may be restricted include the following categories of person :

(a) the relevant director;

(b) the relevant connected entity;

(c) the recipient of the payment for loss of office, if he is not the relevant director;

(d) a person who makes the takeover offer and his associates, where a payment for loss of office is made in connection with a share transfer;

(e) in the case of a resolution for affirming a transaction that contravenes Part 11 (where the company elects to adopt the transaction despite the contravention), any other directors of the company who authorised the contravening transaction;

(f) any person who holds any shares in the company concerned in trust for the above categories of person.

[12] The types of transactions are (a) loans, quasi-loans and credit transactions; (b) payment for loss of office; (c) directors' service contracts; and (d) substantial property transactions.

[13] Clauses 11.11(2) and (5); 11.31(1) and (4); 11.34(2), (4) and (5); 11.48(2) and (4); 11.57(2) and (5); and 11.62(1) and (4) of the CB.

(h) Widening the ambit of disclosure currently under section 162 of the CO

Background

28. Section 162 of the CO requires a director, who has a material interest, directly or indirectly, in a contract or proposed contract with the company, to disclose to the board of directors the nature of such interest at the earliest meeting of directors that is practicable. We are of the view that the current application of the section is relatively narrow and there is a need to widen the ambit.

Proposal

29. **Division 6 (Clauses 11.63 to 11.67)** restates the provisions of section 162 of the CO which are modified to be in line with those of other common law jurisdictions such as the UK and Australia,[14] and to widen the ambit of the section as follows:

(a) the ambit of disclosure is widened to cover "transactions" and "arrangements" instead of just "contracts" (**Clause 11.63(1) and (2)**);

(b) for a public company, the ambit of disclosure is widened to include disclosure by a director of any material interest of entities connected with him (**Clause 11.63(2)**);[1]

(c) a director is required to disclose the "nature and extent" of his interest instead of just disclosing the "nature" of his interest (**Clause 11.63(1) and (2)**);

(d) the disclosure requirements are extended to shadow directors (**Clause 11.66**).

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[14] SCCLR, *Corporate Governance Review by the Standing Committee on Company Law Reform – A Consultation Paper on Proposals made in Phase I of the Review* (July 2001), paragraph 7.11.

[15] Clause 11.63(5)(a) contains an exception providing that a director is not required to declare an interest if he is not aware of the interest or the transaction in question.

PART 12

COMPANY ADMINISTRATION AND PROCEDURE

Introduction

1. Part 12 contains provisions on company administration and procedure. The provisions are grouped into five divisions:

   - Division 1: Resolutions and meetings;
   - Division 2: Registers (including registers of members, directors and secretaries);
   - Division 3: Company records;
   - Division 4: Registered office and publication of company names; and
   - Division 5: Annual return.

2. In relation to resolutions and meetings, a number of significant changes are proposed with a view to:

   (a) enhancing shareholder engagement in the decision-making process of a company;

   (b) simplifying and deregulating the decision-making process of a company; and

   (c) improving the transparency of the decision-making process of a company.

3. We also update the provisions relating to registers, registered offices and annual returns so that they are commensurate with the needs of the modern economy and on par with similar legislation in other jurisdictions.

- The significant changes to be introduced under this Part are highlighted below:

  <u>Resolutions and meetings</u>

  (a) Introducing a comprehensive set of rules for proposing and passing a written resolution;

(b) Enhancing members' powers to require directors to circulate members' resolutions;

(c) Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, AGMs, if they are received in time for sending with the notice of the meeting;

(d) Permitting a general meeting to be held at more than one location by using audio-visual technology;

(e) Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights;

(f) Giving members a right to inspect voting documents (including proxies and voting papers);

(g) Clarifying the rights and obligations of a proxy;

(h) Allowing companies to dispense with AGMs by unanimous shareholders' consent;

Registers

(i) Clarifying that the court may refuse to compel compliance with a request for inspection or a copy of the register of members, directors or secretaries if the right is being abused;

Registered office and publication of company names

(j) Empowering the Financial Secretary to make regulations to require a company to display its name and related information in certain locations and state prescribed information in documents or communications.

Significant Changes

(a) Introducing a comprehensive set of rules for proposing and passing a written resolution

Background

4. At present, section 116B of the CO provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting and without any previous notice, by a resolution signed by all members of a company. We note the widespread use of such written resolutions, especially by SMEs, for their decision-making process. However, there are no established statutory rules for proposing and passing a written resolution, for example, who may propose a written resolution, and how a written resolution is to be circulated among the members.

Proposal

5. **Subdivision 2 of Division 1** provides for the procedures for proposing, passing and recording written resolutions. **Clause 12.3** provides that the directors of a company or the members of a company representing not less than 2.5% of the total voting rights or a lower percentage specified in the company's articles may propose a resolution as a written resolution. In addition, members of the company who propose the resolution may also require the company to circulate with the resolution a statement of not more than 1,000 words on the subject matter of the resolution (**Clause 12.5**). Once a written resolution is proposed, the company has a duty to circulate the resolution to every member for agreement. In circulating a resolution proposed as a written resolution, the company may send either a hard copy form or electronic form or by making the copies available on a website **(Clauses 12.6 and 12.7)**. It is proposed that the period for agreeing to the proposed written resolution be 28 days or such period as specified in the company's articles (**Clause 12.12**). Members may signify their agreement to a proposed written resolution and send it back to the company either in hard copy or electronic form (**Clause 12.10**).

6. The procedures set out in this subdivision will not replace the common law doctrine of unanimous consent or so-called *Duomatic* principle[1] that, if all the members of a company actually agree on a particular decision which can

[1] See *Re Duomatic Ltd* [1969] 2 Ch 365.

be made at a general meeting, the decision is binding and effective without a meeting. (**Clause 12.1(3)**). In addition, a company's articles may also set out alternative procedures for passing a resolution without a meeting, provided that it cannot replace the procedures set out in the CB **(Clause 12.15)**.

7. The new procedures concerning written resolutions would facilitate the use of written resolutions for decision-making, which is often more expeditious and less costly than passing a resolution in a general meeting.

(b) Enhancing members' powers to require directors to circulate members' resolutions

Background

8. Under section 113 of the CO, members of a company holding not less than 5% of the paid-up capital of the company shall have the right to require the directors of the company to convene a general meeting. The request must state the objects of the meeting. However, the section does not expressly provide members with the right to propose a resolution to be moved at the meeting. As such, directors may refuse to circulate any resolution proposed by members for consideration in a general meeting. This will defeat the purpose of requesting a meeting to be convened.

Proposal

9. **Clauses 12.22 to 12.23** restate section 113 of the CO with some improvements. **Clause 12.22** provides that a request may include the text of a resolution that may properly be moved and is intended to be moved at the meeting. If such a resolution is included in a request, the directors will be obliged to include the proposed resolution in the notice of the meeting to be circulated among members.

(c) Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, AGMs, if they are received in time for sending with the notice of the meeting

Background

10. Section 115A of the CO enables members representing at least 2.5% of the total voting rights of a company or 50 or more members who have paid up

an average sum of not less than $2000 per member, to request the company to circulate a proposed resolution for the next AGM or a statement of not more than 1000 words relating to any proposed resolution or business to be dealt with at any general meeting. Under section 115A(1), members making the requisition need to bear the expenses unless the company resolves otherwise.

11. To strengthen the right of minority shareholders, we propose that the expenses of circulating members' proposed resolutions for AGMs and members' statements relating to the proposed resolution or the business to be dealt with at AGMs should be borne by the company if such documents are received in time for sending with the notice of the meeting.

Proposal

12. **Clause 12.37** provides members a power to request circulation of statements concerning the business to be dealt with at general meetings along the lines of section 115A of the CO. **Clause 12.38** imposes a duty on the company to circulate members' statements in the same manner as the notice of meeting. Under **Clause 12.39**, if the meeting concerned is an AGM and a members' statement is received in time for sending with the notice of the meeting, the expenses will be borne by the company. Otherwise, the expenses will be paid by the members concerned.

13. **Clauses 12.78** and **12.79** contain similar provisions in respect of members' proposed resolutions for AGMs. A circulation request must be received by the company not later than 6 weeks before the AGM, or if later, before the time at which notice of meeting is given. The company is obliged to circulate the resolution at the company's expense.

(d) Permitting general meeting to be held at more than one location by using audio-visual technology

Background

14. With the development of electronic communications, it is not uncommon for a company to hold its general meeting at two or more venues with audio-visual links. The CO does not have express provision permitting a general meeting to be held at two or more places.

Proposal

15. To keep up with technological development, **Clause 12.42** is introduced to permit a company to hold a general meeting at two or more places using any audio-visual technology that enables the members of the company to exercise their right to speak and vote at the meeting. The section has effect subject to any provision of the company's articles. A company may set out rules and procedures for holding a dispersed meeting.

(e) Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights

Background

16. Under section 114D of the CO, members have the right to demand a poll and such right cannot be excluded by the articles. It may be exercised on any question except the election of the chairman of the meeting or the adjournment of the meeting and is effectively demanded if made by:

(a) not less than 5 members having the right to vote at the meeting;

(b) members representing not less than 10% of the total voting rights; or

(c) members holding not less than 10% of the total paid up share capital of the company carrying the right to vote at the meeting.

A proxy has the same right as the member for whom he is proxy to join in demanding a poll.

17. It is proposed that the threshold requirement should be lowered from 10% to 5% of the total voting rights. This is in line with the provision that shareholders holding not less than 5% of the voting rights are able to requisition an extraordinary general meeting.

Proposal

18. **Clause 12.50** basically restates section 114D of the CO, except reducing the threshold requirement for demanding a poll to 5% of the total voting rights of all the members having the right to vote at the meeting.

(f) Giving members a right to inspect voting documents (including proxies and voting papers)

Background

19. There is no legislative provision for inspection of voting documents in the CO.

Proposal

20. To improve the transparency of the voting process, **Clause 12.54** requires a company to keep record or document relating to a vote cast at a general meeting on a resolution, including the instrument appointing a proxy to vote at the meeting, and if a poll is taken at the meeting, the voting paper relating to the poll. The record or document must be made available for inspection by members. In addition, **Clause 12.55** allows any member of the company to inspect the record or document without charge.

(g) Clarifying the rights and obligations of a proxy

Background

21. The rights of a proxy are subject to certain limitations under the CO:

(a) unless the articles otherwise provide, a proxy is not entitled to vote on a show of hands (section 114C(1A)(a) of the CO); and

(b) there is no statutory provision expressly providing that a proxy may be elected as a chairman of a meeting.

22. At present, there is no requirement for any person put forward by the company board as a proxy to vote the proxies on any poll according to their terms. The SCCLR has recommended introducing such a statutory requirement so as to overcome the possibility of the shareholders being disenfranchised by a person, who is put forward by the board as a proxy deliberately failing to vote that proxy in accordance with the shareholders' instructions.[2]

[2] SCCLR, *Corporate Governance Review by the Standing Committee on Company Law Reform – A Consultation Paper on Proposals made in Phase II of the Review* (June 2003), paragraphs 21.95 to 21.98.

23. In the absence of any contractual obligation, a member retains the right, after appointing a proxy, to attend and vote in person to give his own vote according to his own volition. If the member does so, the proxy may implicitly be regarded as revoked. The common law principle that the appointment of a proxy will be revoked if the appointor attends and votes at the meeting is not currently set out in the CO.

Proposal

24. The CB clarifies the rights and obligations of a proxy in the following manner:

(a) **Clause 12.58(1)** provides that a proxy may exercise all or any of the member's rights to attend and to speak and vote at a general meeting (i.e. including voting on a show of hands);

(b) **Clause 12.64** provides that a proxy may be elected as the chairperson of the general meeting, subject to any provisions of the company's articles;

(c) Where a proxy put forward by a company is appointed by a member to be his proxy, **Clause 12.65** requires the proxy to vote in the way specified in the appointment of the proxy; and

(d) **Clause 12.67** codifies the common law principle that the appointment of a proxy will be revoked if the appointor attends and votes at the meeting.

(h) Allowing all companies to dispense with the holding of AGMs by unanimous members' consent

Background

25. Every company is required to hold AGMs. Under section 111(6) of the CO, a company may dispense with holding AGMs if everything that is required or intended to be done at the meeting is done by written resolutions in accordance with section 116B of the CO, provided that a copy of each of the documents (including any accounts or records) which under the CO would be required to be laid before the meeting is provided to each member of the company.

26. For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome. In order to simplify the decision-making process, we suggest that all companies should be allowed to dispense with AGMs if unanimous members' consent is obtained, and that dispensation should be in force unless a member, by notice, requires an AGM to be held in a particular year or until the dispensation is revoked by passing an ordinary resolution to that effect. In practice, it is much less likely for public and guarantee companies to dispense with holding AGMs by unanimous members' consent but the possibility could not be ruled out. The written resolution procedure under section 111(6) is retained in case a company might wish to dispense with an AGM on a specific occasion by a written resolution.

Proposal

27. **Clause 12.76** allows a company to dispense with the requirement for holding of AGMs by passing a written resolution or a resolution at a general meeting by all members. After passing such a resolution, the company will no longer be required to hold any subsequent AGMs. However, the financial statements and reports originally required to be laid before an AGM will still need to be sent to the members under Part 9. Also any member may request the company to convene an AGM for a particular year. The company may revoke the resolution by passing an ordinary resolution to that effect and in which case, the company will be required to hold subsequent AGMs. For a single member company, **Clause 12.75(2)(a)** provides that such a company is not required to hold an AGM.

(i) Clarifying that the court may refuse to compel compliance with a request for inspection or a copy of the register of members, directors or secretaries if the right is being abused

Background

28. Under section 98(1) of the CO, the register of members of a company and the index of members' names are open to inspection by any member without charge and by any other person on a payment of a fee. Upon receipt of a request for a copy of the register of members, the company must send the copy within 10 days after the date on which the request is received.

29. Section 98 of the CO was constitutionally challenged by the Democratic Party in *The Democratic Party v The Secretary for Justice*[3] on the ground that the public availability of the register of members is, in so far as it applies to a political party, inconsistent with the freedom of association and freedom from arbitrary or unlawful interference with the privacy of its members, which are guaranteed by Articles 27 and 30 of the Basic Law and articles 14 and 18 of the Hong Kong Bill of Rights.

30. In his judgment, Mr Justice Hartmann held that the restrictions on the right to privacy imposed by section 98 of the CO, insofar as they may affect political parties that have chosen to incorporate, are no more than necessary. The court has discretion not to make an order under section 98(4) of the CO to compel inspection or production if it considers that the purposes of the request amount to an abuse. We propose to specifically provide for the court's discretion in the CB.

31. We have considered but decided against introducing changes along the lines of sections 116 to 118 of the UKCA 2006. Under section 117, a company may apply to the court for an order directing the company not to comply with a request for inspection or a copy of the register of members if the request was not made for a proper purpose. We believe such a proposal would unnecessarily increase the compliance costs of companies, especially SMEs, as companies would have to apply to court every time they wanted to refuse a request. Under the existing arrangement, the burden rests with the person making the request to apply to the court if his request is refused. In addition, in case a company refuses a request for inspection, the enquirer could still search the information from the CR, with the exception of companies limited by guarantee and listed companies. For the latter, we have proposed to only require listed companies to file with the Company Registry particulars of members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return (please see paragraph [51]).

Proposal

32. **Clause 12.96(8)** states that the court must not make an order to direct a company to provide a copy of the register of members or index of members' names to the person requesting it if it is satisfied that the right to request the copy is being abused. There are similar provisions in respect of the

[3] HCAL 84/2006.

register of directors and the register of secretaries (**Clauses 12.110(7) and 12.117(7))**. The court's power not to direct inspection of the registers where there is abuse will be set out in the regulations made by the Financial Secretary under **Clause 12.125(4)(e)**.

(j) Empowering the Financial Secretary to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications

Background

33. Under section 93(1) of the CO, every company shall display its name on the outside of every office or place in which its business is carried on and mention its name in its public documents (e.g. business letters, notices, official publications, and contracts).

34. The SCCLR has recommended some changes to the rules on publication of company names:

(a) every company should also display its name on the company's website and the outside of the company's registered office;

(b) basic rules for electronic display of company names should be set along the lines that where an office is shared by more than six companies, each of such companies is only required to display its registered name in such a manner that it can be read for at least twenty continuous seconds at least once in every four minutes or, where impracticable, the electronic system used for the display should be capable of calling up such information on request within 4 minutes; and

(c) every company should also be required to mention its company registration number in its public documents, in addition to the current requirement of mentioning its registered name in such documents.

Proposal

35. As the rules involve technical details and may change with developments in technology, they should be stated in subsidiary legislation to facilitate future

amendments. **Clause 12.127** and **12.128** empowers the Financial Secretary to make the relevant regulations, including the offence provisions. The regulations will be made after the enactment of the CB and will be subject to negative vetting by the LegCo.

Other Changes

(a) Facilitating the use of electronic communications between the company and members

36. Part 18 of the CB introduces rules to facilitate communications between a company and its members in electronic form or by means of a website. Part 12 contains provisions to the effect that a company is regarded as having agreed that certain documents or information may be sent by electronic means to an electronic address if the company has given an electronic address when sending a relevant document to its members.[4]

37. **Clause 12.30** specifies how a company may give notice of a general meeting by making it available on a website in addition to the provisions on website communications in Part 18. The notice should be available on the website throughout the period beginning on the date of the notification and ending on the conclusion of the meeting.

(b) Shortening the notice period for passing a special resolution

38. At present, section 114 of the CO provides that a company must give at least 21 days' notice to every member of the company for convening an AGM, and 14 days' notice for convening a meeting other than either an AGM or a meeting for the passing of a special resolution. Under section 116 of the CO, a company is required to give at least 21 days' notice for a general meeting in which a special resolution is proposed to be passed.

39. To simplify the notice requirement, **Clause 12.28** only provides for the notice requirements in respect of AGMs and for other general meetings. The notice requirement under section 116 is abolished. In effect, a company may convene a meeting other than an AGM for passing a special resolution by giving 14 days' notice only.

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[4] See for example, in the CB, **Clause 12.14** concerning written resolutions, **Clause 12.29(2)** concerning documents and information relating to proceedings at a general meeting, and **Clause 12.61** concerning documents relating to proxies.

(c) Giving members a right to appoint a proxy irrespective of whether the company has share capital, while allowing a company limited by guarantee to impose certain restrictions by it articles

40. The system of proxy voting helps to ensure that the views of members who are unable to attend a meeting in person will still be voiced and considered. Under section 114C of the CO, the right to appoint a proxy is effectively limited to companies having a share capital. Members of companies limited by guarantee ("guarantee companies") may have a right to appoint a proxy only if it is provided in the company's articles. We note that some guarantee companies may wish to exclude non-members from attending their meetings and to confine a proxy to another member. Nevertheless, a better way to protect the right of members of guarantee companies would be to give all members, irrespective of whether the company has share capital or not, a right to appoint a proxy while allowing guarantee companies to confine a proxy to another member. The amendment is reflected in **Clause 12.58(1) and (2)**.

(d) Enhancing the right of members of a company having a share capital to appoint multiple proxies

41. Unless the articles otherwise provide, the number of proxies that may be appointed by a shareholder to attend on the same occasion is limited to two (section 114C(2) of the CO). Such a default cap on the maximum number of proxies that a shareholder may appoint on the same occasion is considered to be unnecessarily restrictive. **Clause 12.58(3)** allows multiple proxies without imposing any cap on the number of proxies that may be appointed.

(e) Application of provisions relating to general meetings to class meetings

42. Section 63A(6) of the CO provides that subject to certain exceptions, sections 114, 114A, 114AA and 115A of the CO relating to general meetings shall, so far as applicable, apply with necessary modifications in relation to any meeting of shareholders in connection with the variation of rights attached to a class of shares. Currently, there is no separate provision under the CO on class meetings or variation of class rights that relate to companies without a share capital.

43. **Clause 12.88** provides that subject to certain exceptions and with necessary modifications, the provisions in relation to a general meeting apply in relation to a class meeting. Examples of the exceptions are **Clause 12.22** (please see paragraph 9), members' power to call general meeting at company's expense, power of court to order meeting, and the provisions in relation to quorum and right to demand a poll for a variation of class rights meetings. **Clause 12.89** provides for class meetings of companies without a share capital in a similar way.

(f) Shortening the period for keeping the records of past members from 30 years to 20 years

44. Under section 95(1) of the CO, a company is required to keep not only the records of present members, but also records of past members for 30 years after they ceased to be members. We consider that a period of 30 years is unnecessarily long. **Clause 12.92(6)** reduces the period for which a company should keep the record of a past member to 20 years after that person ceased to be a member.

(g) Exempting listed companies from giving notice of closure of register of members by newspaper advertisement

45. Section 99(1) of the CO requires a Hong Kong incorporated company to give notice of closure of its register of members/debenture holders by advertisement in a newspaper. The Listing Rules have been amended in 2007 to require a listed company to publish notices (including a notice of closure of register of members) on the SEHK's website instead of in a newspaper.[5] As a result, a Hong Kong incorporated listed company has to publish its notice of closure of register of members both in a newspaper and on the SEHK's website. To streamline the requirements and to ensure a level playing field between listed companies incorporated in Hong Kong and elsewhere, **Clause 12.98** allows listed companies to give notice in accordance with the Listing Rules instead of by advertisement in a newspaper.

[5] See Rule 2.07C and Rule 13.66 of the Main Board Listing Rules which were implemented on 25 June 2007.

(h) Empowering the Financial Secretary to make regulations for keeping, inspection and provision of copies of company records

46. At present, every company must keep and make its registers (including registers of members, debenture holders, charges, directors and secretaries) available for public inspection. In addition, every company must make its minute books available for members' inspection.[6] The registers and minute books must be open for inspection during business hours. Though a company may impose reasonable restriction, the minimum inspection time should not be less than 2 hours in each day.[7] The maximum fees that a company may charge for inspection and copy of the registers or minutes are prescribed in the CO.[8] However, there is no legal requirement for prior appointment.

47. We propose to streamline the provisions in the CB and put the technical details in subsidiary legislation. This will also facilitate regular updating of the law in the future. There will be a requirement for prior appointment before inspection in the subsidiary legislation.

48. **Clause 12.122** defines "company records" to mean any register, index, agreement, memorandum, minutes or other document required by the Ordinance to be kept by a company, but does not include accounting records. The provisions on accounting records will be dealt with in Part 9. **Clause 12.123** allows the company records to be kept in hard copy form or electronic form. **Clause 12.125** empowers the Financial Secretary to make regulations for the keeping, inspection and provision of copies of any company records, such as alternative locations for keeping and inspection of registers and minute books, time, duration and manner of inspection, and the amount of fee payable on production of copies.

(i) Prescribing the contents of annual returns and the accompanying documents in a Schedule which may be amended by the Registrar by order published in the Gazette

49. Every company is required to file an annual return with the Registrar to update information of the company, including its share capital, registered

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[6] See sections 95(2) (register of members), 158A(1) (registers of directors and secretaries), 74A(2) (register of debentures holders), 89(2) (register of charges) and 119A(1) (minute books) of the CO.

[7] See sections 98(1) (register of members), 158(7) (registers of directors and secretaries), 75(1) (register of debenture holders), 90(1) (register of charges), 120(1) (minute books) of the CO.

[8] See sections 75(1) (register of debenture holders), 98(1) of and item 1 of 14th Sch (register of members), 90(1) (register of charges), 158(7) (registers of directors and secretaries), 120(1) and (2) (minute books) of the CO.

office, members, directors and secretaries. In the case of public companies, the balance sheet and auditor's report must also be filed. Sections 107 and 109 of the CO prescribe the contents of an annual return and deal with the general administrative provisions relating to annual returns.

50. The information that should be contained in annual returns may change over time. To facilitate regular updating of the law in the future, we propose to prescribe the technical details in a Schedule and empower the Registrar to amend the Schedule by order published in the Gazette. The order will be subject to negative vetting by the LegCo.

51. **The Schedule** in Part 12 sets out the details of the information to be contained in annual returns and the required accompanying documents. The requirements are essentially the same as the current provisions in the CO, except that the requirement for listed companies to file all the members' details in their annual returns will be relaxed. Given the frequent share transactions of listed companies, a snapshot of the membership of a listed company at a particular point of time is not very meaningful. Instead, paragraph 2 of Part 1 of the Schedule will only require listed companies to file particulars of members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return. It would still be possible for anyone to have access to information regarding all the listed company's shareholders by inspecting the company's own register at its registered office.

PART 14

REMEDIES FOR PROTECTION OF COMPANIES' OR MEMBERS' INTERESTS

Introduction

1. Shareholder remedies provisions were substantially revised by the Companies (Amendment) Ordinance 2004 with a view to enhancing legal remedies available to members of a company. The amendments included providing for a statutory derivative action that may be taken on behalf of a company by a member of the company; facilitating members to exercise their rights to obtain access to company records; and empowering the court, on application by an affected person or the Financial Secretary, to grant an injunction restraining any person from engaging in conduct which constitutes contravention of the CO or a breach of his fiduciary or other duties owed to a company. The unfair prejudice remedy in section 168A of the CO has also been improved. It provides the court with a power to award damages to the members of a company where it was found that their interests had been unfairly prejudiced and to award such interest on the damages as the court thinks fit. The scope of the remedy has been extended to allow past members (and their personal representatives) of local companies and members and past members (and their personal representatives) of non-Hong Kong companies to commence legal action under that section.

2. Part 14 groups the existing provisions concerning shareholder remedies under the CO into a distinct part of the Companies Bill. These include:

   (a) unfair prejudice remedy (section 168A of the CO);

   (b) injunction order (section 350B of the CO);

   (c) statutory derivative action (sections 168BA to 168BK of the CO); and

   (d) court order for inspection of company records (sections 152FA to 152FE of the CO).

3. Some changes are proposed to improve the operation of the unfair prejudice remedy and statutory derivative action provisions. The existing common law derivative action is preserved in Part 14. We are consulting separately in Chapter 9 on whether the common law derivative action regime should still be maintained.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions";

  (b) Enhancing the court's discretion in granting relief in cases of unfair prejudice; and

  (c) Allowing a member of an associated company to bring a statutory derivative action on behalf of the company ("multiple derivative action").

Significant Changes

(a) Extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions"

Background

4. Section 168A(1) of the CO provides that a member of a company may petition to the court if the affairs of the company are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members. There is some uncertainty whether, under the current provisions, a member can bring an action for unfair prejudice where a course of action is only at the proposal stage, or where there is only a threat to do or not to do something. We propose to clarify the scope of the unfair prejudice provision to cover "proposed acts or omissions" along the lines of a similar provision in the UKCA 2006.[1]

[1] Section 994(1) of the UKCA 2006.

Proposal

5. **Clauses 14.1 to 14.7** restate the unfair prejudice remedy provisions under section 168A of the CO. **Clause 14.3(1)(b)** provides that the court may exercise the power to grant remedies under these provisions if there is any actual or proposed act or omission of the company (including one done or made on behalf of the company) which is or would be prejudicial to the interests of the members. The provision is intended to cover threatened or proposed conduct which has not yet taken place. As such, the remedies that may be granted by the court under **Clause 14.4** are also extended to cover an order restraining the proposed act or requiring the doing of an act that the company has proposed to omit to do.

(b) Enhancing the court's discretion in granting relief in cases of unfair prejudice

Background

6. Section 168A(2) of the CO provides that orders made by the court (other than damages and interest awarded) must be "with a view to bringing to an end the matter complained of". This may prevent the court from granting a remedy which is unable to meet that requirement. The corresponding provision in the UKCA 2006 is more flexible and allows the court to make such order "as it thinks fit for giving relief in respect of the matter complained of"."[2]

7. Section 168A(6) of the CO states that section 296 shall apply in relation to a petition under section 168A as it applies in relation to a winding-up petition. Section 296 empowers the Chief Justice to make rules relating to the winding-up of companies. Currently the rules in the Companies (Winding-up) Rules made under section 296 apply to proceedings under section 168A in so far as they are applicable. In the interest of plain language drafting an express rule making power is desirable and the Judiciary will be consulted on the matter.

Proposal

8. **Clause 14.4** provides that the court may make any order that it thinks fit for giving relief in respect of the matter complained of. **Clause 14.6** provides

[2] Section 996(1) of the UKCA 2006.

for an express rule making power on the Chief Justice in relation to unfair prejudice proceedings under Part 14.

(c) Allowing a member of an associated company to bring a statutory derivative action on behalf of the company ("multiple derivative action")

Background

9. Statutory derivative action ("SDA") provisions in Part IVAA of the CO allow a member of a company to bring an action or intervene in proceedings on behalf of the company in respect of "misfeasance" committed against the company. "Misfeasance" means fraud, negligence, default in complying with any statutory provision or rule of law or breach of duty. Unlike some comparable jurisdictions[3], only members of the company (vis-à-vis members of a related company of the company) have standing under section 168BC(1) of the CO to seek leave to commence a SDA. In other words, only "simple" derivative actions, as opposed to "multiple" derivative actions, can be brought under the SDA provisions.

10. However, in a recent case *Waddington Ltd v Chan Chun Hoo and Others*[4], both the Court of Appeal and the Court of Final Appeal ruled that a "multiple" derivative action is maintainable in Hong Kong under the common law. The reasons for allowing members to bring a simple derivative action also justify a multiple derivative action, as the wrongdoers' control of both a parent company and its subsidiary can preclude the subsidiary from taking action against the wrongdoers. Giving standing to a member of the parent company to bring an action on behalf of the subsidiary company is appropriate since the member may otherwise suffer a real loss if no action on behalf of the subsidiary is taken. In addition to allowing a multiple derivative action under the common law, the Court of Final Appeal stated that it was appropriate for the CO to be amended to take in "multiple" derivative actions as there was no justification for excluding them from the statutory scheme.[5]

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[3] For example, in Australia, provision is made (subject to leave of the court) for proceedings to be brought by a person who is "a member… of the company or of a related body corporate (section 236(1)(a), ACA). New Zealand has taken the same approach under NZCA, section 165(1)(a). In Canada, a complainant bringing a derivative action may be a shareholder of the corporation or any of its affiliates and may sue on behalf of the corporation or any of its subsidiaries (Canadian Business Corporations Act 1985, sections 238 and 239(1)). In Singapore, the immediate members of the corporation and any other person who in the discretion of the court is a proper person may apply for leave to sue on behalf of the relevant company (SCA, section 216A(1)).

[4] [2006] 2 HKLRD 896; (2008) 11 HKCFAR 370.

[5] Paragraph 26 of the Court of Final Appeal judgment per Ribeiro PJ.

11. Following the *Waddington* case the SCCLR recommended that the SDA provisions in the CO should be expanded to allow a multiple derivative action by a shareholder of a parent company on behalf of a subsidiary or on behalf of a second or lower tier subsidiary.

12. The *Waddington* case was concerned with a multiple derivative action in the context of a parent-subsidiary relationship and the reasoning of the Court of Final Appeal was discussed in that context. The same reasoning can however be applied to situations where a member of a subsidiary seeks to bring a derivative action on behalf of another subsidiary of the same holding company.

13. Based on the SCCLR's recommendation and in order to bring the position of Hong Kong more in line with the legislation of comparable jurisdictions, we propose to extend the scope of the SDA provisions to allow a member of a related company to bring or to intervene in an action on behalf of the company.

Proposal

14. **Clause 14.13** will give standing to members of associated companies[6] and thereby expand the scope of SDA to cover "multiple" derivative actions which would provide a simple and effective mechanism for members of an associated company to commence SDA on behalf of the company. The proposal would further enhance the protection of the interests of minority shareholders.

15. To expedite implementation of the amendments, the proposal on enabling multiple statutory derivative actions will be incorporated into a Companies (Amendment) Bill scheduled to be introduced into the LegCo in early 2010.

[6] An "associated company" in relation to a company (which includes both a company incorporated in Hong Kong and a non-Hong Kong company) means any company that is (a) a subsidiary of the company; (b) a holding company of the company; or (c) the subsidiary of such a holding company.

PART 15

DISSOLUTION BY STRIKING OFF OR DEREGISTRATION

Introduction

1. At present, there are two ways in which a defunct company may be dissolved without formally being wound up:

   (a) striking off the register by the Registrar or by the court; or

   (b) deregistration upon application to the Registrar.

2. There are two routes available for companies which have been dissolved to be restored or reinstated to the register by application to the court under sections 291(7) or 291AB(2) of the CO.[1]

3. Part 15 sets out provisions on striking off and deregistration of defunct companies, restoration of companies that have been struck off or deregistered, and related matters, including treatment of the property of dissolved companies. The amendments aim at streamlining the existing procedures for striking-off and restoration of companies while imposing certain new requirements to prevent possible abuse of the deregistration procedure.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Extending the voluntary deregistration procedure to public non-listed and guarantee companies with some exceptions;

  (b) Imposing additional conditions for deregistration of defunct companies*;*

  (c) Streamlining the procedures for restoration of dissolved companies by court order; and

[1] In the liquidation context, companies which have been dissolved pursuant to winding-up proceedings may, by order of the court made under section 290 of the CO, have the dissolution declared void. The provisions will be reviewed in Phase II of the CO Rewrite exercise.

(d) Introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar.

Significant Changes

(a) Extending the voluntary deregistration procedure to public non-listed and guarantee companies with some exceptions

Background

4. At present, an application may be made to the Registrar under section 291AA of the CO to deregister a private company if the following three conditions are met:

   (a) the company has not commenced operation or business or has not been in operation or carried on business for 3 months;

   (b) it has no outstanding liabilities;[2]

   (c) all the members agree to the deregistration.

   The company will be dissolved upon deregistration without going through the winding-up process.

5. There has been a suggestion that non-private companies, particularly small guarantee companies which are social or community organisations, should be allowed to deregister voluntarily. Currently, they cannot apply for voluntary deregistration under section 291AA even if they satisfy the conditions in paragraph 4 above. It would be costly for them to apply to court for a members' voluntary winding-up instead. It is noted that the UK has extended the facility of voluntary striking-off procedure to public companies under the UKCA 2006.[3]

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[2] A "no-objection" notice from the Commissioner of Inland Revenue certifying that the company has no outstanding tax liabilities is required.

[3] See section 1003 of UKCA 2006. This was proposed in UK Department of Trade and Industry, *White Paper on Company Law Reform* (March 2005), paragraph 4.9.

Proposal

6. We believe that flexibility should be allowed for small non-private companies, particularly guarantee companies, to apply for voluntary deregistration. However, it would not be prudent to allow listed companies and certain categories of regulated businesses which have a public interest nature and are subject to regulation by relevant authorities (such as banks, insurance and securities companies, Mandatory Provident Fund Schemes trustees) from applying for deregistration. As trust companies registered under Part VIII of the Trustee Ordinance (Cap 29) may act as executors or administrators of estates in respect of which it may not be easy to identify all relevant beneficiaries, they should also be excluded from applying for voluntary deregistration to avoid prejudicing the beneficiaries' interests.

7. **Clause 15.6** excludes listed companies and certain categories of businesses from applying for voluntary deregistration. The conditions for applying voluntary deregistration, particularly the requirement of consensus by all members and the additional conditions proposed in section (b) below, would prevent any possible abuse of the procedure by other public non-listed or guarantee companies.

(b) Imposing additional conditions for voluntary deregistration of defunct companies

Background

8. As noted in paragraph 4 above, voluntary deregistration of private companies may be allowed if certain conditions are met. There have been cases where some companies applying for deregistration were parties to legal proceedings or were in possession of immovable property in Hong Kong with high maintenance costs attached (such as retaining walls). As a consequence, the deregistration proved to have adverse impact on third parties or the Government. For instance, the "deregistered" company might have outstanding liabilities contingent upon the outcome of the legal proceedings. The Government might have to bear high maintenance costs as the immovable property became vested in the Government as bona vacantia following dissolution of the company. To prevent the potential abuse of the deregistration procedure, we are of the view that additional conditions should be imposed on companies applying for deregistration.

Proposal

9. **Clauses 15.7 to 15.8** mainly restate the existing deregistration provisions under section 291AA of the CO. **Clause 15.7** imposes two additional conditions for deregistration, namely that the applicant must confirm that the company is not a party to any legal proceedings and that it has no immovable property in Hong Kong. Any person who knowingly or recklessly gives false or misleading information to the Registrar in an application commits an offence.

(c) Streamlining the procedures for restoration of dissolved companies by court order

Background

10. At present, there are two routes available for companies which have been struck off or deregistered to be restored or reinstated to the register by application to the court. They are respectively under sections 291(7) and 291AB(2) of the CO. The time of application for such a restoration or reinstatement may be up to 20 years after the company's dissolution. These two routes are very similar in nature. They should be merged into one procedure.

11. The current period of application (20 years) seems too lengthy. Under section 292(3) of the CO, former directors of a dissolved company are only obliged to keep the books and papers of the company for not less than 5 years after the dissolution. Although there are provisions in sections 291(7) and 291AB(5) to the effect that a company restored or reinstated shall be deemed to be continued in existence as if it had not been dissolved, an odd situation may arise where a dissolved company is restored or reinstated to the register more than 5 years from its dissolution when all its books and papers were destroyed. Consideration should be given to shorten the period of application.

Proposal

12. **Clauses 15.23 to 15.26** replaces the two existing routes in sections 291(7) and 291AB(5) with one restoration procedure by court order. Where a company has been struck off the register by the Registrar or deregistered upon its own application, and thereby dissolved, any director or member or

creditor of the company or any interested person, including the Government, may make an application to the court for restoration of the company.

13. The application period will be shortened to within 6 years of dissolution of the company in general (**Clause 15.24**).[4] However, where an application is intended to enable a person to bring legal proceedings against the company for damages for personal injury, the limitation period will not apply. This will avoid jeopardising the interests of the deceased or injured persons. Under **Clause 15.16**, the period for which former directors of a dissolved company must keep the company's books and papers will be aligned to 6 years. It will reduce any uncertainty arising from the restoration procedure.

(d) Introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar

Background

14. At present, where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, she may adopt the procedure set out in section 291 of the CO and strike the name of the company off from the register**.** Under section 291(4), the procedure may also be used where a company is being wound up and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator (under sections 239 and 248 of the CO) have not been made for a period of six consecutive months.

15. There have been some cases where a company struck off seeks to be restored on the ground that, contrary to the Registrar's belief, it was actually in operation or carrying on business at the time of its striking off. This may occur because a company fails to file its annual returns, moves without notifying the CR of a change of registered office and is unaware of the proposed strike-off.[5] While restoration is often straightforward in such circumstances as it is unlikely to be contested, it still requires an application to the court. We believe that a simplified restoration procedure should be introduced to allow companies to be restored to the register in straightforward cases without the need for recourse to the court.

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[4] Companies which have been struck off or deregistered under the existing CO will be grandfathered.

[5] Elaborate procedures are provided for in section 291 of the CO before a company is struck off and gazette notices are published before any striking off.

Proposal

16. **Clauses 15.18 to 15.22** enable the Registrar to restore a company which has been struck off under **Clause 15.3 or 15.4** (where it appears that the company is not in operation or carrying on business or, in the case of a company being wound up, the circumstances in section 291(4) of the CO apply). The Registrar may, on an application by a director or member of a company, restore a company having being struck off by her. In this connection, three conditions must be met:

(a) the company must be in operation or carrying on business at the time its name was struck off;

(b) the applicant must bring up to date the company's records kept by the Registrar; and

(c) if the company has any immovable property situated in Hong Kong which has become vested in the Government as bona vacantia, the Government has no objection to the restoration.

17. The administrative restoration procedure does not apply to companies which were deregistered upon applications to the Registrar. For those cases, application for restoration should be made to the court under **Clauses 15.23 to 15.24**.

Other Changes

(a) Streamlining striking off procedure

18. The current process of striking off a company not in operation or carrying on business under section 291 of the CO takes approximately 5.5 months to complete. The Registrar must take the following steps before striking off a company:

(a) send to the company by post a letter inquiring whether it is carrying on business or in operation;

(b) if no answer is received within one month from the date of the first, the Registrar should within 14 days send to the company a second letter by registered post;

(c) if no answer is received within one month from the date of the second letter, a notice will be published in the Gazette stating that at the expiration of three months from the date of that notice, the company will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved. The notice will also be sent to the company by post.

19. **Clauses 15.1 to 15.3** mainly restate the existing striking off procedure with some streamlining. **Clause 15.2** streamlines the procedure by synchronising the publication of the Gazette notice with the sending of the second letter. It will shorten the striking off procedure by about one month's time.

(b) Requiring company to change name if it has been used by another company upon restoration

20. **Clause 15.28** supplements the existing restoration procedure. It requires a company which is restored to the register by court order to change its name within 28 days after restoration if the name has already been used by another company or is otherwise prohibited from use under the Ordinance. If the company does not change its name, the company and every responsible person will be liable to a fine. The Registrar may substitute the name with a name comprising its registered number with the words "Company Registration Number" as the prefix. The provision addresses the situation where a company fails to change its former name after restoration where required to do so.

(c) Reimbursing Government reasonable costs of disposal on restoration of bona vacantia property

21. **Clause 15.29** restates section 292A of the CO to provide that any property vested in the Government as bona vacantia will be revested in the company upon its restoration, subject to any liability, interest or claim that was attached to the property. If the Registrar has disposed of the property, she must pay the company the amount of the consideration, or if no consideration was received, an amount equal to the value of the property. A new provision is added in this clause to allow the Registrar to deduct from the amount payable to the company the reasonable costs in connection with the disposition of the property.

PART 16

NON-HONG KONG COMPANIES

Introduction

1. Part 16 deals with companies incorporated outside Hong Kong which have established a place of business in Hong Kong. It essentially restates the existing Part XI of the CO which has been substantially amended by the Companies (Amendment) Ordinance 2004, mainly with a view to simplifying the filing requirements. No substantive amendment to the existing registration regime of non-Hong Kong companies is proposed. Nevertheless, we aim to improve the clarity of the provisions and make them more user-friendly. Where appropriate, the procedural and technical details concerning the registration of and returns to be made by non-Hong Kong companies are moved to subsidiary legislation to facilitate updating of the provisions in future.

- The significant changes to be introduced under this Part are highlighted below:

  (a) Clarifying provisions for striking non-Hong Kong companies off the register and their restoration to the register; and

  (b) Modifying the penalty provisions to align with those of Hong Kong incorporated companies.

Significant Changes

(a) Clarifying provisions for striking non-Hong Kong companies off the register and their restoration to the register

Background

2. At present, section 339A of the CO empowers the Registrar to remove the name of a non-Hong Kong company from the register if there is reasonable cause to believe that the company has ceased to have a place of business in Hong Kong, by applying the CO provisions relating to the striking off of

local defunct companies, with such adaptations as are necessary. Such a legislative provision by way of reference is considered unsatisfactory and may give rise to uncertainty as to which provisions would apply. For example, whether there is a right for a non-Hong Kong company that has been struck off the register or its directors or members to apply for its restoration to the register. To avoid such uncertainty, express provisions are introduced in Part 16 to clarify the matters.

Proposal

3. **Clauses 16.23 to 16.28** expressly set out the steps that the Registrar should take before striking a non-Hong Kong company off the register, the procedures for a director or member of a non-Hong Kong company that has been struck off the register to apply to the Registrar for its restoration to the register, and the conditions for granting such an application.

(b) Modifying the penalty provisions to align with those of Hong Kong incorporated companies

Background

4. Section 340 of the CO imposes liability on a non-Hong Kong company that is in default of any provisions under Part XI as well as every officer or agent of that company who authorises or permits the default. Under the Twelfth Schedule to the CO, a fine of up to $50,000 (level 5) may be imposed summarily upon any of these persons and a daily default fine of $700 may also be imposed for any continued default in compliance with these provisions. The imposition of a uniform level of penalty for different types of offences is considered unsatisfactory. It would also result in an offence of similar nature being subject to different penalty levels, depending on whether the company is a locally incorporated or a non-Hong Kong company.

Proposal

5. The offence provisions are set out in individual clauses of Part 16. The penalty levels are generally aligned with comparable offence provisions for Hong Kong incorporated companies.

Other Changes

(a) Moving certain procedural details to subsidiary legislation

6. Currently, the procedural and technical details concerning the registration of and returns to be made by non-Hong Kong companies are set out in sections 333, 334 and 335 of the CO. These include the particulars to be contained in the applications or returns and the accompanying documents. Such procedural or technical details are likely to require updating over time. To facilitate future updating, they should be moved from primary into subsidiary legislation.

7. **Clause 16.31** empowers the Financial Secretary to make regulations to prescribe certain procedural and technical details. Such details include, among others:

(a) the particulars to be contained in applications for registration of non-Hong Kong companies and the documents to accompany such applications;

(b) the particulars to be contained in annual returns or returns of change of certain particulars by registered non-Hong Kong companies and the documents to accompany such returns; and

(c) the documents to accompany a notice of the termination of the authorisation of an authorised representative by a registered non-Hong Kong company to the Registrar.

(b) Clarifying provisions on change of corporate name of non-Hong Kong companies

8. At present, section 335(2) of the CO requires a non-Hong Kong company to notify the Registrar of any change of its corporate name. The provision is fairly general. There may be uncertainty as to whether notification is required in certain scenarios, such as where there is a change to the registered name of the company in its place of incorporation without a change in the translation appearing on our register which is being used as the company's corporate name in Hong Kong. **Clause 16.5** clarifies the notification requirements in various scenarios relating to the change of

corporate name of non-Hong Kong companies. **Clause 16.6** clarifies the registration procedures for change of corporate name.

PART 17

COMAPNIES NOT FORMED, BUT REGISTRABLE, UNDER THIS ORDINANCE

Introduction

1. Part 17 deals with companies not formed under the new Ordinance or a former Companies Ordinance but eligible to be registered under the new Ordinance. It mainly restates, with some modifications, Part IX of the CO, except sections 324 and 325. Part IX provides for the registration of companies (consisting of one or more members) which are/have been formed in pursuance of any Ordinance other than the CO or a former CO (i.e. Companies Ordinance 1865 and Companies Ordinance 1911); or otherwise constituted according to law. Sections 324 and 325 are closely related to sections 181 and 186 of the CO on winding-up and will be tackled in Phase II of the CO rewrite exercise together with other winding-up related provisions.

2. There is no significant change to be introduced under this Part. Nevertheless, we have taken the opportunity to remove the archaic provisions on "joint stock company" under sections 310 to 312 of the CO as there does not appear to be a practical need for them.

Proposed Changes

Removing archaic provisions on "joint stock company"

3. At present, under section 310 of the CO, a joint stock company with limited liability, formed pursuant to any Ordinance (other than the CO or any of its predecessors), or letters patent, or being otherwise duly constituted according to law, and consisting of one or more members, may at any time register under the CO as a company limited by shares. A joint stock company is defined in section 311 of the CO as "a company having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock,

and no other persons…". Section 312 sets out the requirements for registration by such a company.

4. The origin of sections 310 to 312 of the CO can be traced back to the CO enacted in Hong Kong in 1911, presumably as a transplantation from the UK Companies (Consolidation) Act 1908. The UK provisions were aimed, in part, at allowing joint stock companies formed under the earlier Joint Stock Companies Acts to register as a company under the subsequent UK Companies Acts. The UK Joint Stock Companies Acts did not apply in Hong Kong, and there was no equivalent legislation in Hong Kong. The only incorporated "joint stock companies" that could be in existence in Hong Kong would be companies incorporated under the Companies Ordinances (of 1865, 1911 and 1932) (which are excluded from the scope of sections 310 to 312 under section 310(1)(a)) or joint stock companies incorporated under some other Ordinances in Hong Kong, or Acts of Parliament or letters patent applicable to Hong Kong.

5. We have done research in order to find out if there are still in existence in Hong Kong any limited liability joint stock companies incorporated under an Ordinance (other than the CO or any of its predecessors), an Act of Parliament which has application to Hong Kong, or letters patent. As far as can be ascertained, no such company exists.

6. The position with regard to unincorporated joint stock companies is less certain although the chances of such companies being in existence are rather remote. If there had been any such companies in existence which wished to register under the CO, they would have done so by now.

7. On the basis of the above, and for the sake of simplicity, we consider it justified to have the set of complicated rules on registration of joint stock companies removed from the CB. If, despite the remote possibility, there are still in existence some unincorporated joint stock companies, they could simply dissolve the company and incorporate as a new one if they wish to become a company under the new Ordinance.

PART 18

COMMUNICATIONS TO AND BY COMPANIES

Introduction

1. Part 18 introduces a new set of rules governing communications between a company and its members, debenture holders, and other persons in electronic or hard copy form. The rules, modelled on similar provisions in the UKCA 2006[1], will also facilitate communications sent by companies (particularly listed companies) to their shareholders by means of a website. Some of the proposed changes will be incorporated into a Companies (Amendment) Bill to be introduced into the LegCo in early 2010, so that they can be implemented ahead of the CO rewrite exercise.

2. The Part also restates section 356 of the CO regarding service of documents on a company (**Clause 18.7**) and adopts regulations 133 (notice given by a company to the joint holders of a share) and 134 (notice given by a company to the persons entitled to a share in consequence of the death or bankruptcy of a member) in Table A of the First Schedule to the CO to be the default rules in the CB (**Clauses 18.15** and **18.16**).

- The significant changes to be introduced under this Part are highlighted below:

  (a) Setting out the rules governing communications to and by companies in electronic form; and

  (b) Facilitating communications sent by companies to their members by means of a website

[1] Sections 1144 to 1148 of and Schedules 4 and 5 to the UKCA 2006.

Significant Changes

(a) Setting out the rules for communications with companies in electronic form

Background

3. As a result of the rapid growth of new information technology over recent years, communications by electronic means have presented opportunities to reduce costs and increase the efficiency of communications with companies. In this regard, both the CO and Electronic Transactions Ordinance (Cap 553) ("ETO") contain some general provisions which enable electronic communications with companies. Specifically, Regulation 1 of Table A in the First Schedule to the CO provides that, wherever any provision of Table A (except a provision for appointment of a proxy) requires that a communication as between a company, its directors or members be effected in writing, the requirement may be satisfied by the communication being given in the form of an electronic record if the person to whom the communication is given consents to it being given to him in that form.[2]

4. The ETO is permissive and facilitatory in nature, and where applicable, it confers on electronic records the same legal status as that of their paper-based counterparts. However, consent of the recipient is required for receiving electronic records. Under the ETO (section 15), where neither the provider nor the recipient of information is (or is acting on behalf of) a government entity, if the recipient consents to the information being given in the form of an electronic record, then sections 5 and 5A of the ETO shall apply (unless otherwise specifically excepted or excluded by reason of sections 11(1), 13, 14 and 16(1) of the ETO). Section 5 of the ETO provides that if a rule of law requires or permits information to be given in writing, the use of electronic records satisfies the rule of law if the information contained in the records is accessible so as to be usable for subsequent reference. Section 5A of the ETO further provides that if a rule of law requires or permits a document to be served on a person by personal service or by post, the service of the document in the form of an electronic record to an information system designated by the recipient satisfies the rule of law if the information contained in the records is accessible so as to be usable for subsequent reference.

[2] This provision was inserted into regulation 1, effective for companies adopting Table A on or after 13 February 2004.

5. However, while section 23 of the CO provides that the articles of a company shall have effect as a contract between the company and each member and shall be deemed to contain covenants on the part of the company and of each member to observe all the provisions of the articles, it is unlikely that a provision in the articles in the form of Regulation 1 of Table A would itself be sufficient to constitute a consent on the part of the recipient for the purposes of the ETO.

6. Furthermore, there is a lack of ground rules in the CO, which comprehensively deal with electronic communications (as well as non-electronic communications)[3] to or by companies. There is a need to provide a set of comprehensive rules in the CB to govern electronic communications to and by companies in order to encourage more widespread use of electronic communications in Hong Kong.

Proposal

7. Division 3 (**Clauses 18.8 to 18.10**) contains provisions dealing with communications from natural persons to a company. **Clause 18.8** deals with documents or information sent to the company in electronic form. It provides that a document may be sent to a company in electronic form if the company has so agreed, generally or specially, or is regarded as having so agreed under a provision of the CB. There are provisions in Part 12 of the CB which deem the company to have agreed to receive a document sent in electronic form. For example, under **Clause 12.14**, if a company has given an electronic address when sending to its members a document containing or accompanying a proposed written resolution, it is regarded as having agreed that any document or information relating to that resolution may be sent by electronic means to that address. **Clauses 12.29(2) and 12.61** contain similar provisions in respect of a notice calling a meeting and an instrument of proxy or an invitation to appoint a proxy in relation to a meeting respectively.

8. Division 4 (**Clauses 18.11 to 18.13**) contains provisions dealing with communications by a company to other persons (whether a company or natural person). **Clause 18.11** provides that a document may be sent by a

[3] There are some provisions in the CO which deal with non-electronic communications with a company under the CO, such as section 356 (service of documents on company), section 338 (service of documents on non-Hong Kong company), regulations 132 (notice given by a company to its member), 133 (notice given by a company to the joint holders of a share) and 134 (notice given by a company to the persons entitled to a share in consequence of the death or bankruptcy of a member) of Table A in the First Schedule of the CO.

company to another person in electronic form if the recipient has agreed, generally or specifically, that it be sent in electronic form or, where the recipient is a company, is regarded as having so agreed under a provision of the CB. Under **Clause 18.3**, a document is deemed to have been received by the recipient 48 hours after it is sent by electronic means, or any longer period as specified in the company's articles (for members), instrument creating the debenture (for debenture holders) or any other agreement (for other persons).

9. Any person who has agreed to receive electronic communications may revoke the agreement at any time. Under **Clause 18.2**, the agreement may be revoked by the recipient by giving a notice of revocation of at least 7 days or such longer period as specified in the articles of association (for members), instrument creating the debenture (for debenture holders) or any other agreement (for other persons).

10. **Clauses 18.8** and **18.11** also provide for the manner of authentication of a document sent in electronic form. A document will be sufficiently authenticated if the sender's identity is confirmed in a manner specified by the recipient or where no such manner has been specified, the communication contains or is accompanied by a statement of the sender's identity and the recipient has no reason to doubt the truth of the statement.

11. It should be noted that a document in electronic form may also be sent by hand or by post (e.g. by sending a diskette or CD containing the document in electronic form).

(b) Facilitating communications sent by companies to their members by means of website

Background

12. At present, the CO requires companies to send to every shareholder the full annual report and accounts or a summary version thereof. Unless the shareholder positively opts for electronic communication, this must be in paper. Recent amendments to the Listing Rules[4] have allowed a listed company, subject to the applicable laws in its home jurisdiction, to send corporate communications to its shareholders by making them available on the listed company's website if the shareholders agree, or are deemed to

[4] See Main Board Listing Rule 2.07A and GEM Rule 16.04(2A) which came into effect on 1 January 2009.

have so agreed. In the absence of enabling provisions in the CO, listed companies which are incorporated in Hong Kong would not be able to make use of such flexibility. There is a need to amend the law so that companies incorporated in Hong Kong can take advantage of the new procedure relating to website communications as companies incorporated outside Hong Kong .

Proposal

13. **Clause 18.13** provides that a company may communicate with its members, debenture holders and other persons by means of a website, if so permitted by its articles or a members' resolution and if the recipient consents to the use of website communications. If the recipients are members or debenture holders, they will be taken to have agreed to receive information from the company via a website if they have been asked individually for their acceptance and have not responded within 28 days of the company's request. Where a member or debenture holder has not agreed to accept website communications, the company may not ask the member or debenture holder again within a period of 12 months. Companies are required to notify intended recipients each time material is published on a website. The document or information should be available on the website throughout the period specified by the applicable provision of the CB, or where no such period is specified, a period of 28 days.

Other Changes

(a) Providing members and debenture holders a right to require hard copy version of documents

14. **Clause 18.17** allows the members or debenture holders to require information to be provided in hard copy form within 28 days from the date of receipt of a document otherwise than in hard copy form. This will enable a member or debenture holder to obtain a paper copy of the document in case of temporary failure to access the document through the website or other electronic devices. A company is required to send a paper copy of the document or information within 21 days of receiving the request; or if the document or information requires an action to be taken by the member or debenture holder on or before a date, at least 7 days before that date. If the company fails to comply with the request, the company and every responsible person will be liable to a fine.

(b) Stating rules for communications with company in hard copy and other agreed forms

15. **Clauses 18.9** and **18.12** state the existing practice that a document may be sent to a company or by a company to another person in hard copy form by hand or by post. If the recipient is a company, the document can be sent to the company's registered office, an address specified by the company, or an address authorised or required under the relevant provision of the CB. **Clause 18.5** lists the addresses to which a company may send documents to other persons. Where the company does not have the intended recipient's address as specified in **Clause 18.5**, the company may use the recipient's last known address.

16. **Clauses 18.10** and **18.14** provide that communications between a company and another person may be effected by any other means as agreed between the parties. These provisions contemplate oral communications and such other kinds of communications as may be developed in the future arising from new information and telecommunications technologies.

CO Rewrite
重寫《公司條例》

Companies Bill

Consultation Draft

Parts 1, 2, 10-12 & 14-18

December 2009

Financial Services and the Treasury Bureau
www.fstb.gov.hk

ABOUT THIS DOCUMENT

This document should be read together with the Consultation Paper on Draft Companies Bill (First Phase Consultation) issued in December 2009 (available at http://www.fstb.gov.hk/fsb/co_rewrite). Explanatory Notes on the various Parts are contained in that Consultation Paper.

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PART 1

PRELIMINARY

Division 1 – Short Title and Commencement

1.1 Short title and commencement

(1) This Ordinance may be cited as the Companies Ordinance.

(2) This Ordinance comes into operation on a day to be appointed by the Secretary for Financial Services and the Treasury by notice published in the Gazette.

Division 2 – Interpretation of this Ordinance: General

1.2 Interpretation

(1) In this Ordinance –

"articles" (章程細則), in relation to a company, means the articles of association of the company;

"associated company" (有聯繫公司), in relation to a body corporate, means –

(*a*) a subsidiary of the body corporate;

(*b*) a holding company of the body corporate; or

(*c*) a subsidiary of such a holding company;

"body corporate" (法人團體) –

(*a*) includes –

(i) a company; and

(ii) a company incorporated outside Hong Kong; and

(*b*) excludes a corporation sole;

"certified public accountant (practising)" (執業會計師) has the meaning given by section 2(1) of the Professional Accountants Ordinance (Cap. 50);

"company" (公司) means –

(*a*) a company formed and registered under this Ordinance; or

(*b*) an existing company;

"constitution" (章程) –

(*a*) in relation to a company formed and registered under this Ordinance, means the company's articles; or

(*b*) in relation to an existing company, means the company's memorandum and articles;

"contributory" (分擔人), in relation to a company, means a person liable to contribute to the assets of the company in the event of its being wound up;

"court" (法院) means a court of competent jurisdiction of the Hong Kong Special Administrative Region and includes a magistrate;

"debenture" (債權證), in relation to a company, includes debenture stock, bonds and any other debt securities of the company, whether or not constituting a charge on the assets of the company;

"director" (董事) includes any person occupying the position of director (by whatever name called);

"document" (文件) includes –

(*a*) a summons, notice, order and any other legal process; and

(*b*) a register;

"electronic record" (電子紀錄) means a record generated in digital form by an information system, which can be –

(*a*) transmitted within an information system or from one information system to another; and

(*b*) stored in an information system or other medium;

"existing company" (原有公司) means a company formed and registered under a former Companies Ordinance;

"former Companies Ordinance" (《舊有公司條例》) means –

(*a*) the Companies Ordinance 1865 (1 of 1865);

(*b*) the Companies Ordinance 1911 (58 of 1911); or

(*c*) the predecessor Ordinance;

"founder member" (創辦成員) –

(*a*) in relation to a company formed and registered under this Ordinance, means a person who signs on the company's articles for the purposes of section 3.1(1)(*a*);[1] or

(*b*) in relation to an existing company, means a person who subscribed to or signed on the company's memorandum;

"group of companies" (公司集團) means any 2 or more bodies corporate one of which is the holding company of the other or others;

"incorporation form" (法團成立表格), in relation to a company formed and registered under this Ordinance, means the application form on which an application under section 3.1(1) is made;

"Index of Company Names" (《公司名稱索引》) means the index of names kept under section 2.10;

"information system" (資訊系統) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

"listed company" (上市公司) means a company that has any of its shares listed on a recognized stock market;

"manager" (經理), in relation to a company –

(*a*) means a person who performs managerial functions in relation to the company under the directors' immediate authority; and

(*b*) excludes –

[1] A consultation draft of Part 3 will be published later.

(i) a receiver or manager of the company's property; and

(ii) a special manager of the company's estate or business appointed under section 216 of the Companies (Winding Up Provisions) Ordinance (Cap. 32);[2]

"member" (成員), in relation to a company, means –

(*a*) a founder member of the company; or

(*b*) a person who agrees to become a member of the company and whose name is entered, as a member, in the company's register of members;

"memorandum" (章程大綱), in relation to an existing company, means the memorandum of association of the company;

"non-Hong Kong company" (非香港公司) means a company incorporated outside Hong Kong that –

(*a*) establishes a place of business in Hong Kong on or after the commencement of Part 16; or

(*b*) has established a place of business in Hong Kong before that commencement and continues to have a place of business in Hong Kong at that commencement;

"officer" (高級人員), in relation to a body corporate, includes a director, manager or secretary of the body corporate;

"ordinary resolution" (普通決議) – see section 12.18;

"predecessor Ordinance" (《前身條例》) means the Companies Ordinance (Cap. 32) as in force from time to time before [*the date on which Cap. 32, other than the winding-up provisions, is repealed*];

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[2] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

"recognized stock market" (認可證券市場) has the meaning given by section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571);

"Register" (登記冊) means the records kept under section 2.8;

"registered non-Hong Kong company" (註冊非香港公司) means a non-Hong Kong company that is registered in the Register as a registered non-Hong Kong company;

"Registrar" (處長) means the person who is appointed to be the Registrar of Companies under section 2.2(1);

"reserve director" (備任董事), in relation to a private company, means a person nominated as a reserve director of the company under section 10.3(1);

"Secretary" (局長) means the Secretary for Financial Services and the Treasury;

"shadow director" (幕後董事), in relation to a body corporate, means a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act;

"share" (股份) –

(*a*) means a share in a company's share capital; and

(*b*) if any of the company's shares is converted into stock, includes stock;

"special resolution" (特別決議) – see section 12.19;

"specified form" (指明格式) means the form specified under section 2.5;

"undertaking" (企業) means –

(*a*) a body corporate;

(*b*) a partnership; or

(*c*) an unincorporated association carrying on a trade or business, whether for profit or not;

"written resolution" (書面決議) – see section 12.10.

(2) In this Ordinance –

(*a*) a reference to a company being registered by a name, or to registration of a company under this Ordinance, includes the company being restored to the Register under Part 15; and

(*b*) a reference to this Ordinance includes any subsidiary legislation made under this Ordinance.

(3) For the purposes of this Ordinance –

(*a*) a document or information is sent or supplied in hard copy form if it is sent or supplied –

(i) in paper copy form; or

(ii) in a similar form capable of being read;

(*b*) a document or information is sent or supplied in electronic form if it is sent or supplied –

(i) by electronic means; or

(ii) by any other means while in electronic form; and

(*c*) a document or information is sent or supplied by electronic means if it is sent or supplied in the form of an electronic record to an information system.

1.3 Responsible person

(1) This section applies –

(*a*) where a provision of this Ordinance provides that a responsible person of a company or non-Hong Kong company commits an offence if there is –

(i) a contravention of this Ordinance, or of a requirement, direction, condition or order; or

(ii) a failure to comply with a requirement, direction, condition or order; or

(*b*) where this Ordinance empowers a person to make subsidiary legislation that will contain such a provision.

(2) For the purposes of the provision, a person is a responsible person of a company or non-Hong Kong company if the person –

(*a*) is an officer or shadow director of the company or non-Hong Kong company; and

(*b*) authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention or failure.

(3) For the purposes of the provision, a person is also a responsible person of a company or non-Hong Kong company if –

(*a*) the person is an officer or shadow director of a body corporate that is an officer or shadow director of the company or non-Hong Kong company;

(*b*) the body corporate authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention or failure; and

(*c*) the person authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention or failure.

1.4 Certified translation

(1) For the purposes of this Ordinance, a translation made in Hong Kong of a document is a certified translation if –

(*a*) it is certified as a correct translation of the document by the translator; and

(*b*) a person specified in subsection (3) certifies that in that person's belief the translator is competent in translating the document into English or Chinese (as the case may be).

(2) For the purposes of this Ordinance, a translation made in a place outside Hong Kong of a document is a certified translation if –

(*a*) in the case of a translator specified in subsection (4), it is certified as a correct translation of the document by the translator; or

(*b*) in the case of any other translator –

(i) it is certified as a correct translation of the document by the translator; and

(ii) a person specified in subsection (5) certifies that in that person's belief the translator is competent in translating the document into English or Chinese (as the case may be).

(3) The person specified for the purposes of subsection (1)(*b*) is –

(*a*) a notary public practising in Hong Kong;

(*b*) a solicitor practising in Hong Kong;

(*c*) a certified public accountant (practising);

(*d*) a consular officer in Hong Kong; or

(*e*) a professional company secretary practising in Hong Kong.

(4) The translator specified for the purposes of subsection (2)(*a*) is a translator appointed by a court of law of the place.

(5) The person specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) a notary public practising in the place;

(*b*) a lawyer practising in the place;

(*c*) a professional accountant practising in the place;

(*d*) an officer of a court of law duly authorized by the law of the place to certify documents for any judicial or other legal purpose;

(*e*) a consular officer in the place;

(*f*) a professional company secretary practising in the place; or

(*g*) any other natural person specified by the Registrar.

(6) The Secretary may, by order published in the Gazette, amend subsections (3), (4) and (5).

1.5 Dormant company

(1) For the purposes of Parts 9[3] and 12, if a qualified private company passes a special resolution specified in subsection (2), and the resolution is delivered to the Registrar, the company is a dormant company as from the date mentioned in subsection (2)(*a*) as declared by the resolution.

(2) The special resolution is one –

(*a*) declaring that the qualified private company will become dormant as from –

(i) the date of delivery of that resolution to the Registrar; or

(ii) a later date specified in that resolution; and

(*b*) authorizing the directors to deliver that resolution to the Registrar.

(3) For the purposes of subsection (2)(*a*), a qualified private company is regarded as dormant during any period in which there is no accounting transaction in relation to the company.

(4) For the purposes of Parts 9 and 12, a qualified private company ceases to be a dormant company if it passes a special resolution declaring that the company intends to enter into an accounting transaction, and the resolution is delivered to the Registrar.

(5) In this section –

"accounting transaction" (會計交易), in relation to a qualified private company, means a transaction that is required by Part 9 to be entered in the company's accounting records, excluding a transaction arising from the payment of any fee that the company is required by an Ordinance to pay;

[3] A consultation draft of Part 9 will be published later.

"qualified private company" (合資格私人公司) means a private company that is not a company specified in subsection (6).

(6) A company specified for the purposes of the definition of "qualified private company" in subsection (5) is –

(*a*) an authorized institution as defined by section 2(1) of the Banking Ordinance (Cap. 155);

(*b*) an insurer as defined by section 2(1) and (2) of the Insurance Companies Ordinance (Cap. 41);

(*c*) a corporation licensed under Part V of the Securities and Futures Ordinance (Cap. 571) to carry on a business in any regulated activity as defined by section 1 of Part 1 of Schedule 1 to that Ordinance;

(*d*) an associated entity, within the meaning of Part VI of the Securities and Futures Ordinance (Cap. 571), of a corporation mentioned in paragraph (*c*);

(*e*) an approved trustee as defined by section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);

(*f*) a company registered as a trust company under Part VIII of the Trustee Ordinance (Cap. 29);

(*g*) a company having a subsidiary that falls within paragraph (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*); or

(*h*) a company that fell within paragraph (*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) at any time during the 5 years immediately before the special resolution is passed.

(7) The Financial Secretary may, by order published in the Gazette, amend subsection (6).

Division 3 – Interpretation of this Ordinance: Types of Companies

Subdivision 1 – Limited Company and Unlimited Company

1.6 Limited company

For the purposes of this Ordinance, a company is a limited company if it is a company limited by shares or by guarantee.

1.7 Company limited by shares

For the purposes of this Ordinance, a company is a company limited by shares if the liability of its members is limited by the company's constitution to any amount unpaid on the shares held by the members.

1.8 Company limited by guarantee

(1) For the purposes of this Ordinance, a company is a company limited by guarantee if –

(*a*) it does not have a share capital; and

(*b*) the liability of its members is limited by the company's constitution to the amount that the members undertake, by that constitution, to contribute to the assets of the company in the event of its being wound up.

(2) Subsection (1)(*a*) does not apply if the company was formed as, or became, a company limited by guarantee under a former Companies Ordinance before 13 February 2004.

1.9 Unlimited company

For the purposes of this Ordinance, a company is an unlimited company if –

(*a*) it has a share capital; and

(*b*) there is no limit on the liability of its members.

Subdivision 2 – Private Company and Public Company

1.10 Private company

(1) For the purposes of this Ordinance, a company is a private company if –

(*a*) it has a share capital; and

(*b*) its articles –

(i) restrict a member's right to transfer shares;

(ii) limit the number of members to 50; and

(iii) prohibit any invitation to the public to subscribe for any shares or debentures of the company.

(2) In subsection (1)(*b*)(ii) –

"member" (成員) excludes –

(*a*) a member who is an employee of the company; and

(*b*) a person who was a member while being an employee of the company and who continues to be a member after ceasing to be such an employee.

(3) For the purposes of this section, 2 or more persons who hold shares in a company jointly are regarded as one member.

1.11 Public company

(1) For the purposes of this Ordinance, a company is a public company if –

(*a*) it has a share capital;

(*b*) its articles do not –

(i) restrict a member's right to transfer shares;

(ii) limit the number of members to 50; or

(iii) prohibit any invitation to the public to subscribe for any shares or debentures of the company; and

(*c*) it is not a company limited by guarantee.

(2) In subsection (1)(*b*)(ii) –

"member" (成員) excludes –

(*a*) a member who is an employee of the company; and

(*b*) a person who was a member while being an employee of the company and who continues to be a member after ceasing to be such an employee.

(3) For the purposes of this section, 2 or more persons who hold shares in a company jointly are regarded as one member.

Division 4 – Interpretation of this Ordinance: Holding Company and Subsidiary

1.12 Holding company

(1) For the purposes of this Ordinance, a body corporate is a holding company of another body corporate if –

(*a*) it controls the composition of that other body corporate's board of directors;

(*b*) it controls more than half of the voting rights in that other body corporate; or

(*c*) it holds more than half of that other body corporate's issued share capital.

(2) For the purposes of this Ordinance, a body corporate is also a holding company of another body corporate if it is a holding company of a body corporate that is that other body corporate's holding company.

(3) For the purposes of subsection (1)(*a*), a body corporate controls the composition of another body corporate's board of directors if it has power to appoint or remove all, or a majority, of that other body corporate's directors without any other person's consent.

(4) For the purposes of subsection (3), a body corporate has the power to make such an appointment if –

(*a*) without the exercise of the power in a person's favour by the body corporate, the person cannot be appointed as a director of that other body corporate; or

(*b*) it necessarily follows from a person being a director or other officer of the body corporate that the person is appointed as a director of that other body corporate.

(5) In subsection (1)(*c*), a reference to a body corporate's issued share capital excludes any part of it that carries no right to participate beyond a specified amount in a distribution of profits or capital.

1.13 Provisions supplementary to section 1.12

(1) For the purposes of this Division –

(*a*) if any share is held, or any power is exercisable, by a body corporate in a fiduciary capacity, the share or power is regarded as not being held or exercisable by the body corporate; and

(*b*) subject to subsections (2) and (3), if any share is held, or any power is exercisable, by a subsidiary of a body corporate, or by a person as nominee for a body corporate or such a subsidiary, the share or power is regarded as being held or exercisable by the body corporate.

(2) For the purposes of this Division, any share in another body corporate held, or any power in relation to another body corporate exercisable, by a person by virtue of a debenture of that other body corporate, or of a trust deed for securing an issue of such a debenture, is regarded as not being held or exercisable by the person.

(3) For the purposes of this Division, any share held, or any power exercisable, by a body corporate or a subsidiary of a body corporate, or by a person as nominee for a body corporate or such a subsidiary, is regarded as not being held or exercisable by the body corporate or subsidiary if –

(*a*) the ordinary business of the body corporate or subsidiary includes the lending of money; and

(*b*) the share or power is held or exercisable by way of security only for the purpose of a transaction entered into in the ordinary course of that business.

(4) In subsection (1)(*b*), a reference to a body corporate or subsidiary excludes a body corporate or subsidiary that is concerned only in a fiduciary capacity.

1.14 Subsidiary

For the purposes of this Ordinance, a body corporate is a subsidiary of another body corporate if that other body corporate is a holding company of it.

Division 5 – Interpretation of this Ordinance: Parent Undertakings and Subsidiary Undertakings

1.15 Interpretation

In this Division –

"shares" (股份) –

(*a*) in relation to an undertaking having a share capital, means the allotted shares;

(*b*) in relation to an undertaking having capital in a form other than share capital, means the right to share in the capital of the undertaking; or

(*c*) in relation to an undertaking not having a capital, means –

(i) the interest giving a right to share in the profits, or liability to contribute to the losses, of the undertaking; or

(ii) the interest giving rise to an obligation to contribute to the debts or expenses of the undertaking in the event of its being wound up.

1.16 Parent undertaking

(1) For the purposes of this Ordinance, an undertaking is a parent undertaking of another undertaking if –

(*a*) in the case where both undertakings are bodies corporate, it is a holding company of that other undertaking; or

(*b*) in any other case –

(i) it holds a majority of the voting rights in that other undertaking;

(ii) it is a member of that other undertaking and has the right to appoint or remove a majority of that other undertaking's board of directors; or

(iii) it is a member of that other undertaking and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in that other undertaking.

(2) For the purposes of this Ordinance, an undertaking is also a parent undertaking of another undertaking if it has the right to exercise a dominant influence over that other undertaking by virtue of –

(*a*) the provisions contained in the constitution, or an equivalent constitutional document, of that other undertaking; or

(*b*) a contract in writing that –

(i) is of a kind authorized by the constitution, or an equivalent constitutional document, of that other undertaking; and

(ii) is permitted by the law under which that other undertaking is established.

(3) In subsection (1)(*b*), a reference to the voting rights in an undertaking is –

(*a*) in the case of an undertaking having a share capital, a reference to the rights given to the members in respect of their shares; or

(*b*) in the case of an undertaking not having a share capital –

(i) if the undertaking is required to hold general meetings at which matters are decided by the exercise of voting rights, a reference to the rights given to the members to vote at the general meetings on all matters or on substantially all matters; or

(ii) if the undertaking is not required to hold such general meetings, a reference to the rights under the undertaking's constitution to direct the undertaking's overall policy or to alter the terms of that constitution.

(4) For the purposes of subsection (1)(*b*), an undertaking is a member of another undertaking if –

(*a*) a person acting on behalf of it, or of any of its subsidiary undertakings, holds shares in that other undertaking; or

(*b*) any of its subsidiary undertakings is a member of that other undertaking.

(5) For the purposes of subsection (1)(*b*)(ii), a reference to the right to appoint or remove a majority of a board of directors is a reference to the right to appoint or remove directors holding a majority of the voting rights at meetings of the directors on all matters or on substantially all matters.

(6) For the purposes of subsection (5) –

(*a*) in determining whether an undertaking has the right to appoint or remove a director, a right that is exercisable only with another person's consent is to be disregarded unless only the undertaking has the right; and

(*b*) an undertaking has the right to appoint a director if –

(i) it necessarily follows from a person's appointment as a director of the undertaking that the person is appointed to the board; or

(ii) the directorship is held by the undertaking itself.

(7) For the purposes of subsection (2), an undertaking does not have any right to exercise a dominant influence over another undertaking unless –

(*a*) it has a right to give directions with respect to the operating and financial policies of that other undertaking; and

(*b*) that other undertaking's directors are, or a majority of them is, obliged to comply with the directions, whether or not the directions are for that other undertaking's benefit.

1.17 Provisions supplementary to section 1.16

(1) For the purposes of this Division, a right held by a subsidiary undertaking of another undertaking is regarded as being held by that other undertaking.

(2) For the purposes of this Division –

(*a*) without limiting paragraph (*b*), a right that is exercisable only in certain circumstances is taken into account –

(i) only when the circumstances have arisen and for so long as they continue to exist; or

(ii) only when the circumstances are within the control of the person having the right; and

(*b*) a right that is normally exercisable but is temporarily incapable of being exercised continues to be taken into account.

(3) For the purposes of this Division –

(*a*) a right held by a person in a fiduciary capacity is regarded as not being held by the person; and

(*b*) a right held by a person as nominee for another is regarded as being held by that other.

(4) For the purposes of this Division, a right is regarded as being held by a person as nominee for another if it is exercisable only on the instructions, or with the consent, of that other.

(5) For the purposes of this Division, a right attached to shares held by way of security is regarded as being held by the person providing the security –

(*a*) if, except where the right is exercised for the purpose of preserving the value of the security or of realizing the security, it is exercisable only in accordance with that person's instructions; or

(*b*) if –

(i) the shares are held in connection with the granting of loans as part of normal business activities; and

(ii) except where the right is exercised for the purpose of preserving the value of the security or of realizing the security, it is exercisable only in that person's interests.

(6) Subsections (3) and (5) do not require a right held by a parent undertaking to be regarded as being held by any of its subsidiary undertakings.

(7) For the purposes of subsection (5), a right is regarded as being exercisable in accordance with the instructions, or in the interests, of an undertaking if it is exercisable in accordance with the instructions, or in the interests, as the case may be, of any group undertaking of the undertaking.

(8) In this section, an undertaking is a group undertaking of another undertaking if –

(*a*) it is a parent or subsidiary undertaking of that other undertaking; or

(*b*) it is a subsidiary undertaking of any parent undertaking of that other undertaking.

1.18 Parent company

For the purposes of this Ordinance, a parent company is a parent undertaking that is a company.

1.19 Subsidiary undertaking

(1) For the purposes of this Ordinance, an undertaking is a subsidiary undertaking of another undertaking if that other undertaking is a parent undertaking of it.

(2) For the purposes of this Ordinance, an undertaking is also a subsidiary undertaking of another undertaking if a parent undertaking of it is a subsidiary undertaking of that other undertaking.

1.20 Financial Secretary may amend this Division

The Financial Secretary may, by order published in the Gazette, amend this Division.

Division 6 – Application of this Ordinance

1.21 Application to existing company

(1) This Ordinance applies to an existing company, in the same manner as if –

(*a*) in the case of a company limited by guarantee, the company had been formed and registered under this Ordinance as a company limited by guarantee;

(*b*) in the case of a limited company other than a company limited by guarantee, the company had been formed and registered under this Ordinance as a company limited by shares; or

(*c*) in the case of a company other than a limited company, the company had been formed and registered under this Ordinance as an unlimited company.

(2) In such application, a reference in this Ordinance to the date of registration is to be read as the date on which the company was registered under a former Companies Ordinance.

1.22 Application to unlimited company registered in pursuance of former Companies Ordinance as limited company

(1) This Ordinance applies to an unlimited company registered as a limited company in pursuance of the predecessor Ordinance or section 58 of the Companies Ordinance 1911 (58 of 1911), in the same manner as it applies to an unlimited company registered under this Ordinance as a limited company.

(2) In such application, a reference in this Ordinance to the date of registration is to be read as the date on which the company was registered in pursuance of the predecessor Ordinance or section 58 of the Companies Ordinance 1911 (58 of 1911).

1.23 Application to company registered, but not formed, under former Companies Ordinance

(1) This Ordinance applies to a company registered, but not formed, under a former Companies Ordinance, in the same manner as it applies to an eligible company registered under Part 17.

(2) In such application, a reference in this Ordinance to the date of registration is to be read as the date on which the company was registered under the former Companies Ordinance.

PART 2

REGISTRAR OF COMPANIES AND REGISTER

Division 1 – Preliminary

2.1 Interpretation

(1) In this Part –

"company" (公司) includes –

(*a*) a non-Hong Kong company registered under section 16.4(1); or

(*b*) a company that was, immediately before the commencement of Part 16, registered in the register kept under section 333AA of the predecessor Ordinance;

"digital signature" (數碼簽署) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

"document" (文件) includes a document in electronic form or any other form;

"electronic signature" (電子簽署) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553).

(2) In this Part, a reference to delivering a document includes sending, supplying, forwarding or producing it.

Division 2 – Registrar of Companies

2.2 Office of Registrar

(1) The Chief Executive may appoint a person to be the Registrar of Companies.

(2) A person holding or acting in the office of Registrar of Companies immediately before the commencement of this section continues to hold or act in that office, as the case may be, as if the person were appointed under subsection (1).

(3) The Chief Executive may appoint other officers for the purposes of this Ordinance.

(4) For the purpose of the registration of companies under this Ordinance, an office is to be established at a place designated by the Chief Executive.

(5) The Chief Executive may direct a seal to be prepared for the authentication of documents required for or connected with the performance of the Registrar's functions.

(6) The last seals that were directed under section 303(4) of the predecessor Ordinance to be prepared are to be regarded as seals that have been directed under subsection (5) to be prepared.

2.3 Registrar's functions

The Registrar's functions are those conferred on the Registrar by or under this Ordinance or any other Ordinance.

2.4 Registrar may charge fee

(1) The Registrar may charge, for a matter specified in column 2 of the Schedule,[4] the fee specified in column 3 of the Schedule opposite the matter.

(2) The Registrar may determine and charge a fee for a service –

(*a*) that is provided by the Registrar under this Ordinance otherwise than in pursuance of an obligation imposed on the Registrar under this Ordinance; and

(*b*) for which no fee is specified under this Ordinance.

(3) A fee determined under subsection (2) for a service must be fixed at a level that provides for the recovery of the cost and expenditure incurred or likely to be incurred by the Registrar in providing the service.

(4) A fee charged under subsection (1) or (2) and received by the Registrar must be paid into the general revenue, unless it is required by section 5

[4] There will be a Schedule for fees in the Bill.

of the Trading Funds Ordinance (Cap. 430) to be paid into the Companies Registry Trading Fund.

(5) The Financial Secretary may, by notice published in the Gazette, amend the Schedule.

2.5 Registrar may specify form

(1) The Registrar may specify the form of any document required for the purposes of this Ordinance.

(2) Subsection (1) does not apply to a document –

(*a*) the form of which is prescribed by this Ordinance; or

(*b*) the form of which is or may be prescribed by regulations made under this Ordinance.

(3) In specifying the form of a document under subsection (1), the Registrar may specify more than one form of the document, whether as alternatives or to provide for different circumstances.

2.6 Registrar may issue guidelines

(1) The Registrar may issue guidelines –

(*a*) indicating the manner in which the Registrar proposes to perform any function or exercise any power; or

(*b*) providing guidance on the operation of any provision of this Ordinance.

(2) The Registrar must –

(*a*) publish the guidelines in a manner appropriate to bring them to the notice of persons affected by them; and

(*b*) make copies of the guidelines available to the public (in hard copy form or electronic form).

(3) Guidelines issued under this section are not subsidiary legislation.

(4) The Registrar may amend or revoke any of the guidelines. Subsections (2) and (3) apply to an amendment or revocation of guidelines in the same way as they apply to the guidelines.

(5) A person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. If, in any legal proceedings, the court is satisfied that a guideline is relevant to determining a matter that is in issue –

(*a*) the guideline is admissible in evidence in the proceedings; and

(*b*) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.

2.7 Registrar may authenticate document etc.

(1) If a document is required by this Ordinance to be signed by the Registrar or to bear the Registrar's printed signature, the Registrar may authenticate it in any manner that the Registrar thinks fit.

(2) If anything is authorized to be certified by the Registrar under this Ordinance or any other Ordinance, the Registrar may certify it in any manner that the Registrar thinks fit.

Division 3 – Register

2.8 Registrar must keep records of companies

(1) The Registrar must keep records of –

(*a*) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part; and

(*b*) the information contained in every certificate that is issued by the Registrar under this Ordinance, excluding a certificate issued under section 2.31(1).

(2) The Registrar must continue to keep the records that were, immediately before the commencement of this section, kept for the purpose of a register of companies under the predecessor Ordinance.

(3) The records kept under this section must be such that information relating to a company is associated with the company in a manner determined by the Registrar, so as to enable all the information relating to the company to be retrieved.

(4) A record of information for the purposes of subsection (1) must be kept in such form as to enable any person to inspect the information contained in the record and to make a copy of the information.

(5) Subject to subsections (3) and (4), a record of information for the purposes of subsection (1) may be kept in any form that the Registrar thinks fit.

(6) If the Registrar keeps a record of information in a form that differs from the form in which the document containing the information was delivered to, or generated by, the Registrar, the record is presumed, unless the contrary is proved, to represent the information contained in the document as delivered or generated.

(7) If the Registrar records the information contained in a document for the purposes of subsection (1), the Registrar is to be regarded as having discharged any duty imposed by law on the Registrar to keep, file or register the document.

2.9 Registrar not required to keep certain documents etc.

(1) The Registrar may destroy or dispose of any document delivered to the Registrar for registration under an Ordinance if the information contained in the document has been recorded by the Registrar in any other form for the purposes of section 2.8(1) or for the purpose of a register of companies under the predecessor Ordinance.

(2) If a document or certificate has been kept by the Registrar for at least 7 years for the purposes of section 2.8(1) or for the purpose of a register of companies under the predecessor Ordinance, the Registrar may destroy or dispose of the document or certificate.

(3) If the Registrar is not required under section 2.28(2) to make any information available for public inspection, the Registrar is not required to keep the record of the information for longer than a period that appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar.

2.10 Registrar must keep Index of Company Names

The Registrar must keep an index of the names of every company.

Division 4 – Registration of Document

Subdivision 1 – Preliminary

2.11 Proper delivery of document to Registrar

(1) For the purposes of this Division, a document is not properly delivered to the Registrar unless –

(*a*) the information contained in the document is capable of being reproduced in legible form;

(*b*) if the document is not in English or Chinese, it is accompanied by a certified translation of it in English or Chinese;

(*c*) the requirements specified in relation to the document under sections 2.12 and 2.13 are complied with;

(*d*) the document is delivered in accordance with an agreement made under section 2.14, and any regulations made under section 2.15, in relation to it;

(*e*) the applicable requirements of the Ordinance under which the document is delivered are complied with;

(*f*) the document is accompanied by the fee charged under section 2.4; and

(*g*) the document, and any signature on, or any digital or electronic signature accompanying, the document are complete.

(2) In this section –

"applicable requirements" (適用規定), in relation to a document, means the requirements as regards –

(*a*) the contents of the document;

(*b*) the form of the document;

(*c*) the authentication of the document; and

(*d*) the manner of delivery of the document.

2.12 Registrar may specify requirements (for section 2.11(1))

(1) The Registrar may, in relation to any document required or authorized to be delivered to the Registrar under an Ordinance –

(*a*) specify requirements for the purpose of enabling the Registrar to make copies or image records of the document and to keep records of the information contained in it;

(*b*) specify requirements as to the authentication of the document; and

(*c*) specify requirements as to the manner of delivery of the document.

(2) The Registrar may, in relation to any document authorized to be delivered to the Registrar for registration under section 2.24(3) for the purpose of rectification of an error, specify requirements as to –

(*a*) the delivery of the document in a form and manner enabling it to be associated with the document containing the error; and

(*b*) the identification of the document containing the error.

(3) For the purposes of subsections (1) and (2), the Registrar may specify different requirements for different documents or classes of documents, or for different circumstances.

(4) For the purposes of subsection (1)(*b*), the Registrar may –

(*a*) require the document to be authenticated by a particular person or a person of a particular description;

(*b*) specify the means of authentication; and

(*c*) require the document to contain, or to be accompanied by, the name or registration number, or both, of the company to which it relates.

(5) For the purposes of subsection (1)(*c*), the Registrar may –

(*a*) require the document to be in hard copy form, electronic form or any other form;

(*b*) require the document to be delivered by post or any other means;

(*c*) specify requirements as to the address to which the document is to be delivered; and

(*d*) in the case of a document to be delivered by electronic means, specify requirements as to the hardware and software to be used and the technical specifications.

(6) This section does not empower the Registrar –

(*a*) to require a document to be delivered to the Registrar by electronic means; or

(*b*) to specify any requirement that is inconsistent with any requirement prescribed by an Ordinance as to –

(i) the authentication of the document; and

(ii) the manner of delivery of the document to the Registrar.

(7) Requirements specified under this section are not subsidiary legislation.

2.13 Registrar may specify print size requirements of prospectus (for section 2.11(1))

(1) The Registrar may specify requirements as to the print size of prospectuses.

(2) Requirements specified under this section are not subsidiary legislation.

2.14 Registrar may agree to delivery by electronic means (for section 2.11(1))

(1) The Registrar may enter into an agreement with a company to provide that any document, or any class of document, that relates to the company, and is required or authorized to be delivered to the Registrar under an Ordinance –

(*a*) will be delivered by electronic means, except as provided for in the agreement; and

(*b*) will conform to the requirements –

(i) specified in the agreement; or

(ii) specified by the Registrar in accordance with the agreement.

(2) An agreement with a company may also provide that any document, or any class of document, that relates to the company, and is required or authorized to be delivered by the Registrar to it under an Ordinance, will be delivered by electronic means.

(3) The Registrar may specify a standard form for an agreement and the extent to which the form is to be used.

(4) This section does not empower the Registrar to make any agreement that is inconsistent with regulations made under section 2.15.

2.15 Financial Secretary may make regulations requiring delivery by electronic means (for section 2.11(1))

(1) The Financial Secretary may make regulations requiring any document required or authorized to be delivered to the Registrar under an Ordinance to be delivered by electronic means.

(2) The regulations are subject to the approval of the Legislative Council.

2.16 Unsatisfactory document

(1) For the purposes of this Division, a document delivered to the Registrar for registration is unsatisfactory if –

(*a*) the document falls within subsection (2);

(*b*) there is a doubt or dispute as to whether or not the document falls within subsection (2); or

(*c*) the registration of the document would in any way jeopardize the integrity of the Register.

(2) A document falls within this subsection if –

(*a*) the document is altered or contains errors;

(*b*) any signature on, or any digital or electronic signature accompanying, the document is altered or contains errors;

(*c*) the requirements of the Ordinance under which the document is delivered (except those specified in section 2.11(1)(*e*)) are not complied with;

(*d*) the information contained in the document is –

(i) internally inconsistent; or

(ii) inconsistent with other information on the Register or other information contained in another document delivered to the Registrar;

(*e*) the information contained in the document derives from anything that –

(i) is invalid or ineffective; or

(ii) has been done without the company's authority;

(*f*) the information contained in the document –

(i) is factually inaccurate; or

(ii) derives from anything that is factually inaccurate or forged;

(*g*) the document is signed or delivered by a person without proper authority;

(*h*) the document contains matters contrary to law; or

(*i*) the document contains unnecessary material.

(3) In this section –

"unnecessary material" (不必要的資料), in relation to a document delivered to the Registrar, means any material that –

(*a*) is unnecessary in order to comply with an obligation under this Ordinance or any other Ordinance; and

(*b*) is not specifically authorized to be delivered or supplied to the Registrar.

(4) For the purposes of paragraph (*a*) of the definition of "unnecessary material" in subsection (3), an obligation to deliver a document of a particular description, or a document conforming to certain requirements, does not extend to anything that is not needed for a document of that description or for a document conforming to those requirements.

Subdivision 2 – Registrar's Powers to Refuse to Accept and to Register Document

2.17 Registrar may refuse to accept document

(1) Where the Registrar receives a document delivered to him or her for registration under an Ordinance, the Registrar may refuse to accept the document if –

(*a*) any information that must be provided in the document is not provided;

(*b*) the document is not completed in the manner specified in it;

(*c*) the document is not accompanied by the fee charged under section 2.4; or

(*d*) the document is not yet required to be delivered to the Registrar under the Ordinance.

(2) If the Registrar refuses to accept a document under subsection (1) or has not received a document, the document is to be regarded as not having been delivered to the Registrar in satisfaction of the provision of the Ordinance that requires or authorizes the document to be delivered to the Registrar.

2.18 Registrar may refuse to register document

(1) Where the Registrar accepts a document delivered for registration, the Registrar may exercise the powers specified in subsections (2) and (3) if, in the Registrar's opinion –

(*a*) the document is not properly delivered to the Registrar; or

(*b*) the document is unsatisfactory.

(2) The Registrar may –

(*a*) refuse to register the document; and

(*b*) return the document to the person who delivered it for registration.

(3) If the document is unsatisfactory, the Registrar may also advise that –

(*a*) the document be appropriately amended or completed, and be redelivered for registration with or without a supplementary document; or

(*b*) a fresh document be delivered for registration in its place.

(4) Despite subsection (1), where a document is not properly delivered to the Registrar, the Registrar may register it if, in the Registrar's opinion, the document is not unsatisfactory.

(5) If the Registrar registers a document under subsection (4), no objection may be taken to the legal consequences of the document being so registered on the ground that it was not properly delivered to the Registrar.

(6) If the Registrar refuses to register a document under subsection (2)(*a*), the document is to be regarded as not having been delivered to the Registrar in satisfaction of the provision of the Ordinance that requires or authorizes the document to be delivered to the Registrar.

2.19 Registrar may withhold registration of unsatisfactory document pending further particulars etc.

For the purpose of determining whether the powers specified in section 2.18(2) and (3) are exercisable in relation to a document on the ground that it is unsatisfactory, the Registrar may –

(*a*) withhold the registration of the document pending compliance with the request under paragraph (*b*); and

(*b*) request the person who is required or authorized to deliver the document to the Registrar for registration under the Ordinance to do any or all of the following within a period specified by the Registrar –

(i) to produce any other document, information or evidence that, in the Registrar's opinion, is necessary for the Registrar to determine the question;

(ii) to appropriately amend or complete the document, and redeliver it for registration with or without a supplementary document;

(iii) to apply to the court for an order or direction that the Registrar thinks necessary and to conduct the application diligently;

(iv) to comply with other direction of the Registrar.

2.20 Appeal against Registrar's decision to refuse registration

(1) If a person is aggrieved by a decision of the Registrar to refuse to register a document under section 2.18(2)(*a*) on the ground that it is unsatisfactory, the person may, within 42 days after the decision, appeal to the Court of First Instance against the decision.

(2) The Court of First Instance may make any order that it thinks fit, including an order as to costs.

(3) If the Court of First Instance makes an order as to costs against the Registrar under subsection (2), the costs are payable out of the general revenue, and the Registrar is not personally liable for the costs.

2.21 Certain period to be disregarded for calculating daily penalty for failure to deliver document to Registrar

(1) This section applies if –

(*a*) a document is delivered to the Registrar for registration under an Ordinance; and

(*b*) the Registrar refuses to register the document under section 2.18(2)(*a*).

(2) The Registrar may send a notice of the refusal, and the reasons for the refusal, to –

(*a*) the person who is required to deliver the document to the Registrar for registration under the Ordinance or, if there is more than one person who is so required, any of those persons; or

(*b*) if another person delivers, on behalf of the person so required, the document to the Registrar for registration, that other person.

(3) Where it is an offence under an Ordinance for failing to deliver the document in satisfaction of a provision of the Ordinance that requires the delivery, the period specified in subsection (4) is to be disregarded for the purposes of a provision of the Ordinance that imposes a penalty for each day during which the offence continues if a notice is sent under subsection (2) with respect to the document.

(4) The period is one beginning with the date on which the document was delivered to the Registrar and ending with the fourteenth day after the date on which the notice is sent under subsection (2).

Division 5 – Registrar's Powers in relation to Keeping Register

2.22 Registrar may require company to resolve inconsistency with Register

(1) If it appears to the Registrar that the information contained in a document registered by the Registrar is inconsistent with other information on the Register, the Registrar may give notice to the company to which the document relates –

(*a*) stating in what respects the information contained in it appears to be inconsistent with other information on the Register; and

(*b*) requiring the company to take steps to resolve the inconsistency.

(2) For the purposes of subsection (1)(*b*), the Registrar may require the company to deliver to the Registrar within a period specified in the notice –

(*a*) information required to resolve the inconsistency; or

(*b*) evidence that proceedings have been commenced by the company in the Court of First Instance for the purpose of

resolving the inconsistency and that the proceedings have been conducted diligently.

(3) If a company fails to comply with a requirement under subsection (1)(*b*), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

2.23 Registrar may require further information for updating etc.

(1) For the purpose of ensuring that a person's information on the Register is accurate or bringing the information up to date, the Registrar may send a notice to the person requiring the person to give the Registrar, within a period specified by the Registrar, any information about the person, being information of the kind that is included on the Register.

(2) If a company fails to comply with a requirement under subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(3) If any other person fails to comply with a requirement under subsection (1), the person commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

2.24 Registrar may rectify typographical or clerical error in Register

(1) The Registrar may, on his or her own initiative, rectify a typographical or clerical error contained in any information on the Register.

(2) The Registrar may, on application by a company, rectify a typographical or clerical error contained in any information relating to the company on the Register.

(3) If, in relation to an application for the purposes of subsection (2), a document showing the rectification is delivered to the Registrar for registration, the Registrar may rectify the error by registering the document.

2.25 Registrar must rectify information on Register on Court order

(1) The Court of First Instance may, on application by any person, by order direct the Registrar to rectify any information on the Register or to remove any information from it if the Court is satisfied that –

(*a*) the information derives from anything that –

(i) is invalid or ineffective; or

(ii) has been done without the company's authority; or

(*b*) the information –

(i) is factually inaccurate; or

(ii) derives from anything that is factually inaccurate or forged.

(2) If, in relation to an application for the purposes of subsection (1), a document showing the rectification is filed with the Court of First Instance, the Court order may require the Registrar to rectify the information by registering the document.

(3) This section does not apply if the Court of First Instance is specifically empowered under any other Ordinance or any other provision of this Ordinance to deal with the rectification of the information on or the removal of the information from the Register.

(4) The Court of First Instance must not order the removal of any information from the Register under subsection (1) unless it is satisfied that –

(*a*) even if a document showing the rectification in question is registered, the continuing presence of the information on

the Register will cause material damage to the company; and

(*b*) the company's interest in removing the information outweighs any interest of other persons in the information continuing to appear on the Register.

(5) If the Court of First Instance makes an order for the rectification of any information on or the removal of any information from the Register under subsection (1), it may make any consequential order that appears to it to be just with respect to the legal effect (if any) to be accorded to the information by virtue of its having appeared on the Register.

(6) If the Court of First Instance makes an order for the removal of any information from the Register under subsection (1), it may direct –

(*a*) that a note made under section 2.27(1) in relation to the information is to be removed from the Register;

(*b*) that the order is not to be made available for public inspection as part of the Register; and

(*c*) that –

(i) no note is to be made under section 2.27(1) as a result of the order; or

(ii) any such note is to be restricted to providing information in relation to the matters specified by the Court.

(7) The Court of First Instance must not give any direction under subsection (6) unless it is satisfied that –

(*a*) any of the following may cause damage to the company –

(i) the presence on the Register of the note or an unrestricted note, as the case may be;

(ii) the availability for public inspection of the order; and

(*b*) the company's interest in non-disclosure outweighs any interest of other persons in disclosure.

(8) If the Court of First Instance makes an order under this section, the person who made the application must deliver an office copy of the order to the Registrar for registration.

2.26 Registrar may appear in proceedings for rectification

(1) In any proceedings before the Court of First Instance for the purposes of section 2.25, the Registrar –

(*a*) is entitled to appear or be represented, and be heard; and

(*b*) must appear if so directed by the Court.

(2) Whether or not the Registrar appears in those proceedings, the Registrar may submit to the Court of First Instance a statement in writing signed by the Registrar, giving particulars of the matters relevant to the proceedings and within the Registrar's knowledge.

(3) A statement submitted under subsection (2) is to be regarded as forming part of the evidence in the proceedings.

2.27 Registrar may annotate Register

(1) The Registrar may make a note in the Register for the purpose of providing information in relation to –

(*a*) a rectification of an error contained in any information on the Register under section 2.24;

(*b*) a rectification of any information on the Register under section 2.25;

(*c*) a removal of any information from the Register under section 2.25; or

(*d*) any other information on the Register.

(2) For the purposes of this Ordinance, a note is part of the Register.

(3) The Registrar may remove a note if the Registrar is satisfied that it no longer serves any useful purpose.

Division 6 – Inspection of Register

2.28 Registrar must make Register available for public inspection

(1) The Registrar must make the Register available for public inspection at all reasonable times so as to enable any member of the public –

(*a*) to ascertain whether the member of the public is dealing with –

(i) a company, or its directors or other officers, in matters of or connected with any act of the company;

(ii) a director or other officers of a company in matters of or connected with the administration of the company, or of its property;

(iii) a person against whom a disqualification order has been made by a court;

(iv) a person who has entered into possession of the property of a company as mortgagee;

(v) a person who is appointed as the provisional liquidator or liquidator in the winding up of a company; or

(vi) a person who is appointed as the receiver or manager of the property of a company; and

(*b*) to ascertain the particulars of the company, its directors or other officers, or its former directors (if any), or the particulars of any person mentioned in paragraph (*a*)(iv), (v) or (vi).

(2) The Registrar must not make available for public inspection under subsection (1) any information excluded from public inspection by or under an Ordinance or by an order of the court.

(3) If a prohibition under subsection (2) applies by reference to information deriving from a particular description of document, the prohibition does not affect –

(*a*) the availability for public inspection of the information through other means; and

(*b*) the availability for public inspection of the information deriving from another description of document in relation to which the prohibition does not apply.

(4) For the purposes of subsection (1), the Registrar must, on receiving the fee charged under section 2.4, allow the person to inspect any information on the Register in any form that the Registrar thinks fit.

(5) For the purposes of subsection (1), the Registrar may, on receiving the fee charged under section 2.4, produce to the person a copy or a certified true copy of any document or information on the Register, in any form that the Registrar thinks fit.

(6) In this section –

"disqualification order" (取消資格令), in relation to a person, means an order that, for a period specified in the order beginning with the date of the order, the person must not, without the leave of the court –

(*a*) be a director or liquidator of any company;

(*b*) be a receiver or manager of the property of any company; or

(*c*) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of any company.

2.29 Registrar's certified true copy admissible as evidence

In any proceedings –

(*a*) a document purporting to be a copy of any information produced under section 2.28(5), and purporting to be certified by the Registrar as a true copy of the information, is admissible in evidence on its production without further proof; and

(*b*) on being admitted in evidence under paragraph (*a*), the document is proof of the information in the absence of evidence to the contrary.

2.30 Issue of process for compelling production of information on Register

(1) No process for compelling the production of any information on the Register may issue from the court except with the permission of the court.

(2) Any such process must bear on it a statement that it is issued with the permission of the court.

Division 7 – Miscellaneous

2.31 Registrar may certify delivery or non-delivery of documents

(1) The Registrar may, for the purposes of any proceedings, certify that, at a particular date, a document required by a provision of this Ordinance to be delivered to the Registrar has or has not been so delivered.

(2) The Registrar may issue a certificate on the basis of the information on the Register.

(3) The Registrar may issue a certificate on his or her own initiative or on request by any person.

(4) A request for a certificate must be accompanied by the prescribed fee.

(5) A certificate relating to a document is not a certificate of the contents of the document.

(6) In any proceedings –

(*a*) a document purporting to be a certificate issued under subsection (1) on any matter is admissible in evidence on its production without further proof; and

(*b*) on being admitted in evidence under paragraph (*a*), the document is proof of the matter in the absence of evidence to the contrary.

(7) Despite subsection (6)(*b*), the document is not proof of compliance or contravention of a provision of this Ordinance in those proceedings.

(8) This section does not limit –

(*a*) section 17A, 22A or 22B or Part IV of the Evidence Ordinance (Cap. 8); or

(*b*) any provision made by virtue of that section or Part.

2.32 Registrar not responsible for verifying information

The Registrar is not responsible for verifying –

(*a*) the truth of the information contained in a document delivered to the Registrar for registration; or

(*b*) the authority under which a document is delivered to the Registrar for registration.

2.33 Immunity

(1) Neither the Registrar nor any public officer incurs any civil liability, and no civil action may lie against the Registrar or any public officer, in respect of anything done, or omitted to be done, by him or her in good faith –

(*a*) in the performance, or purported performance, of the functions under this Ordinance; or

(*b*) in the exercise, or purported exercise, of the powers under this Ordinance.

(2) Where, for the purposes of this Ordinance, a protected person –

(*a*) provides a service by virtue of which information in electronic form is supplied to the public; or

(*b*) supplies information by means of magnetic tapes or any electronic modes,

the protected person is not personally liable for any loss or damage suffered by a user of the service or information by reason of an error or omission appearing in the information if the error or omission was made in good faith and in the ordinary course of the discharge of the protected person's duties.

(3) Where, for the purposes of this Ordinance, a protected person provides a service or facility by virtue of which documents may be delivered to the Registrar by electronic means, the protected person is not personally liable for any loss or damage suffered by a user of the service or facility by reason of an error or omission appearing in a document delivered to the Registrar by virtue of the service or facility if the error or omission –

(*a*) was made in good faith and in the ordinary course of the discharge of the protected person's duties; or

(*b*) has occurred or arisen as a result of any defect or breakdown in the service or facility or in any equipment used for the service or facility.

(4) The protection given to a protected person by subsections (2) and (3) in respect of an error or omission does not affect any liability of the Government in tort for the error or omission.

(5) In this section –

"protected person" (受保障人) means a person authorized by the Registrar to supply the information or provide the service or facility.

2.34 Discrepancy between document and certified translation

(1) This section applies if –

(*a*) a certified translation of a document is delivered by a company to the Registrar for the purposes of section 2.11(1)(*b*) to accompany the document in a language other than English or Chinese; and

(*b*) there is a discrepancy between the document in that language and the certified translation of the document.

(2) The company may not rely on that translation, in so far as it relates to the discrepancy, as against a third party.

(3) A third party may not rely on that translation, in so far as it relates to the discrepancy, as against the company unless the third party –

(*a*) had no knowledge of the contents of the document in that language; and

(*b*) had actually relied on that translation in so far as it relates to the discrepancy.

(4) In this section –

"third party" (第三者) means a person other than the company.

2.35 Offence for destruction etc. of registers, books or documents

(1) A person commits an offence if the person dishonestly, with a view to gain for the person's own self or another, or with intent to cause loss to another, destroys, removes, alters, defaces or conceals –

(*a*) any register, book or document belonging to, or filed or deposited in, the office of the Registrar; or

(*b*) any electronic record, microfilm, image or other record of such register, book or document.

(2) A person who commits an offence under subsection (1) is liable to imprisonment for 7 years.

(3) A person commits an offence if the person willfully or maliciously destroys, removes, alters, defaces or conceals –

(*a*) any register, book or document belonging to, or filed or deposited in, the office of the Registrar; or

(*b*) any electronic record, microfilm, image or other record of such register, book or document.

(4) A person who commits an offence under subsection (3) is liable –

(*a*) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

PART 10

DIRECTORS AND SECRETARIES

Division 1 – Appointment, Removal and Resignation of Directors

Subdivision 1 – Requirement to have Directors

10.1 Public company and company limited by guarantee required to have at least 2 directors

(1) This section applies to –

(*a*) a public company; and

(*b*) a company limited by guarantee.

(2) The company must have at least 2 directors.

(3) With effect from the date of incorporation of the company, the first directors of the company are the persons named as the directors in the application form submitted under section 3.1(1).[5]

(4) A person who is still deemed to be a director of the company under section 153(2) of the pre-amended predecessor Ordinance immediately before the commencement of this section continues to be deemed to be a director of the company as if section 19(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004) had not been enacted, until a notice of appointment of a director is given to the Registrar in accordance with section 12.112(1).

(5) If a power specified in subsection (6) is exercisable by a director under the company's articles where the number of directors is reduced below the number fixed as the necessary quorum of directors, the power is exercisable also where the number of directors is reduced below the number required by subsection (2).

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[5] A consultation draft of Part 3 will be published later.

(6) The power specified for the purposes of subsection (5) is a power to act for the purpose of –

(*a*) increasing the number of directors; or

(*b*) calling a general meeting of the company,

but not for any other purpose.

(7) In subsection (4) –

"pre-amended predecessor Ordinance" (修訂前的《前身條例》) means the predecessor Ordinance that was in force immediately before it was amended by section 19(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

10.2 Private company required to have at least one director

(1) A private company must have at least one director.

(2) With effect from the date of incorporation of a private company, the first directors of the company are the persons named as the directors in the application form submitted under section 3.1(1).

(3) A person who is still deemed to be a director of a private company under section 153A(2) of the pre-amended predecessor Ordinance immediately before the commencement of this section continues to be deemed to be a director of the company as if section 20(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004) had not been enacted, until a notice of appointment of a director is given to the Registrar in accordance with section 12.112(1).

(4) In subsection (3) –

"pre-amended predecessor Ordinance" (修訂前的《前身條例》) means the predecessor Ordinance that was in force immediately before it was amended by section 20(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

10.3 Nomination of reserve director of private company

(1) If a private company has only one member and that member is the sole director of the company, the company may in general meeting, despite anything in its articles, nominate a person (other than a body corporate) who has attained the age of 18 years as a reserve director of the company to act in the place of the sole director in the event of the sole director's death.

(2) The nomination of a person as a reserve director of a private company ceases to have effect if –

(*a*) before the death of the director in respect of whom the person was nominated –

(i) the person resigns as reserve director in accordance with section 10.12; or

(ii) the company in general meeting revokes the nomination; or

(*b*) the director in respect of whom the person was nominated ceases to be the sole member and sole director of the company for any reason other than the death of that director.

(3) If the nomination of a person as a reserve director of a private company ceases to have effect under subsection (2), the company must give notice to the Registrar in accordance with section 12.112(4).

(4) Subject to compliance with the conditions specified in subsection (5), in the event of the death of the director in respect of whom the reserve director is nominated, the reserve director is to be regarded as a director of the company for all purposes until –

(*a*) a person is appointed as a director of the company in accordance with its articles; or

(*b*) the reserve director resigns from the office of director in accordance with section 10.12,

whichever is the earlier.

(5) The conditions specified for the purposes of subsection (4) are –

(*a*) the nomination of the reserve director has not ceased to have effect under subsection (2); and

(*b*) the reserve director is not prohibited by law nor disqualified from acting as a director of the company.

10.4 Restriction on body corporate being director

(1) This section applies to –

(*a*) a public company;

(*b*) a private company that is a member of a group of companies of which a listed company is a member; and

(*c*) a company limited by guarantee.

(2) A body corporate must not be appointed a director of the company.

(3) An appointment made in contravention of subsection (2) is void.

(4) Nothing in this section affects any liability of a body corporate under any provision of this Ordinance if it –

(*a*) purports to act as a director; or

(*b*) acts as a shadow director,

although it could not, by virtue of this section, be appointed as a director.

10.5 Requirement to have at least one director who is natural person

(1) This section applies to a private company other than a private company that is a member of a group of companies of which a listed company is a member.

(2) The company must have at least one director who is a natural person.

(3) If on the commencement of this section –

(*a*) none of a company's directors are natural persons; and

(*b*) section 153A(1) of the predecessor Ordinance is complied with in relation to the company,

subsection (2) does not apply to the company until after the end of 6 months after the commencement of this section.

10.6 Direction requiring company to appoint director

(1) If it appears to the Registrar that a company is in contravention of section 10.1(2), 10.2(1) or 10.5(2), the Registrar may direct the company to appoint a director or directors in compliance with that section.

(2) The direction must specify –

(*a*) the statutory requirement of which the company appears to be in contravention;

(*b*) the period within which the company must comply with the direction; and

(*c*) the consequences of failing to comply with it.

(3) The company must comply with the direction by –

(*a*) making the necessary appointment or appointments before the end of the period specified in the direction; and

(*b*) giving notice of the appointment or appointments to the Registrar in accordance with section 12.112(1).

(4) If a company contravenes a direction under this section, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

Subdivision 2 – Appointment of Directors

10.7 Minimum age for appointment as director

(1) A person must not be appointed a director of a company unless at the time of appointment the person has attained the age of 18 years.

(2) An appointment made in contravention of subsection (1) is void.

(3) Nothing in this section affects any liability of a person under any provision of this Ordinance if the person –

(*a*) purports to act as a director; or

(*b*) acts as a shadow director,

although the person could not, by virtue of this section, be appointed as a director.

10.8 Appointment of directors to be voted on individually

(1) This section applies to –

(*a*) a public company; and

(*b*) a company limited by guarantee.

(2) At a general meeting of the company, a motion for the appointment of 2 or more persons as directors of the company by a single resolution must not be made, unless a resolution that it should be so made has first been agreed to by the meeting without any vote being given against it.

(3) A resolution moved in contravention of subsection (2) is void, whether or not its being so moved was objected to at the time.

(4) Despite the fact that the resolution is void, no provision (whether contained in a company's articles or in any contract with the company or otherwise) for the automatic reappointment of retiring directors in default of another appointment applies.

(5) For the purposes of this section, a motion for approving a person's appointment, or for nominating a person for appointment, is regarded as a motion for the appointment of the person.

10.9 Validity of acts of director

(1) The acts of a person acting as a director are valid despite the fact that it is afterwards discovered –

(*a*) that there was a defect in the appointment of the person as a director;

(*b*) that the person was not qualified to hold office as a director or was disqualified from holding office as a director;

(*c*) that the person had ceased to hold office as a director; or

(*d*) that the person was not entitled to vote on the matter in question.

(2) Subsection (1) applies even if –

(*a*) the appointment of the person as a director is void under section 10.4(3) or 10.7(2); or

(*b*) the resolution for the appointment of the person as a director is void under section 10.8(3).

(3) Subsection (1) applies to acts done on or after the commencement of this section.

(4) Section 157 of the predecessor Ordinance continues to apply to acts done before the commencement of this section.

Subdivision 3 – Removal and Resignation of Directors

10.10 Resolution to remove director

(1) A company may by ordinary resolution remove a director before the end of the director's term of office, despite anything in its constitution or in any agreement between it and the director.

(2) Subsection (1) does not, if the company is a private company, authorize the removal of a director holding office for life on the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984).

(3) Subsections (4), (5), (6), (7) and (8) apply in relation to a removal of a director by resolution, irrespective of whether the removal by resolution is under subsection (1) or otherwise.

(4) Special notice is required of a resolution –

(*a*) to remove a director; or

(*b*) to appoint somebody in place of a director so removed at the meeting at which the director is removed.

(5) A vacancy created by the removal of a director, if not filled at the meeting at which the director is removed, may be filled as a casual vacancy.

(6) A person appointed director in place of a removed director is to be regarded, for the purpose of determining the time at which that person or any other director is to retire, as if that person had become director on the day on which the person removed was last appointed a director.

(7) On a resolution to remove a director before the end of the director's term of office, no share may, on a poll, carry a greater number of votes than it would carry in relation to the generality of matters to be voted on at a general meeting of the company.

(8) If a share carries special voting rights (that is to say, rights different from those carried by other shares of the same nominal value) in relation to some matters but not others, the reference in subsection (7) to the generality of matters to be voted on at a general meeting of the company is to be construed as a reference to the matters in relation to which the share carries no special voting rights.

(9) This section is not to be regarded as depriving a person of compensation or damages payable to the person in respect of the termination of –

(*a*) the person's appointment as director; or

(*b*) any appointment terminating with that as director.

10.11 Director's right to protest against removal

(1) On receipt of notice of a resolution under section 10.10(4) to remove a director, the company must forthwith send a copy of the notice to the director concerned.

(2) The director (whether or not a member of the company) is entitled to be heard on the resolution at the meeting at which the resolution is voted on.

(3) If notice is given of a resolution under section 10.10(4) to remove a director, and the director concerned makes with respect to it representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company must, unless the representations are received by it too late for it to do so –

(*a*) in any notice of the resolution given to members of the company, state the fact of the representations having been made; and

(*b*) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company).

(4) If a copy of the representations is not sent as required by subsection (3) because they were received too late or because of the company's default, the director may (without prejudice to the right to be heard orally) require that the representations must be read out at the meeting.

(5) Copies of the representations need not be sent and the representations need not be read out at the meeting if, on application either by the company or by any other person who claims to be aggrieved, the Court of First Instance is satisfied that the rights given by this section are being abused.

(6) The Court of First Instance may order the company's costs on an application under subsection (5) to be paid in whole or in part by the director, despite the fact that the director is not a party to the application.

(7) Subsection (5) applies if the representations are received by the company on or after the commencement of this section.

(8) Section 157B(4) of the predecessor Ordinance continues to apply if the representations are received by the company before the commencement of this section.

10.12 Resignation of director

(1) A director of a company may, unless it is otherwise provided in the articles of the company or by any agreement with the company, resign as director at any time.

(2) If a director of a company resigns, the company must give notice of the resignation to the Registrar in the manner required by section 12.112(4) for giving notice of any change in its directors.

(3) Despite subsection (2), if the director resigning has reasonable grounds for believing that the company will not give the notice, notice must be given in the specified form by the director resigning.

(4) The notice required to be given under subsection (3) must state –

(*a*) whether the director resigning is required by the articles of the company or by any agreement with the company to give notice of resignation to the company; and

(*b*) if notice is so required, whether the notice has been given in accordance with the requirement.

(5) If notice of the resignation of a director of a company is required to be given by the articles of the company or by any agreement with the company, the resignation does not have effect unless the director gives notice in writing of the resignation –

(*a*) in accordance with the requirement;

(*b*) by leaving it at the registered office of the company; or

(*c*) by sending it to the company in hard copy form or in electronic form.

(6) In this section –

"director" (董事) includes a reserve director and a person regarded as a director under section 10.3(4).

Division 2 – Directors' Duty of Care, Skill and Diligence

10.13 Duty to exercise reasonable care, skill and diligence

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with –

(*a*) 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

(*b*) the general knowledge, skill and experience that the director has.

(3) The duty specified in subsection (1) is owed by a director of a company to the company.

(4) The duty specified in subsection (1) has effect in place of the common law rules and equitable principles as regards the duty to exercise reasonable care, skill and diligence, owed by a director of a company to the company.

(5) This section applies to a shadow director as it applies to a director.

10.14 Civil consequences of breach of duty to exercise reasonable care, skill and diligence

Without affecting other provisions of this Ordinance, the consequences of breach (or threatened breach) of the duty specified in section 10.13(1) are the same as would apply if the common law rules or equitable principles that section 10.13(1) replaces applied.

Division 3 – Directors' Liabilities

10.15 Interpretation

In this Division –

"permitted indemnity provision" (獲准許的彌償條文), in relation to a company, means a provision that –

(*a*) provides for indemnity against liability incurred by a director of the company to a third party; and

(*b*) meets the requirements specified in section 10.18(2);

"third party" (第三者), in relation to a company, means a person other than the company or an associated company.

10.16 Avoidance of provision relieving director from liability

(1) A provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.

(2) A provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company or the associated company, of which he, she or it is a director, is void.

(3) Subsection (2) is subject to sections 10.17 and 10.18.

(4) This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise.

10.17 Provision of insurance

(1) Section 10.16(2) does not prevent a company from purchasing and maintaining for a director of the company, or of an associated company,

insurance against any liability mentioned in that subsection except liability arising from any fraudulent act or fraudulent omission of the director.

(2) Despite the exception in subsection (1), the company may purchase and maintain for the director insurance against any liability incurred by the director in defending any proceedings, whether civil or criminal, taken against the director for any negligence, default, breach of duty or breach of trust in relation to the company or the associated company, of which he, she or it is a director.

10.18 Permitted indemnity provision

(1) Section 10.16(2) does not apply to a provision for indemnity against liability incurred by the director to a third party if the requirements specified in subsection (2) are met in relation to the provision.

(2) The provision must not provide any indemnity against –

(*a*) any liability of the director to pay –

(i) a fine imposed in criminal proceedings; or

(ii) a sum payable by way of a penalty in respect of non-compliance with any requirement of a regulatory nature; or

(*b*) any liability incurred by the director –

(i) in defending criminal proceedings in which the director is convicted;

(ii) in defending civil proceedings brought by the company, or an associated company, in which judgment is given against the director; or

(iii) in connection with an application for relief under section 358 of the predecessor Ordinance or

section 20.10 or 20.11[6] in which the Court of First Instance refuses to grant the director relief.

(3) A reference in subsection (2)(*b*) to a conviction, judgment or refusal of relief is to the final decision in the proceedings.

(4) For the purposes of subsection (3), a conviction, judgment or refusal of relief –

(*a*) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(*b*) if appealed against, becomes final when the appeal, or any further appeal, is disposed of.

(5) For the purposes of subsection (4)(*b*), an appeal is disposed of if –

(*a*) it is determined, and the period for bringing any further appeal has ended; or

(*b*) it is abandoned or otherwise ceases to have effect.

10.19 Permitted indemnity provision to be disclosed in directors' report

(1) If, when a directors' report of a company is approved in accordance with section 9.20,[7] a permitted indemnity provision (whether made by the company or otherwise) is in force for the benefit of one or more directors of the company, the report must state that the provision is in force.

(2) If, at any time during the financial year to which a directors' report of a company relates, a permitted indemnity provision (whether made by the company or otherwise) was in force for the benefit of one or more persons who were then directors of the company, the report must state that the provision was in force.

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6 A consultation draft of Part 20 will be published later.

7 A consultation draft of Part 9 will be published later.

(3) If, when a directors' report of a company is approved in accordance with section 9.20, a permitted indemnity provision made by the company is in force for the benefit of one or more directors of an associated company, the report of the first-mentioned company must state that the provision is in force.

(4) If, at any time during the financial year to which a directors' report of a company relates, a permitted indemnity provision made by the company was in force for the benefit of one or more persons who were then directors of an associated company, the report must state that the provision was in force.

(5) In this section –

"directors' report" (董事報告) means the report required to be prepared under section 9.16(1).

10.20 Place where copy of permitted indemnity provision must be kept available for inspection

(1) This section has effect if a permitted indemnity provision is made for a director of a company, and applies –

(*a*) to that company (whether the provision is made by that company or an associated company); and

(*b*) if the provision is made by an associated company, to that associated company.

(2) A company to which this section applies must keep the following available for inspection at its registered office or at a prescribed place –

(*a*) a copy of the permitted indemnity provision; or

(*b*) if the provision is not in writing, a written memorandum setting out the terms of the provision.

(3) The company must –

(*a*) retain the copy or memorandum for at least one year after the date of termination or expiry of the provision; and

(*b*) keep the copy or memorandum available for inspection during that time.

(4) If the copy or memorandum is kept available for inspection at a place other than the company's registered office, the company must notify the Registrar of the place, or any change in the place, at which the copy or memorandum is kept. The notice must be given to the Registrar in the specified form within 14 days after the copy or memorandum is first kept at that place or within 14 days after the change (as the case may be).

(5) If a company contravenes subsection (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(6) In this section, a reference to a permitted indemnity provision includes a variation of the provision.

10.21 Right of member to inspect and request copy

(1) A copy of a permitted indemnity provision or a written memorandum required to be kept by a company under section 10.20 must be open to inspection by any member of the company without charge.[8]

(2) A member of the company is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the provision or memorandum.

(3) The company must provide the member with the copy within a prescribed period after the request and the prescribed fee are received by the company.

(4) If a company contravenes subsection (3) –

(*a*) the company, and every responsible person of the company, commit an offence, and each is liable to a fine at

[8] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues; and

(*b*) the Court of First Instance may by order direct that the copy be provided to the person requesting it.

(5) In this section, a reference to a permitted indemnity provision includes a variation of the provision.

10.22 Ratification of conduct by director amounting to negligence, etc.

(1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company.

(2) The decision of the company to ratify the conduct must be made by resolution of the members of the company.

(3) If the resolution is proposed at a meeting, a decision of the company to ratify the conduct is not made unless the resolution is passed after disregarding every vote in favour of the resolution by a member who –

(*a*) is a director in respect of whose conduct the ratification is sought;

(*b*) is an entity connected with that director; or

(*c*) holds any shares in the company in trust for that director or entity.

(4) Subsection (3) does not prevent a member specified in that subsection from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(5) For the purposes of this section –

(*a*) "conduct" (行為) includes acts and omissions;

(*b*) "director" (董事) includes a past director;

(*c*) a shadow director is regarded as a director; and

(*d*) a reference to an entity connected with a director has the meaning given by section 11.2 except that subsection (1)(*b*) of that section does not apply.

(6) Nothing in this section affects –

(*a*) the validity of a decision taken by unanimous consent of the members of the company; or

(*b*) any power of the directors to agree not to sue, or to settle or release a claim made by them on behalf of the company.

(7) This section does not affect –

(*a*) any other Ordinance or rule of law imposing additional requirements for valid ratification; or

(*b*) any rule of law as to acts that are incapable of being ratified by the company.

10.23 Application and saving

(1) Sections 10.16, 10.17, 10.18 and 10.19 apply to any provision made on or after the commencement of those sections.

(2) Section 165 of the predecessor Ordinance, so far as it relates to directors, continues to apply in relation to any provision to which it applied immediately before the commencement of sections 10.16, 10.17, 10.18 and 10.19.

(3) Sections 10.20 and 10.21 apply to a permitted indemnity provision made on or after the commencement of those sections.

(4) Section 10.22 applies to conduct by a director on or after the commencement of that section.

Division 4 – Appointment and Resignation of Secretaries

10.24 Company required to have secretary

(1) A company must have a secretary.

(2) With effect from the date of incorporation of a company, the first secretary of the company is the person named as the secretary in the application form submitted under section 3.1(1).

(3) If the name of a firm is specified in the application form under section 3.5(3)(*c*), all partners of the firm as at the date of the application form are the first joint secretaries of the company.

(4) A secretary of a company must –

(*a*) if an individual, ordinarily reside in Hong Kong;

(*b*) if a body corporate, have its registered office or a place of business in Hong Kong.

(5) Anything required or authorized to be done by or to the secretary may be done –

(*a*) if the office is vacant or there is for any other reason no secretary capable of acting, by or to any assistant or deputy secretary; or

(*b*) if there is no assistant or deputy secretary capable of acting, by or to any officer of the company authorized generally or specially in that behalf by the directors.

10.25 Circumstances under which director may not be secretary

(1) Subject to subsections (2) and (3), a director of a company may be a secretary of the company.

(2) The director of a private company having only one director must not also be a secretary of the company.

(3) No private company having only one director may have as secretary of the company a body corporate the sole director of which is the sole director of the private company.

10.26 Direction requiring company to appoint secretary

(1) If it appears to the Registrar that a company is in contravention of section 10.24(1) or (4) or 10.25(2) or (3), the Registrar may direct the company to appoint a secretary in compliance with that section.

(2) The direction must specify –

(*a*) the statutory requirement of which the company appears to be in contravention;

(*b*) the period within which the company must comply with the direction; and

(*c*) the consequences of failing to comply with it.

(3) The company must comply with the direction by –

(*a*) making the necessary appointment before the end of the period specified in the direction; and

(*b*) giving notice of the appointment to the Registrar in the manner required by section 12.119(1) for giving notice of any change in its secretary or joint secretaries.

(4) If a company contravenes a direction under this section, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

10.27 Resignation of secretary

(1) A secretary of a company may, unless it is otherwise provided in the articles of the company or by any agreement with the company, resign as secretary at any time.

(2) If a secretary of a company resigns, the company must give notice of the resignation to the Registrar in the manner required by section 12.119(1) for giving notice of any change in its secretary or joint secretaries.

(3) Despite subsection (2), if the secretary resigning has reasonable grounds for believing that the company will not give the notice, notice must be given in the specified form by the secretary resigning.

(4) The notice required to be given under subsection (3) must state –

(*a*) whether the secretary resigning is required by the articles of the company or by any agreement with the company to give notice of resignation to the company; and

(*b*) if notice is so required, whether the notice has been given in accordance with the requirement.

(5) If notice of the resignation of a secretary of a company is required to be given by the articles of the company or by any agreement with the company, the resignation does not have effect unless the secretary gives notice in writing of the resignation –

(*a*) in accordance with the requirement;

(*b*) by leaving it at the registered office of the company; or

(*c*) by sending it to the company in hard copy form or in electronic form.

Division 5 – Miscellaneous Provisions Relating to Directors and Secretaries

10.28 Director vicariously liable for acts of alternate etc.

(1) If the articles of a company authorize a director to appoint an alternate director to act in place of the director, then, unless the articles contain any provision to the contrary, whether express or implied –

(*a*) an alternate director so appointed is to be regarded as the agent of the director who appoints the alternate director; and

(*b*) a director who appoints an alternate director is vicariously liable for any tort committed by the alternate director while acting in the capacity of alternate director.

(2) Nothing in subsection (1)(*b*) affects the personal liability of an alternate director for any act or omission.

10.29 Avoidance of acts done by person in dual capacity as director and secretary

(1) A provision requiring or authorizing a thing to be done by or to a director and a secretary of a company is not satisfied by its being done by or to the same person acting –

(*a*) both as director and secretary; or

(*b*) both as director and in place of the secretary.

(2) This section applies to any provision of this Ordinance or in a company's articles.

10.30 Provisions as to undischarged bankrupt acting as director

(1) A person who is an undischarged bankrupt must not act as director of, or directly or indirectly take part or be concerned in the management of, a company, except with the leave of the court by which the person was adjudged bankrupt.

(2) A person who contravenes subsection (1) commits an offence and is liable –

(*a*) on conviction on indictment to a fine of $700,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine of $150,000 and to imprisonment for 12 months.

(3) The court must not give leave for the purposes of this section unless notice of intention to apply for it has been served on the Official Receiver.

(4) If the Official Receiver is of opinion that it is contrary to the public interest that an application under subsection (3) should be granted, the Official Receiver must attend the hearing of, and oppose the granting of, the application.

(5) In subsection (1) –

"company" (公司) has the meaning given by section 168C(1) of the Companies (Winding Up Provisions) Ordinance (Cap. 32).[9]

10.31 Minutes of directors' meetings

(1) A company must cause minutes of all proceedings at meetings of its directors to be recorded.

(2) A company must keep the records under subsection (1) for at least 20 years from the date of the meeting.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

10.32 Minutes as evidence

(1) Minutes recorded in accordance with section 10.31, if purporting to be signed by the chairman of the meeting or by the chairman of the next directors' meeting, are evidence of the proceedings at the meeting.

(2) If minutes have been recorded in accordance with section 10.31 of the proceedings at a meeting of directors, then, until the contrary is proved –

(*a*) the meeting is to be regarded as duly held and convened;

(*b*) all proceedings at the meeting are to be regarded to have duly taken place; and

(*c*) all appointments at the meeting are to be regarded as valid.

(3) Subsection (2)(*c*) is subject to sections 10.4(3) and 10.7(2).

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[9] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

10.33 Written record of decision of sole director of private company

(1) If a private company has only one director and the director takes any decision that –

(*a*) may be taken in a meeting of directors; and

(*b*) has effect as if agreed in a meeting of directors,

the director must (unless that decision is taken by way of a resolution in writing) provide the company with a written record of that decision within 7 days after the decision is made.

(2) If the director provides the company with a written record of a decision in accordance with subsection (1), that record is sufficient evidence of the decision having been taken by the director.

(3) A company must keep a written record provided to the company in accordance with subsection (1) for at least 20 years from the date on which the written record is so provided.

(4) A director who contravenes subsection (1) commits an offence.

(5) If a company contravenes subsection (3), the company, and every responsible person of the company, commit an offence.

(6) A person who commits an offence under subsection (4) or (5) is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(7) A contravention of subsection (1) by a director does not affect the validity of any decision mentioned in that subsection.

10.34 Application and saving

(1) Sections 10.31 and 10.32 apply to meetings of directors held on or after the commencement of those sections.

(2) Section 119 of the predecessor Ordinance continues to apply to meetings of directors held before the commencement of sections 10.31 and 10.32.

(3) Section 10.33 applies to decisions taken on or after the commencement of that section.

(4) Section 153C of the predecessor Ordinance continues to apply to decisions taken before the commencement of section 10.33.

PART 11

FAIR DEALING BY DIRECTORS

Division 1 – Preliminary

11.1 Interpretation

In this Part, a reference to circumstances constituting a contravention –

(*a*) is a reference to all the facts and other circumstances constituting the contravention; and

(*b*) includes, in the case of a transaction or arrangement that, but for any fact or circumstances, would not be prohibited because of Subdivision 3 of Division 2, the fact or circumstances.

11.2 Connected entity

(1) In this Part, a reference to an entity connected with a director or past director of a company –

(*a*) is a reference to –

(i) a member of the director's or past director's family;

(ii) a body corporate with which the director or past director is associated;

(iii) a person acting in the capacity as trustee of a trust specified in subsection (2), other than a trust for the purpose of an employees' share scheme or a pension scheme; or

(iv) a person acting in the capacity as partner of –

(A) the director or past director; or

(B) another person who, by virtue of subparagraph (i), (ii) or (iii), is an entity

connected with the director or past director; and

(*b*) excludes a person who is a director or past director, as the case may be, of the company.

(2) The trust is one –

(*a*) the beneficiaries of which include –

(i) the director or past director; or

(ii) a person who, by virtue of subsection (1)(*a*)(i) or (ii), is an entity connected with the director or past director; or

(*b*) the terms of which give a power to the trustees that may be exercised for the benefit of –

(i) the director or past director; or

(ii) a person who, by virtue of subsection (1)(*a*)(i) or (ii), is an entity connected with the director or past director.

(3) In this section –

"partner" (合夥人), in relation to another person, means a person who is a partner of that other person in a partnership within the meaning of the Partnership Ordinance (Cap. 38).

11.3 Family member of director or past director

(1) In this Part, a reference to a member of a director's or past director's family is a reference to –

(*a*) the director's or past director's spouse;

(*b*) any other person (whether of a different sex or the same sex) with whom the director or past director lives as a couple in an enduring family relationship;

(*c*) a child, step-child or adopted child of the director or past director;

(*d*) a child, step-child or adopted child of a person falling within paragraph (*b*) who –

(i) is not a child, step-child or adopted child of the director or past director;

(ii) lives with the director or past director; and

(iii) has not attained the age of 18; or

(*e*) a parent of the director or past director.

(2) In subsection (1), a reference to a child or step-child of a person includes an illegitimate child of the person.

(3) In this section –

"adopted" (領養) means adopted in any manner recognized by the law of Hong Kong.

11.4 Director or past director associated with, or controlling, body corporate

(1) For the purposes of this Part, a director or past director is associated with a body corporate if –

(*a*) the director or past director, or any one or more of the entities connected with the director or past director, or the director or past director together with any one or more of the entities connected with the director or past director, are entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of that body corporate; or

(*b*) the directors, or a majority of the directors, of that body corporate are accustomed to act in accordance with the directions or instructions of –

(i) the director or past director; or

(ii) an entity connected with the director or past director.

(2) In this section, a reference to voting power the exercise of which is controlled by a director or past director, or by an entity connected with a director or past director, includes voting power the exercise of which is controlled by a body corporate controlled by the director or past director or by the connected entity.

(3) For the purposes of this section, a director or past director, or an entity connected with a director or past director, controls a body corporate if the director or past director, or any one or more of the entities connected with the director or past director, or the director or past director together with any one or more of the entities connected with the director or past director, are entitled to exercise, or control the exercise of, more than 50% of the voting power at any general meeting of that body corporate.

(4) Despite section 11.2 –

(*a*) a body corporate with which a director or past director is associated is not regarded as an entity connected with the director or past director for the purposes of subsection (1)(*a*) or (3) unless it also falls within section 11.2(1)(*a*)(iii) or (iv);

(*b*) a trustee of a trust the beneficiaries of which include a body corporate with which a director or past director is associated is not, by reason only of that fact, regarded as an entity connected with the director or past director for the purposes of subsection (1)(*a*) or (3); and

(*c*) a person acting in the capacity as partner of a body corporate with which a director or past director is associated is not, by reason only of that fact, regarded as an entity connected with the director or past director for the purposes of subsection (1)(*a*) or (3).

11.5 Company subject to more than one prohibition

(1) If a company is prohibited by more than one provision of this Part from doing something without the approval of the members of the company, or of the members of a holding company of the company, specified in each provision, the company is prohibited from doing the thing without all those approvals.

(2) For the purposes of subsection (1), a company is prohibited from doing something without the approval of the members of the company, or of the members of a holding company of the company, if the company is prohibited from doing the thing unless –

(*a*) it has obtained that approval; or

(*b*) the thing is conditional on that approval being obtained.

(3) Subsection (1) does not require a separate resolution for the purposes of each of the provisions.

11.6 Application to transaction or arrangement despite its governing law

For the purposes of this Part, it is immaterial whether or not the law (apart from this Ordinance) that governs a transaction or arrangement is the law of Hong Kong.

Division 2 – Loan, Quasi-loan and Credit Transaction

Subdivision 1 – Preliminary

11.7 Interpretation

(1) In this Division –

"director" (董事) includes a shadow director;

"guarantee" (擔保) includes indemnity;

"land" (土地) includes any estate or interest in land, buildings, messuages and tenements of any nature or kind;

"services" (服務) means anything other than goods or land.

(2) For the purposes of this Division, a body corporate is not regarded as a shadow director of any of its subsidiaries only because the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its direction or instructions.

11.8 Quasi-loan

(1) For the purposes of this Division, a person makes a quasi-loan to a director or an entity connected with a director if the person –

(*a*) agrees to pay, or pays otherwise than in pursuance of an agreement, a sum for the director or connected entity –

(i) on terms that the director or connected entity (or another person on behalf of the director or connected entity) will reimburse the person; or

(ii) in circumstances giving rise to a liability on the director or connected entity to reimburse the person; or

(*b*) agrees to reimburse, or reimburses otherwise than in pursuance of an agreement, expenditure incurred by another person for the director or connected entity –

(i) on terms that the director or connected entity (or another person on behalf of the director or connected entity) will reimburse the person; or

(ii) in circumstances giving rise to a liability on the director or connected entity to reimburse the person.

(2) For the purposes of this Division, if a person makes a quasi-loan to a director or an entity connected with a director, the director's or connected entity's liabilities under the quasi-loan include the liabilities of any other person

who has agreed to reimburse the person on the director's or connected entity's behalf.

11.9 Credit transaction

(1) For the purposes of this Division, a person enters into a credit transaction as creditor for a director or an entity connected with a director if the person –

(*a*) supplies goods to the director or connected entity under a hire-purchase agreement;

(*b*) sells goods or land to the director or connected entity under a conditional sale agreement;

(*c*) leases or hires goods or leases land to the director or connected entity in return for periodical payments; or

(*d*) otherwise supplies goods or services or disposes of land to the director or connected entity on the understanding that payment (whether in a lump sum or instalments or by way of periodical payments or otherwise) is to be deferred.

(2) In this section –

"conditional sale agreement" (有條件售賣協議) means an agreement for the sale of goods or land under which –

(*a*) the purchase price or part of it is payable by instalments;

(*b*) the property in the goods or land is to remain in the seller until the conditions regarding the payment of instalments, or other conditions, specified in the agreement are fulfilled; and

(*c*) despite such reservation of property, the buyer is to be in possession of the goods or land prior to the fulfilment of those conditions;

"hire-purchase agreement" (租購協議) means an agreement for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee.

11.10 Person for whom transaction or arrangement entered into

(1) In this Division, a reference to a director, or an entity connected with a director, for whom a transaction is entered into is –

(*a*) in the case of a loan or quasi-loan, or a guarantee or security in connection with a loan or quasi-loan, a reference to the director or connected entity to whom the loan or quasi-loan is made; or

(*b*) in the case of a credit transaction, or a guarantee or security in connection with a credit transaction, a reference to the director or connected entity to whom goods, land or services are supplied, sold, leased, hired or otherwise disposed of under the credit transaction.

(2) For the purposes of this Division, an arrangement is entered into for a director or an entity connected with a director if –

(*a*) in the case of an arrangement mentioned in section 11.20(1)(*a*) or (2)(*a*), a company takes part in the arrangement under which another person enters into a transaction with the director or connected entity; or

(*b*) in the case of an arrangement mentioned in section 11.20(1)(*b*) or (2)(*b*), a company enters into the arrangement in relation to any rights, obligations or liabilities under a transaction entered into by another person with the director or connected entity.

11.11 Prescribed approval of members

(1) For the purposes of this Division, a reference to the prescribed approval of the members of any company is a reference to an approval obtained by a resolution of those members –

(*a*) that is passed before the company enters into the transaction or arrangement; and

(*b*) in respect of which the requirements specified in subsection (2) are met.

(2) The requirements specified for the purposes of subsection (1)(*b*) are –

(*a*) in the case of a written resolution, a memorandum setting out the matters specified in subsection (4) is sent to every member at or before the time at which the proposed resolution is sent to the member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the matters specified in subsection (4) is sent to every member together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member specified in subsection (5).

(3) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member is to be disregarded for the purpose of determining whether the requirement specified in subsection (2)(*a*) or (*b*)(i) has been met.

(4) The matters specified for the purposes of subsection (2)(*a*) and (*b*)(i) are –

(*a*) in the case of a resolution for the purposes of section 11.16, 11.17 or 11.18 –

(i) the nature of the transaction to be approved by the resolution;

(ii) the amount of the loan or quasi-loan;

(iii) the purpose for which the loan or quasi-loan is required; and

(iv) the extent of the company's liability under any transaction connected with the loan or quasi-loan;

(*b*) in the case of a resolution for the purposes of section 11.19 –

(i) the nature of the transaction to be approved by the resolution;

(ii) the amount and value of the credit transaction;

(iii) the purpose for which the goods, land or services supplied, sold, leased, hired or otherwise disposed of under the credit transaction are required; and

(iv) the extent of the company's liability under any transaction connected with the credit transaction; or

(*c*) in the case of a resolution for the purposes of section 11.20 –

(i) the matter that would have to be disclosed if the company were seeking approval of the transaction to which the arrangement relates;

(ii) the nature of the arrangement to be approved by the resolution; and

(iii) the extent of the company's liability under the arrangement.

(5) The member specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) in the case of a resolution for the purposes of section 11.16 or 11.17 –

(i) one who is the director to whom the loan or quasi-loan is proposed to be made or was made; or

(ii) one who holds any shares in the company in trust for that director;

(*b*) in the case of a resolution for the purposes of section 11.18 –

(i) one who is the connected entity to whom the loan or quasi-loan is proposed to be made or was made;

(ii) one who is the director with whom that entity is connected; or

(iii) one who holds any shares in the company in trust for that connected entity or director;

(*c*) in the case of a resolution for the purposes of section 11.19 –

(i) one who is the director or connected entity for whom the credit transaction is proposed to be entered into or was entered into;

(ii) one who is the director with whom that entity is connected; or

(iii) one who holds any shares in the company in trust for the director specified in subparagraph (i) or (ii) or that connected entity; or

(*d*) in the case of a resolution for the purposes of section 11.20 –

(i) one who is the director or connected entity for whom the arrangement is proposed to be entered into or was entered into;

(ii) one who is the director with whom that entity is connected; or

(iii) one who holds any shares in the company in trust for the director specified in subparagraph (i) or (ii) or that connected entity.

(6) Subsection (2)(*b*)(ii) does not prevent a member specified in subsection (5) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(7) In this section, a reference to a transaction to which an arrangement relates is –

(*a*) in the case of an arrangement mentioned in section 11.20(1)(*a*) or (2)(*a*), a reference to the transaction entered into with a director or an entity connected with a director under the arrangement; or

(*b*) in the case of an arrangement mentioned in section 11.20(1)(*b*) or (2)(*b*) in relation to any rights, obligations or liabilities under a transaction, a reference to the transaction.

(8) For the purposes of subsection (1)(*a*), it is irrelevant whether the resolution is passed before, on or after the commencement of this Division.

11.12 Value of transaction or arrangement etc.

(1) For the purposes of this Division –

(*a*) the value of a transaction is determined in accordance with subsection (2); and

(*b*) the value of any other relevant transaction or arrangement is the value of the transaction or arrangement determined in accordance with subsection (2) or (3), reduced by any amount by which the liabilities of the director, or the entity connected with a director, for whom the transaction or arrangement was entered into have been reduced.

(2) For the purposes of subsection (1) –

(*a*) the value of a loan is the amount of its principal;

(*b*) the value of a quasi-loan is the amount, or maximum amount, that the person to whom the quasi-loan is made is liable to reimburse the person making the quasi-loan;

(*c*) the value of a credit transaction is the price that it is reasonable to expect could be obtained for goods, land or services to which the transaction relates if they had been supplied (at the time the transaction is entered into) in the ordinary course of business and on the same terms (apart from the price) as they have been supplied, or are to be supplied, under the transaction; and

(*d*) the value of a guarantee or security is the amount guaranteed or secured.

(3) For the purposes of subsection (1)(*b*) –

(*a*) the value of an arrangement mentioned in section 11.20(1)(*a*) or (2)(*a*) is the value of the transaction entered into with a director or an entity connected with a director under the arrangement; and

(*b*) the value of an arrangement mentioned in section 11.20(1)(*b*) or (2)(*b*) in relation to any rights, obligations or liabilities under a transaction is the value of the transaction.

(4) For the purposes of this Division, the value of a transaction or arrangement, or any other relevant transaction or arrangement, is regarded as exceeding $750,000 if its value is not capable of being expressed as a specific sum of money –

(*a*) whether because the amount of any liability arising under the transaction or arrangement is unascertainable, or for any other reason; and

(*b*) whether or not any liability under the transaction or arrangement has been reduced.

11.13 Relevant transaction or arrangement

(1) A transaction or arrangement is a relevant transaction or arrangement for the purposes of an exception provision –

(*a*) if it is entered into before, or at the same time as, the transaction in question; and

(*b*) if –

(i) where the transaction in question is entered into for a director of the company or an entity connected with such a director, it is entered into for the director or connected entity by virtue of the exception provision by the company or a subsidiary of the company; or

(ii) where the transaction in question is entered into for a director of a holding company of the company or an entity connected with such a director, it is entered into for the director or connected entity by virtue of the exception provision by the holding company or a subsidiary of the holding company.

(2) Despite subsection (1), a transaction or arrangement is not a relevant transaction or arrangement for the purposes of an exception provision if –

(*a*) it was entered into by a body corporate that, at the time it was entered into –

(i) was a subsidiary of the company entering into the transaction in question; or

(ii) was a subsidiary of a holding company of that company; and

(*b*) at the time the question arises as to whether the transaction in question falls within the exception provision, the body corporate is no longer such a subsidiary.

(3) In this section –

"exception provision" (例外條文) means –

(*a*) section 11.21(1);

(*b*) section 11.21(2); or

(*c*) section 11.22.

11.14 Total exposure amount

(1) In sections 11.25 and 11.26 –

"total exposure amount" (風險承擔總額) –

(*a*) in relation to a private company or a company limited by guarantee, means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the aggregate of the amounts outstanding at the time that transaction is entered into, in respect of the principal and interest or otherwise, on every loan made by the company to a director of the company or of a holding company of the company (excluding the transaction in question, and any loan made with the prescribed approval mentioned in section 11.16 or by virtue of section 11.15, 11.21, 11.22, 11.23, 11.24, 11.27 or 11.28);

(iii) the aggregate of the amounts representing the maximum liability of the company at that time under every guarantee given by the company, and in respect of every security provided by the

company, in connection with any loan made by any person to a director of the company or of a holding company of the company (excluding the transaction in question, and any guarantee or security given or provided with the prescribed approval mentioned in section 11.16 or by virtue of section 11.15, 11.21, 11.22, 11.23, 11.24, 11.27 or 11.28);

(iv) the aggregate of the net amounts incurred or to be incurred by the company at that time under every arrangement specified in subsection (2) that is entered into by the company (excluding any arrangement entered into with the prescribed approval mentioned in section 11.20 or by virtue of section 11.15); or

(*b*) in relation to a public company, means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the aggregate of the amounts outstanding at the time that transaction is entered into, in respect of the principal and interest or otherwise, on every loan and quasi-loan made by the company to, and every credit transaction entered into by the company as creditor for, a director of the company or of a holding company of the company, or an entity connected with such a director (excluding the transaction in question, and any loan, quasi-loan or credit transaction made or entered into with the prescribed approval mentioned in section 11.16, 11.17, 11.18 or 11.19 or by virtue of

section 11.15, 11.21, 11.22, 11.23, 11.24, 11.27 or 11.28);

(iii) the aggregate of the amounts representing the maximum liability of the company at that time under every guarantee given by the company, and in respect of every security provided by the company, in connection with any loan or quasi-loan made by any person to, or any credit transaction entered into by any person as creditor for, a director of the company or of a holding company of the company, or an entity connected with such a director (excluding the transaction in question, and any guarantee or security given or provided with the prescribed approval mentioned in section 11.16, 11.17, 11.18 or 11.19 or by virtue of section 11.15, 11.21, 11.22, 11.23, 11.24, 11.27 or 11.28);

(iv) the aggregate of the net amounts incurred or to be incurred by the company at that time under every arrangement specified in subsection (3) that is entered into by the company (excluding any arrangement entered into with the prescribed approval mentioned in section 11.20 or by virtue of section 11.15).

(2) An arrangement specified for the purposes of subsection (1)(*a*)(iv) is –

(*a*) an arrangement under which –

(i) another person makes a questionable loan to a director of the company or of a holding company of the company; and

(ii) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or an associated company of the company; or

(*b*) an arrangement for an assignment to the company, or assumption by the company, of any rights, obligations or liabilities under a questionable loan made by another person to a director of the company or of a holding company of the company.

(3) An arrangement specified for the purposes of subsection (1)(*b*)(iv) is –

(*a*) an arrangement under which –

(i) another person makes a questionable loan or quasi-loan to, or enters into a questionable credit transaction as creditor for, a director of the company or of a holding company of the company, or an entity connected with such a director; and

(ii) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or an associated company of the company; or

(*b*) an arrangement for an assignment to the company, or assumption by the company, of any rights, obligations or liabilities under –

(i) a questionable loan or quasi-loan made by another person to a director of the company or of a holding company of the company, or an entity connected with such a director; or

(ii) a questionable credit transaction entered into by another person as creditor for a director of the

company or of a holding company of the company, or an entity connected with such a director.

(4) In this section –

(*a*) a reference to a questionable loan or quasi-loan made by a person to a director of the company, or an entity connected with such a director, under an arrangement is a reference to a loan or quasi-loan, as the case may be, that, if it had been made by the company on the date of the arrangement, would have been prohibited by section 11.16(1), 11.17(1) or 11.18(1) or would have been so prohibited in the absence of sections 11.25 and 11.26;

(*b*) a reference to a questionable credit transaction entered into by a person as creditor for a director of the company, or an entity connected with such a director, under an arrangement is a reference to a credit transaction that, if it had been entered into by the company on the date of the arrangement, would have been prohibited by section 11.19(1) or would have been so prohibited in the absence of sections 11.25 and 11.26;

(*c*) a reference to a questionable loan or quasi-loan made by a person to a director of a holding company of the company, or an entity connected with such a director, under an arrangement is a reference to a loan or quasi-loan, as the case may be, that, if it had been made by the company on the date of the arrangement, would have been prohibited by section 11.16(2), 11.17(2) or 11.18(2) or would have been so prohibited in the absence of sections 11.25 and 11.26; and

(*d*) a reference to a questionable credit transaction entered into by a person as creditor for a director of a holding company

of the company, or an entity connected with such a director, under an arrangement is a reference to a credit transaction that, if it had been entered into by the company on the date of the arrangement, would have been prohibited by section 11.19(2) or would have been so prohibited in the absence of sections 11.25 and 11.26.

11.15 Preservation of effect of members' unanimous consent

(1) If, under a provision of this Division, a transaction or arrangement must not be entered into without the prescribed approval of any company's members, the provision does not prohibit the transaction or arrangement from being entered into with the unanimous consent of those members that is given before it is entered into.

(2) If, under a provision of this Division, a transaction or arrangement may be entered into with only the prescribed approval of any company's members, the provision does not preclude the transaction or arrangement from being entered into with the unanimous consent of those members that is given before it is entered into.

(3) For the purposes of subsection (1) or (2), it is irrelevant whether the unanimous consent is given before, on or after the commencement of this Division.

Subdivision 2 – Prohibitions

11.16 Company must not make loan etc. to director

(1) Without the prescribed approval of its members, a company must not –

(*a*) make a loan to a director of the company; or

(*b*) give a guarantee or provide security in connection with a loan made by any person to such a director.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a company must not –

(*a*) make a loan to a director of a holding company of the company; or

(*b*) give a guarantee or provide security in connection with a loan made by any person to such a director.

(3) Despite subsection (2) –

(*a*) a company may enter into the transaction with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a company may enter into the transaction with only the prescribed approval of the holding company's members if it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

11.17 Public company must not make quasi-loan etc. to director

(1) Without the prescribed approval of its members, a public company must not –

(*a*) make a quasi-loan to a director of the company; or

(*b*) give a guarantee or provide security in connection with a quasi-loan made by any person to such a director.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a public company must not –

(*a*) make a quasi-loan to a director of a holding company of the company; or

(*b*) give a guarantee or provide security in connection with a quasi-loan made by any person to such a director.

(3) Despite subsection (2) –

(*a*) a public company may enter into the transaction with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a public company may enter into the transaction with only the prescribed approval of the holding company's members if it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

11.18 Public company must not make loan or quasi-loan etc. to connected entity

(1) Without the prescribed approval of its members, a public company must not –

(*a*) make a loan or quasi-loan to an entity connected with a director of the company; or

(*b*) give a guarantee or provide security in connection with a loan or quasi-loan made by any person to an entity connected with such a director.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a public company must not –

(*a*) make a loan or quasi-loan to an entity connected with a director of a holding company of the company; or

(*b*) give a guarantee or provide security in connection with a loan or quasi-loan made by any person to an entity connected with such a director.

(3) Despite subsection (2) –

(*a*) a public company may enter into the transaction with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a public company may enter into the transaction with only the prescribed approval of the holding company's

members if it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

11.19 Public company must not enter into credit transaction etc. as creditor for director or connected entity

(1) Without the prescribed approval of its members, a public company must not –

(*a*) enter into a credit transaction as creditor for –

(i) a director of the company; or

(ii) an entity connected with such a director; or

(*b*) give a guarantee or provide security in connection with a credit transaction entered into by any person as creditor for such a director or an entity connected with such a director.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a public company must not –

(*a*) enter into a credit transaction as creditor for –

(i) a director of a holding company of the company; or

(ii) an entity connected with such a director; or

(*b*) give a guarantee or provide security in connection with a credit transaction entered into by any person as creditor for such a director or an entity connected with such a director.

(3) Despite subsection (2) –

(*a*) a public company may enter into the transaction with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a public company may enter into the transaction with only the prescribed approval of the holding company's members if it is a wholly owned subsidiary of the holding

company, and the holding company is incorporated in Hong Kong.

11.20 Company must not take part in arrangement purporting to circumvent sections 11.16 to 11.19

(1) Without the prescribed approval of its members, a company must not –

(*a*) take part in an arrangement under which –

(i) another person enters into a questionable transaction with a director of the company, or an entity connected with such a director; and

(ii) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or an associated company of the company; or

(*b*) arrange for an assignment to the company, or assumption by the company, of any rights, obligations or liabilities under a questionable transaction entered into by another person with a director of the company, or an entity connected with such a director.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a company must not –

(*a*) take part in an arrangement under which –

(i) another person enters into a questionable transaction with a director of a holding company of the company, or an entity connected with such a director; and

(ii) that other person, in pursuance of the arrangement, has obtained or is to obtain any

benefit from the company or an associated company of the company; or

(*b*) arrange for an assignment to the company, or assumption by the company, of any rights, obligations or liabilities under a questionable transaction entered into by another person with a director of a holding company of the company, or an entity connected with such a director.

(3) Despite subsection (2) –

(*a*) a company may enter into the arrangement with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a company may enter into the arrangement with only the prescribed approval of the holding company's members if it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

(4) In this section –

(*a*) a reference to a questionable transaction entered into by a person with a director of the company, or an entity connected with such a director, under an arrangement is a reference to a transaction that, if it had been entered into by the company on the date of the arrangement, would have been prohibited by section 11.16(1), 11.17(1), 11.18(1) or 11.19(1) or would have been so prohibited in the absence of Subdivision 3; and

(*b*) a reference to a questionable transaction entered into by a person with a director of a holding company of the company, or an entity connected with such a director, under an arrangement is a reference to a transaction that, if it had been entered into by the company on the date of the arrangement, would have been prohibited by section

11.16(2), 11.17(2), 11.18(2) or 11.19(2) or would have been so prohibited in the absence of Subdivision 3.

Subdivision 3 – Exceptions to Subdivision 2

11.21 Exception for small loan, quasi-loan and credit transaction

(1) A company is not prohibited by section 11.16, 11.17 or 11.18 from making a loan or quasi-loan, or giving a guarantee or providing security in connection with a loan or quasi-loan, if the aggregate of the value of the transaction in question, and the value of any other relevant transaction or arrangement, does not exceed $150,000.

(2) A company is not prohibited by section 11.19 from entering into a credit transaction, or giving a guarantee or providing security in connection with a credit transaction, if the aggregate of the value of the transaction in question, and the value of any other relevant transaction or arrangement, does not exceed $200,000.

11.22 Exception for expenditure on company business

(1) If the condition specified in subsection (2) is satisfied, a company is not prohibited by section 11.16, 11.17, 11.18 or 11.19 from entering into any transaction –

(*a*) to provide a director of the company or of a holding company of the company, or an entity connected with such a director, with funds to meet expenditure incurred or to be incurred by the director or connected entity, as the case may be –

(i) for the purposes of the company; or

(ii) for the purpose of enabling the director or connected entity, as the case may be, to properly perform duties as an officer of the company; or

(*b*) to enable such a director, or an entity connected with such a director, to avoid incurring such expenditure.

(2) The condition is that the aggregate of the value of the transaction in question, and the value of any other relevant transaction or arrangement, does not exceed $750,000.

11.23 Exception for expenditure on defending proceedings etc.

(1) If the condition specified in subsection (2) is satisfied, a company is not prohibited by section 11.16, 11.17, 11.18 or 11.19 from entering into any transaction –

(*a*) to provide a director of the company or of a holding company of the company with funds to meet expenditure incurred or to be incurred by the director –

(i) in defending any criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by the director in relation to the company or an associated company of the company; or

(ii) in connection with an application for relief under section 358 of the predecessor Ordinance or section 20.10 or 20.11;[10] or

(*b*) to enable such a director to avoid incurring such expenditure.

(2) The condition is that the transaction in question is entered into on the terms –

(*a*) that the funds are to be repaid, or any liability of the company incurred in relation to that transaction is to be discharged, if –

[10] A consultation draft of Part 20 will be published later.

(i) the director is convicted in the proceedings;

(ii) judgment is given against the director in the proceedings; or

(iii) the court refuses to grant the director relief on the application; and

(*b*) that the funds are to be so repaid, or such liability is to be so discharged, not later than the date when the conviction, judgment or refusal of relief becomes final.

(3) For the purposes of subsection (2), a conviction, judgment or refusal of relief –

(*a*) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(*b*) if appealed against, becomes final when the appeal, or any further appeal, is disposed of.

(4) For the purposes of subsection (3)(*b*), an appeal is disposed of if –

(*a*) it is determined, and the period for bringing any further appeal has ended; or

(*b*) it is abandoned or otherwise ceases to have effect.

11.24 Exception for expenditure in connection with investigation or regulatory action

(1) If the condition specified in subsection (2) is satisfied, a company is not prohibited by section 11.16, 11.17, 11.18 or 11.19 from entering into any transaction –

(*a*) to provide a director of the company or of a holding company of the company with funds to meet expenditure incurred or to be incurred by the director in putting up a defence in an investigation, or against any action taken or proposed to be taken, by a regulatory authority in connection with any alleged misconduct by the director in

relation to the company or an associated company of the company; or

(*b*) to enable such a director to avoid incurring such expenditure.

(2) The condition is that the transaction in question is entered into on the terms –

(*a*) that the funds are to be repaid, or any liability of the company incurred in relation to that transaction is to be discharged, if the director is found in the investigation or action to have committed the misconduct; and

(*b*) that the funds are to be so repaid, or such liability is to be so discharged, not later than the date when the finding becomes final.

(3) For the purposes of subsection (2) –

(*a*) a finding subject to review –

(i) if no application for review has been made, becomes final at the end of the period for making an application for review; or

(ii) if an application for review has been made, becomes final when the review, or any further review, is disposed of;

(*b*) a finding subject to appeal –

(i) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(ii) if appealed against, becomes final when the appeal, or any further appeal, is disposed of; and

(*c*) a finding not subject to review or appeal becomes final when it is made.

(4) For the purposes of subsection (3)(*a*)(ii) or (*b*)(ii), a review or appeal is disposed of if –

(*a*) it is determined, and the period for bringing any further review or appeal has ended; or

(*b*) it is abandoned or otherwise ceases to have effect.

(5) In this section –

"misconduct" (不當行為) means negligence, default, breach of duty or breach of trust.

11.25 Exception for home loan

(1) If the conditions specified in subsection (2) are satisfied, a company is not prohibited by section 11.16, 11.17, 11.18 or 11.19 from entering into any transaction –

(*a*) for the purpose of facilitating the purchase of any residential premises for use as the only or main residence of –

(i) a director of the company or of a holding company of the company; or

(ii) an employee of the company who is an entity connected with such a director;

(*b*) for the purpose of improving any residential premises so used; or

(*c*) in substitution for any transaction entered into by any other person for a purpose specified in paragraph (*a*) or (*b*).

(2) The conditions are –

(*a*) that, at the time the transaction in question is entered into, the total exposure amount does not exceed 5% of –

(i) the value of the company's net assets as determined by reference to its most recent annual financial statement prepared in accordance with Part 9;[11] or

[11] A consultation draft of Part 9 will be published later.

(ii) if no annual financial statement has been prepared, the amount of the company's called-up share capital;

(*b*) that the company ordinarily enters into transactions for a purpose specified in subsection (3) on terms no less favourable than those on which the transaction in question is entered into;

(*c*) that a valuation report on the residential premises is made and signed by a professionally qualified valuation surveyor, who is subject to the discipline of a professional body, within 3 months before the date on which the transaction in question is entered into;

(*d*) that the amount of the transaction in question does not exceed 80% of the value of the residential premises as stated in the valuation report; and

(*e*) that the transaction in question is secured by a legal mortgage on the land comprising the residential premises.

(3) The purpose specified for the purposes of subsection (2)(*b*) is –

(*a*) to facilitate the purchase of any residential premises for use as the only or main residence of an employee of the company;

(*b*) to improve any residential premises so used; or

(*c*) to substitute for any transaction entered into by any other person for a purpose specified in paragraph (*a*) or (*b*).

(4) In this section –

"residential premises" (住用處所) means any residential premises together with any land to be occupied or enjoyed with the premises.

(5) In this section, an annual financial statement is a company's most recent annual financial statement if the time for sending it out to members of the company is most recent.

11.26 Exception for leasing goods and land etc.

(1) If the conditions specified in subsection (2) are satisfied, a company is not prohibited by section 11.16, 11.17, 11.18 or 11.19 from leasing or hiring goods or leasing land to a director of the company or of a holding company of the company, or an entity connected with such a director.

(2) The conditions are –

(*a*) that, at the time the transaction in question is entered into, the total exposure amount does not exceed 5% of the amount of the company's net assets as shown in the latest balance sheet laid before the company in general meeting; and

(*b*) that the terms of the transaction in question are not more favourable than what is reasonable to expect the company to have offered, if the goods had been leased or hired, or the land has been leased, on the open market, to a person unconnected with the company.

11.27 Exception for transaction entered in ordinary course of business

(1) A company is not prohibited by section 11.16, 11.17 or 11.18 from making a loan or quasi-loan, or giving a guarantee or providing security in connection with a loan or quasi-loan, if –

(*a*) the company's ordinary business includes the making of loans or quasi-loans, or the giving of guarantees or provision of securities in connection with loans or quasi-loans, as the case may be;

(*b*) the loan, quasi-loan, guarantee or security is made, given or provided by the company in the ordinary course of its business; and

(*c*) the amount of the loan or quasi-loan, guarantee or security is not greater, and the terms of it are not more favourable,

than what is reasonable to expect the company to have offered to a person of the same financial standing but unconnected with the company.

(2) A company is not prohibited by section 11.19 from entering into a credit transaction, or giving a guarantee or providing security in connection with a credit transaction, if –

(*a*) the company's ordinary business includes the entering into of credit transactions, or the giving of guarantees or provision of securities in connection with credit transactions, as the case may be;

(*b*) the credit transaction, guarantee or security is entered into, given or provided by the company in the ordinary course of its business; and

(*c*) the amount of the credit transaction, guarantee or security is not greater, and the terms of it are not more favourable, than what is reasonable to expect the company to have offered to a person of the same financial standing but unconnected with the company.

11.28 Exception for intra-group transaction

If a company is a member of a group of companies, the company is not prohibited by section 11.18 or 11.19 from –

(*a*) making a loan or quasi-loan to, or entering into a credit transaction as creditor for, a body corporate that is a member of the group; or

(*b*) giving a guarantee or providing security in connection with –

(i) a loan or quasi-loan made by any person to such a body corporate; or

(ii) a credit transaction entered into by any person as creditor for such a body corporate.

Subdivision 4 – Consequences of Contravention

11.29 Civil consequences of contravention

(1) If a company enters into a transaction in contravention of section 11.16, 11.17, 11.18 or 11.19, or enters into an arrangement in contravention of section 11.20, the transaction or arrangement is voidable at the company's instance unless –

(*a*) restitution of any money or other asset that was the subject matter of the transaction or arrangement is no longer possible;

(*b*) the company has been indemnified for any loss or damage resulting from the transaction or arrangement; or

(*c*) a person who is not a party to the transaction or arrangement acquired rights in good faith, for value, and without actual notice of the contravention, and those rights would be affected by the avoidance.

(2) Whether or not the transaction or arrangement has been avoided, each of the persons specified in subsection (3) is liable –

(*a*) to account to the company for any gain that the person has made, directly or indirectly, by the transaction or arrangement; and

(*b*) jointly and severally with any other person so liable under this section, to indemnify the company for any loss or damage resulting from the transaction or arrangement.

(3) The persons are –

(*a*) a director of the company, or of a holding company of the company, for whom the company entered into the transaction or arrangement;

(*b*) an entity connected with such a director, for whom the company entered into the transaction or arrangement;

(*c*) the director of the company, or of a holding company of the company, with whom such an entity is connected; and

(*d*) any other director of the company who authorized the transaction or arrangement.

(4) Despite subsection (2) –

(*a*) the connected entity specified in subsection (3)(*b*) is not liable if the connected entity establishes that, at the time the transaction or arrangement was entered into, the connected entity did not know the circumstances constituting the contravention;

(*b*) the director specified in subsection (3)(*c*) is not liable if the director establishes that the director took all reasonable steps to secure the company's compliance with section 11.18, 11.19 or 11.20, as the case may be; and

(*c*) a director specified in subsection (3)(*d*) is not liable if the director establishes that, at the time the transaction or arrangement was entered into, the director did not know the circumstances constituting the contravention.

(5) This section does not exclude the operation of any other Ordinance or rule of law by virtue of which the transaction or arrangement may be called in question or any liability to the company may arise.

11.30 Affirmation of contravening transaction or arrangement

(1) Despite section 11.29, a transaction or arrangement may no longer be avoided under that section if, within a reasonable period after it is entered into, the transaction or arrangement is affirmed.

(2) If a transaction or arrangement contravenes Subdivision 2 because it was entered into without the prescribed approval of the company's members,

the transaction or arrangement must be affirmed by the company by a resolution of those members.

(3) If a transaction or arrangement contravenes Subdivision 2 because it was entered into without the prescribed approval of the holding company's members, the transaction or arrangement must be affirmed by the holding company by a resolution of those members.

(4) If a transaction or arrangement contravenes Subdivision 2 because it was entered into without the prescribed approval of the company's members and the prescribed approval of the holding company's members, the transaction or arrangement must be affirmed –

(*a*) by the company by a resolution of the company's members; and

(*b*) by the holding company by a resolution of the holding company's members.

(5) This section does not affect the validity of a company's or holding company's decision to affirm a transaction or arrangement if it is taken by unanimous consent of the company's or holding company's members.

11.31 Provisions supplementary to section 11.30

(1) The following requirements must be met in relation to a resolution of the members of any company under section 11.30 –

(*a*) in the case of a written resolution, a memorandum setting out the matters specified in subsection (3) is sent to every member at or before the time at which the proposed resolution is sent to the member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the matters specified in subsection (3) is sent to every member together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member specified in subsection (4).

(2) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member is to be disregarded for the purpose of determining whether the requirement specified in subsection (1)(*a*) or (*b*)(i) has been met.

(3) The matters specified for the purposes of subsection (1)(*a*) and (*b*)(i) are –

(*a*) in the case of a resolution for the purpose of a contravention of section 11.16, 11.17 or 11.18 –

(i) the nature of the transaction to be affirmed by the resolution;

(ii) the amount of the loan or quasi-loan;

(iii) the purpose for which the loan or quasi-loan is required; and

(iv) the extent of the company's liability under any transaction connected with the loan or quasi-loan;

(*b*) in the case of a resolution for the purpose of a contravention of section 11.19 –

(i) the nature of the transaction to be affirmed by the resolution;

(ii) the amount and value of the credit transaction;

(iii) the purpose for which the goods, land or services supplied, sold, leased, hired or otherwise disposed of under the credit transaction are required; and

(iv) the extent of the company's liability under any transaction connected with the credit transaction; or

(*c*) in the case of a resolution for the purpose of a contravention of section 11.20 –

(i) the matter that would have to be disclosed if the company were seeking affirmation of the transaction to which the arrangement relates;

(ii) the nature of the arrangement to be affirmed by the resolution; and

(iii) the extent of the company's liability under the arrangement.

(4) The member specified for the purposes of subsection (1)(*b*)(ii) is –

(*a*) in the case of a resolution for the purpose of a contravention of section 11.16 or 11.17 –

(i) one who is the director to whom the loan or quasi-loan is proposed to be made or was made;

(ii) one who is any other director of the company who authorized the loan or quasi-loan; or

(iii) one who holds any shares in the company in trust for the director specified in subparagraph (i) or (ii);

(*b*) in the case of a resolution for the purpose of a contravention of section 11.18 –

(i) one who is the connected entity to whom the loan or quasi-loan is proposed to be made or was made;

(ii) one who is the director with whom that entity is connected;

(iii) one who is any other director of the company who authorized the loan or quasi-loan; or

(iv) one who holds any shares in the company in trust for the director specified in subparagraph (ii) or (iii) or that connected entity;

(*c*) in the case of a resolution for the purpose of a contravention of section 11.19 –

(i) one who is the director or connected entity for whom the credit transaction is proposed to be entered into or was entered into;

(ii) one who is the director with whom that entity is connected;

(iii) one who is any other director of the company who authorized the credit transaction; or

(iv) one who holds any shares in the company in trust for the director specified in subparagraph (i), (ii) or (iii) or that connected entity; or

(*d*) in the case of a resolution for the purpose of a contravention of section 11.20 –

(i) one who is the director or connected entity for whom the arrangement is proposed to be entered into or was entered into;

(ii) one who is the director with whom that entity is connected;

(iii) one who is any other director of the company who authorized the arrangement; or

(iv) one who holds any shares in the company in trust for the director specified in subparagraph (i), (ii) or (iii) or that connected entity.

(5) Subsection (1)(*b*)(ii) does not prevent a member specified in subsection (4) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(6) In this section, a reference to a transaction to which an arrangement relates is –

(*a*) in the case of an arrangement mentioned in section 11.20(1)(*a*) or (2)(*a*), a reference to the transaction entered into with a director or an entity connected with a director under the arrangement; or

(*b*) in the case of an arrangement mentioned in section 11.20(1)(*b*) or (2)(*b*) in relation to any rights, obligations or liabilities under a transaction, a reference to the transaction.

Division 3 – Payment for Loss of Office

Subdivision 1 – Preliminary

11.32 Interpretation

(1) In this Division –

"affected member" (受影響成員) means –

(*a*) a holder of the shares to which the takeover offer relates; or

(*b*) a holder of shares of the same class as any of the shares to which the takeover offer relates;

"director" (董事) includes a shadow director;

"takeover offer" (收購要約) means a takeover offer within the meaning of Part 13.[12]

(2) In this Division –

(*a*) a reference to payment, compensation or consideration includes benefits otherwise than in cash; and

(*b*) a reference to loss of office as a director excludes loss of a person's status as a shadow director.

[12] A consultation draft of Part 13 will be published later.

(3) In section 11.34 and Subdivisions 2 and 3, a reference to a payment to a director or past director includes –

(*a*) a payment to an entity connected with the director or past director; and

(*b*) a payment to a person at the direction of, or for the benefit of –

(i) the director or past director; or

(ii) an entity connected with the director or past director.

(4) In section 11.34 and Subdivisions 2 and 3, a reference to a payment by a person includes a payment by another person at the direction of, or on behalf of, the person.

(5) For the purposes of this Division, a body corporate is not regarded as a shadow director of any of its subsidiaries only because the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its direction or instructions.

11.33 Payment for loss of office

(1) In this Division, a reference to a payment for loss of office made to a director or past director of a company is a reference to a payment made to the director or past director –

(*a*) by way of compensation for loss of office as director of the company;

(*b*) by way of compensation for loss, while director of the company or in connection with ceasing to be director of it, of –

(i) any other office or employment in connection with the management of the affairs of the company; or

(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company;

(*c*) as consideration for or in connection with the retirement from the office as director of the company; or

(*d*) as consideration for or in connection with the retirement, while director of the company or in connection with ceasing to be director of it, from –

(i) any other office or employment in connection with the management of the affairs of the company; or

(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company.

(2) If, in connection with a transfer mentioned in section 11.38 or 11.39 –

(*a*) the price to be paid to a director or past director of the company specified in subsection (3) for any shares in the company exceeds the price that could at the time have been obtained by other holders of like shares; or

(*b*) any valuable consideration is given to a director or past director of the company specified in subsection (3) by a person other than the company,

the excess, or (as the case may be) the money value of the consideration, is regarded as a payment for loss of office for the purposes of sections 11.38 and 11.39.

(3) The director or past director of the company is –

(*a*) one who is or was to cease to hold office in connection with the transfer; or

(*b*) one who is or was to cease to be the holder of either of the following offices in connection with the transfer –

(i) any other office or employment in connection with the management of the affairs of the company;

(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company.

(4) Subsection (1)(*a*) or (*b*) applies to a loss of office occurring on or after the commencement of this Division.

(5) Subsection (1)(*c*) or (*d*) applies to a retirement occurring on or after the commencement of this Division.

(6) For the purposes of subsections (4) and (5), a loss of office or retirement occurs –

(*a*) in the case of a directorship, when the person ceases to be a director;

(*b*) in the case of any other office, when the person ceases to hold the office; or

(*c*) in the case of an employment, when the employment comes to an end.

11.34 Prescribed approval of members or affected members

(1) For the purposes of this Division, a reference to the prescribed approval of the members or affected members of any company is a reference to an approval obtained by a resolution of those members or affected members –

(*a*) that is passed before the payment for loss of office is made; and

(*b*) in respect of which the requirements specified in subsection (2) are met.

(2) The requirements specified for the purposes of subsection (1)(*b*) are –

(*a*) in the case of a written resolution, a memorandum setting out the particulars of the payment is sent to every member or affected member, as the case may be, at or before the time at which the proposed resolution is sent to the member or affected member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the particulars of the payment is sent to every member or affected member, as the case may be, together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member or affected member, as the case may be, specified in subsection (4) or (5).

(3) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member or affected member, as the case may be, is to be disregarded for the purpose of determining whether the requirement specified in subsection (2)(*a*) or (*b*)(i) has been met.

(4) In the case of a resolution for the purposes of section 11.37 or 11.38, the member specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) one who is the director or past director to whom the payment for loss of office is proposed to be made;

(*b*) one who is the proposed recipient of the payment for loss of office and who is not the director or past director specified in paragraph (*a*); or

(*c*) one who holds any shares in the company in trust for that director, past director or recipient.

(5) In the case of a resolution for the purposes of section 11.39, the affected member specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) one who is the director or past director to whom the payment for loss of office is proposed to be made;

(*b*) one who is the proposed recipient of the payment for loss of office and who is not the director or past director specified in paragraph (*a*);

(*c*) one who makes the takeover offer;

(*d*) one who is an associate of the person making the takeover offer; or

(*e*) one who holds any shares in the company in trust for –

(i) that director, past director or recipient;

(ii) the maker of the takeover offer specified in paragraph (*c*); or

(iii) the associate.

(6) Subsection (2)(*b*)(ii) does not prevent a member or affected member, as the case may be, specified in subsection (4) or (5) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(7) In this section –

"associate" (有聯繫者), in relation to a person making a takeover offer, means an associate of the person within the meaning of Part 13.[13]

[13] A consultation draft of Part 13 will be published later.

(8) For the purposes of subsection (1)(*a*), it is irrelevant whether the resolution is passed before, on or after the commencement of this Division.

11.35 Preservation of effect of members' or affected members' unanimous consent

(1) If, under a provision of this Division, a transaction must not be entered into without the prescribed approval of any company's members or affected members, the provision does not prohibit the transaction from being entered into with the unanimous consent of those members or affected members that is given before it is entered into.

(2) If, under a provision of this Division, a transaction may be entered into with only the prescribed approval of any company's members or affected members, the provision does not preclude the transaction from being entered into with the unanimous consent of those members or affected members that is given before it is entered into.

(3) For the purposes of subsection (1) or (2), it is irrelevant whether the unanimous consent is given before, on or after the commencement of this Division.

11.36 This Division does not affect operation of other Ordinance or law

This Division does not affect the operation of any other Ordinance or rule of law requiring disclosure to be made with respect to –

(*a*) any payment for loss of office mentioned in section 11.37, 11.38 or 11.39; or

(*b*) any other like payment made or to be made to a director or past director of a company.

Subdivision 2 – Prohibitions

11.37 Company must not make payment for loss of office to director or past director

(1) Without the prescribed approval of its members, a company must not make a payment for loss of office to a director or past director of the company.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a company must not make a payment for loss of office to a director or past director of a holding company of the company.

(3) Despite subsection (2) –

(*a*) a company may enter into the transaction with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a company may enter into the transaction with only the prescribed approval of the holding company's members if it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

11.38 Person must not make payment for loss of office to director or past director in connection with transfer of company's undertaking or property

(1) Without the prescribed approval of the company's members, a person must not make a payment for loss of office to a director or past director of a company in connection with a transfer of the whole or any part of the undertaking or property of the company.

(2) Without the prescribed approval of the company's members and the prescribed approval of the subsidiary's members, a person must not make a payment for loss of office to a director or past director of a company in

connection with a transfer of the whole or any part of the undertaking or property of a subsidiary of the company.

(3) For the purposes of this section, a payment is presumed, except in so far as the contrary is shown, to be made in connection with a transfer of any undertaking or property of a company if it is made in pursuance of an arrangement –

(*a*) entered into as part of the agreement for the transfer, or within one year before or 2 years after that agreement; and

(*b*) to which the company, or any person to whom the transfer is made, is privy.

(4) Despite subsection (2), a person may enter into the transaction with only the prescribed approval of the company's members if the subsidiary is incorporated outside Hong Kong or is a wholly owned subsidiary of the company.

11.39 Person must not make payment for loss of office to director or past director in connection with transfer of shares resulting from takeover offer

(1) Without the prescribed approval of the affected members, a person must not make a payment for loss of office to a director or past director of a company in connection with a transfer of shares in the company, or in a subsidiary of the company, resulting from a takeover offer.

(2) For the purposes of this section, a payment is presumed, except in so far as the contrary is shown, to be made in connection with a transfer of any shares in a company if it is made in pursuance of an arrangement –

(*a*) entered into as part of the agreement for the transfer, or within one year before or 2 years after that agreement; and

(*b*) to which the company, or any person to whom the transfer is made, is privy.

(3) Despite subsection (1), a person may enter into the transaction without the prescribed approval of a body corporate's affected members if the body corporate is incorporated outside Hong Kong.

(4) For the purposes of this section, the prescribed approval of the affected members of a payment is regarded as being obtained if –

(*a*) a quorum is not present at a meeting to consider the resolution in respect of which the requirement specified in section 11.34(2)(*b*)(i) is met;

(*b*) the meeting is adjourned to a later date; and

(*c*) a quorum is not present at the adjourned meeting.

Subdivision 3 – Exceptions to Subdivision 2

11.40 Exception for payments in discharge of legal obligation etc.

(1) A person is not prohibited by Subdivision 2 from making a payment in good faith –

(*a*) in discharge of an existing legal obligation;

(*b*) by way of damages for breach of an existing legal obligation;

(*c*) by way of settlement or compromise of any claim arising in connection with a person's office or employment; or

(*d*) by way of pension in respect of past services.

(2) For the purposes of subsection (1), if part of a payment falls within that subsection and part of it does not, the payment is to be regarded as if those parts were separate payments.

(3) In this section –

"existing legal obligation" (現存法律義務) –

(*a*) in relation to a payment falling within section 11.37 and made by a company, means an obligation of the company, or an associated company of it, that was not entered into in

connection with, or in consequence of, the event giving rise to the payment for loss of office; or

(*b*) in relation to a payment falling within section 11.38 or 11.39 and made by a person in connection with a transfer of any undertaking, property or shares, means an obligation of the person that was not entered into for the purpose of, in connection with, or in consequence of, the transfer;

"pension" (退休金) includes any superannuation allowance, superannuation gratuity or similar payment.

(4) For the purposes of the definition of "existing legal obligation" in subsection (3), if a payment falls within both sections 11.37 and 11.38 or within both sections 11.37 and 11.39, it is regarded as falling within section 11.37 but not within section 11.38 or 11.39.

11.41 Exception for small payment

(1) A company is not prohibited by section 11.37 from making a payment to a director or past director if the aggregate of the amount or value of the payment, and the amount or value of any other payment for loss of office made by the company or a subsidiary of the company to the director or past director in connection with the same event, does not exceed $20,000.

(2) A company is not prohibited by section 11.38 or 11.39 from making a payment to a director or past director in connection with a transfer of any undertaking or property of, or shares in, the company or a subsidiary of the company if the aggregate of the amount or value of the payment, and the amount or value of any other payment for loss of office made by the company or a subsidiary of the company to the director or past director in connection with the transfer, does not exceed $20,000.

(3) A subsidiary of a company is not prohibited by section 11.38 or 11.39 from making a payment to a director or past director in connection with a

transfer of any undertaking or property of, or shares in, the company or a subsidiary of the company if the aggregate of the amount or value of the payment, and the amount or value of any other payment for loss of office made by the company, or the subsidiary making the payment, to the director or past director in connection with the transfer, does not exceed $20,000.

Subdivision 4 – Consequences of Contravention

11.42 Interpretation

For the purposes of this Division –

(*a*) unless the court directs otherwise, a payment is regarded as being made in contravention of section 11.38 if it is made in contravention of both sections 11.37 and 11.38; and

(*b*) unless the court directs otherwise, a payment is regarded as being made in contravention of section 11.39 if it is made in contravention of both sections 11.37 and 11.39.

11.43 Civil consequences of contravention of section 11.37

If a payment is made by a company in contravention of section 11.37 –

(*a*) the payment is held by the recipient in trust for the company; and

(*b*) any director of the company who authorized the payment is jointly and severally liable to indemnify the company for any loss resulting from the payment.

11.44 Civil consequences of contravention of section 11.38

(1) This section applies if a payment is made in connection with a transfer of any undertaking or property of a company, or a subsidiary of a company, in contravention of section 11.38.

(2) The payment is held by the recipient in trust for the company or subsidiary.

(3) If the payment is made by or on behalf of the company, any director of the company who authorized the payment is jointly and severally liable to indemnify the company for any loss resulting from the payment.

(4) If the payment is made by or on behalf of the subsidiary, any director of the subsidiary who authorized the payment is jointly and severally liable to indemnify the subsidiary for any loss resulting from the payment.

11.45 Civil consequences of contravention of section 11.39

(1) This section applies if a payment is made in connection with a transfer of shares in a company, or a subsidiary of a company, resulting from a takeover offer in contravention of section 11.39.

(2) The payment is held by the recipient in trust for those who have sold their shares as a result of the offer made.

(3) The recipient must bear the expenses in distributing that sum amongst those who have sold their shares.

(4) If the payment is made by or on behalf of the company, any director of the company who authorized the payment is jointly and severally liable to indemnify the company for any loss resulting from the payment.

(5) If the payment is made by or on behalf of the subsidiary, any director of the subsidiary who authorized the payment is jointly and severally liable to indemnify the subsidiary for any loss resulting from the payment.

Division 4 – Directors' Service Contract

11.46 Interpretation

(1) In this Division –

"director" (董事) includes a shadow director.

(2) For the purposes of this Division, a body corporate is not regarded as a shadow director of any of its subsidiaries only because the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its direction or instructions.

11.47 Service contract

(1) In this Division, a reference to a service contract of a director of a company –

(*a*) is a reference to a contract under which –

(i) the director undertakes personally to perform services, as director or otherwise, for the company or for a subsidiary of the company; or

(ii) services, as director or otherwise, that the director undertakes personally to perform are made available by a third party to the company or to a subsidiary of the company; and

(*b*) includes the terms of a person's appointment as director of the company.

(2) In this Division, a reference to a service contract of a director of a company is not restricted to a contract for the performance of services outside the scope of a director's ordinary duties.

11.48 Prescribed approval of members

(1) For the purposes of this Division, a reference to the prescribed approval of the members of any company is a reference to an approval obtained by a resolution of those members –

(*a*) that is passed before the company agrees to the provision; and

(*b*) in respect of which the requirements specified in subsection (2) are met.

(2) The requirements specified for the purposes of subsection (1)(*b*) are –

(*a*) in the case of a written resolution, a memorandum setting out the proposed service contract (incorporating the provision in question) is sent to every member at or before the time at which the proposed resolution is sent to the member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the proposed service contract (incorporating the provision in question) is sent to every member together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member specified in subsection (4).

(3) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member is to be disregarded for the purpose of determining whether the requirement specified in subsection (2)(*a*) or (*b*)(i) has been met.

(4) The member specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) one who is the director with whom the service contract is proposed to be entered into; or

(*b*) one who holds any shares in the company in trust for that director.

(5) Subsection (2)(*b*)(ii) does not prevent a member specified in subsection (4) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(6) For the purposes of subsection (1)(*a*), it is irrelevant whether the resolution is passed before, on or after the commencement of this Division.

11.49 Preservation of effect of members' unanimous consent

(1) If, under section 11.50(1) or (2), any provision must not be agreed to without the prescribed approval of any company's members, that section does not prohibit the provision from being agreed to with the unanimous consent of those members that is given before it is agreed to.

(2) If, under section 11.50(3), any provision may be agreed to with only the prescribed approval of any company's members, that section does not preclude the provision from being agreed to with the unanimous consent of those members that is given before it is agreed to.

(3) For the purposes of subsection (1) or (2), it is irrelevant whether the unanimous consent is given before, on or after the commencement of this Division.

11.50 Company must not agree to director's long-term employment

(1) Without the prescribed approval of its members, a company must not agree to any provision under which the guaranteed term of the employment of a director of the company with the company exceeds or may exceed 3 years.

(2) Without the prescribed approval of its members and the prescribed approval of the holding company's members, a company must not agree to any provision under which the guaranteed term of the employment of a director of a holding company of the company within the group consisting of the holding company and its subsidiaries exceeds or may exceed 3 years.

(3) Despite subsection (2) –

(*a*) a company may agree to the provision with only the prescribed approval of its members if the holding company is incorporated outside Hong Kong; and

(*b*) a company may agree to the provision with only the prescribed approval of the holding company's members if

it is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong.

(4) In this section –

"employment" (僱用) means any employment under a director's service contract.

(5) In this section, a reference to the guaranteed term of a director's employment is a reference to –

(*a*) the period (if any) during which the employment –

(i) is to continue, or may be continued, otherwise than at the instance of the company (whether under the original contract or under a new contract entered into in pursuance of it); and

(ii) cannot be terminated by the company by notice, or can be so terminated only in specified circumstances;

(*b*) in the case of employment terminable by the company by notice, the period of notice required to be given; or

(*c*) in the case of employment having a period within paragraph (*a*) and a period within paragraph (*b*), the aggregate of those periods.

(6) For the purposes of this section, if, more than 6 months before the end of the guaranteed term of a director's employment, the company enters into a further service contract otherwise than in pursuance of a right given, by or under the original contract, to the other party to it, the guaranteed term of the employment under the further contract is regarded as including the unexpired period of the guaranteed term of the employment under the original contract.

(7) For the purposes of subsection (6), it is irrelevant whether the original contract is entered into before, on or after the commencement of this Division.

11.51 Civil consequences of contravention of section 11.50

If a company agrees to a provision in contravention of section 11.50 –

(*a*) the provision is void to the extent of the contravention; and

(*b*) the contract is to be regarded as containing a term entitling the company to terminate it at any time by giving reasonable notice.

11.52 Copy of contract or memorandum to be available for inspection

(1) A company must keep the following available for inspection at its registered office or at a prescribed place –

(*a*) a copy of the service contract of every director of the company or of a subsidiary of the company;

(*b*) if the contract is not in writing, a written memorandum setting out the terms of the contract.

(2) A company must –

(*a*) retain the copy or memorandum for at least one year after the date of termination or expiry of the contract; and

(*b*) keep the copy or memorandum available for inspection during that time.

(3) If the copy or memorandum is kept available for inspection at a place other than the company's registered office, the company must notify the Registrar of the place, or any change in the place, at which the copy or memorandum is kept. The notice must be given to the Registrar in the specified form within 14 days after the copy or memorandum is first kept at that place or within 14 days after the change (as the case may be).

(4) If a company contravenes subsection (1), (2) or (3), the company, and every responsible person of the company, commit an offence, and each is

liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(5) In this section, a reference to a service contract includes a variation of the contract.

(6) For the purposes of subsection (1), it is irrelevant whether the service contract is entered into before, on or after the commencement of this Division.

11.53 Right of member to inspect and request copy

(1) A copy of a service contract or a written memorandum required to be kept by a company under section 11.52 must be open to inspection by any member of the company without charge.[14]

(2) A member of the company is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the service contract or memorandum.

(3) The company must provide the member with the copy within a prescribed period after the request and the prescribed fee are received by the company.

(4) If a company contravenes subsection (3) –

(*a*) the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues; and

(*b*) the Court of First Instance may by order direct that the copy be provided to the person requesting it.

(5) In this section, a reference to a service contract includes a variation of the contract.

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[14] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

Division 5 – Substantial Property Transaction

11.54 Interpretation

(1) In this Division –

"director" (董事) includes a shadow director.

(2) For the purposes of this Division, a body corporate is not regarded as a shadow director of any of its subsidiaries only because the directors, or a majority of the directors, of the subsidiary are accustomed to act in accordance with its direction or instructions.

11.55 Non-cash asset

(1) In this Division –

(*a*) a reference to a non-cash asset is a reference to any property or interest in property, other than cash; and

(*b*) a reference to an acquisition of a non-cash asset includes –

(i) the creation or extinction of an estate or interest in, or a right over, any property; and

(ii) the discharge of a liability of any person, other than a liability for a liquidated sum.

(2) In subsection (1)(*a*) –

"cash" (現金) includes currency other than Hong Kong currency.

11.56 Substantial non-cash asset

(1) In this Division, a reference to a substantial non-cash asset is –

(*a*) in relation to an arrangement entered into by a private company or a company limited by guarantee, a reference to a non-cash asset the value of which, as at the time the arrangement is entered into –

(i) exceeds 10% of the company's asset value and is over $100,000; or

(ii) exceeds $1,500,000; or

(*b*) in relation to an arrangement entered into by a public company, a reference to a non-cash asset the value of which, as at the time the arrangement is entered into –

(i) exceeds 10% of the company's asset value and is over $750,000; or

(ii) exceeds $10,000,000.

(2) For the purposes of this Division –

(*a*) an arrangement involving more than one non-cash asset; or

(*b*) an arrangement that is one of a series involving non-cash assets,

is to be regarded as if the arrangement involved a non-cash asset of a value equal to the aggregate value of all the non-cash assets involved in the arrangement or the series.

(3) In this section, a reference to a company's asset value at any time is –

(*a*) a reference to the value of the company's net assets as determined by reference to its most recent annual financial statement prepared in accordance with Part 9;[15] or

(*b*) if no annual financial statement has been prepared, a reference to the amount of the company's called-up share capital.

(4) In this section, an annual financial statement is a company's most recent annual financial statement if the time for sending it out to members of the company is most recent.

11.57 Prescribed approval of members

(1) For the purposes of this Division, a reference to the prescribed approval of the members of any company is a reference to an approval obtained

[15] A consultation draft of Part 9 will be published later.

by a resolution of those members in respect of which the requirements specified in subsection (2) are met.

(2) The requirements specified for the purposes of subsection (1) are –

(*a*) in the case of a written resolution, a memorandum setting out the matters specified in subsection (4) is sent to every member at or before the time at which the proposed resolution is sent to the member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the matters specified in subsection (4) is sent to every member together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member specified in subsection (5).

(3) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member is to be disregarded for the purpose of determining whether the requirement specified in subsection (2)(*a*) or (*b*)(i) has been met.

(4) The matters specified for the purposes of subsection (2)(*a*) and (*b*)(i) are the particulars of the arrangement, including its nature, the substantial non-cash asset involved, and the parties to it.

(5) The member specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) one who is the director, or the entity connected with a director –

(i) who acquires or is to acquire from the company a substantial non-cash asset under the arrangement; or

(ii) from whom the company acquires or is to acquire a substantial non-cash asset under the arrangement;

(*b*) one who is the director with whom that entity is connected; or

(*c*) one who holds any shares in the company in trust for the director specified in paragraph (*a*) or (*b*) or that connected entity.

(6) Subsection (2)(*b*)(ii) does not prevent a member specified in subsection (5) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

(7) For the purposes of subsection (1), it is irrelevant whether the resolution is passed before, on or after the commencement of this Division.

11.58 Preservation of effect of members' unanimous consent

(1) If, under section 11.59(1) or (2), an arrangement must not be entered into unless the prescribed approval of any company's members has been obtained, that section does not prohibit the arrangement from being entered into with the unanimous consent of those members that is given before it is entered into.

(2) If, under section 11.59(4), an arrangement may be entered into with only the prescribed approval of any company's members, that section does not preclude the arrangement from being entered into with the unanimous consent of those members that is given before it is entered into.

(3) For the purposes of subsection (1) or (2), it is irrelevant whether the unanimous consent is given before, on or after the commencement of this Division.

11.59 Company must not acquire substantial non-cash asset from director etc.

(1) A company must not enter into an arrangement under which –

(*a*) a director of the company, or an entity connected with such a director, acquires or is to acquire from the company, directly or indirectly, a substantial non-cash asset; or

(*b*) the company acquires or is to acquire a substantial non-cash asset, directly or indirectly, from such a director or an entity connected with such a director,

unless the company has obtained the prescribed approval of its members, or the arrangement is conditional on the prescribed approval of its members being obtained.

(2) A company must not enter into an arrangement specified in subsection (3) unless –

(*a*) the company has obtained –

(i) the prescribed approval of its members; and

(ii) the prescribed approval of the holding company's members; or

(*b*) the arrangement is conditional on both of the following approval being obtained –

(i) the prescribed approval of its members;

(ii) the prescribed approval of the holding company's members.

(3) The arrangement specified for the purposes of subsection (2) is an arrangement under which –

(*a*) a director of a holding company of the company, or an entity connected with such a director, acquires or is to acquire from the company, directly or indirectly, a substantial non-cash asset; or

(*b*) the company acquires or is to acquire a substantial non-cash asset, directly or indirectly, from such a director or an entity connected with such a director.

(4) Despite subsection (2)(*a*) –

(*a*) if the holding company is incorporated outside Hong Kong or is being wound up (except where the winding up is a members' voluntary winding up), a company may enter into the arrangement even though the company has obtained only the prescribed approval of its members; and

(*b*) if the company is a wholly owned subsidiary of the holding company, and the holding company is incorporated in Hong Kong, a company may enter into the arrangement even though the company has obtained only the prescribed approval of the holding company's members.

(5) If a company enters into an arrangement that is conditional on the prescribed approval mentioned in subsection (1) or (2) being obtained, it is not subject to any liability because of a failure to obtain that approval.

(6) Subsections (1) and (2) do not apply to an arrangement entered into by a company that is being wound up unless the winding up is a members' voluntary winding up.

(7) Subsections (1) and (2) do not apply to a transaction so far as it relates to –

(*a*) anything to which a director is entitled under the service contract; or

(*b*) a payment for loss of office to a director within the meaning of Division 3.

(8) Subsections (1) and (2) do not apply to –

(*a*) a transaction between a company and another person in the capacity of a member of the company;

(*b*) a transaction between a holding company and its wholly owned subsidiary; or

(*c*) a transaction between 2 wholly owned subsidiaries of the same holding company.

11.60 Civil consequences of contravention of section 11.59

(1) If a company enters into an arrangement in contravention of section 11.59, the arrangement, and any transaction entered into in pursuance of the arrangement (whether by the company or any other person), is voidable at the company's instance unless –

(*a*) restitution of any money or other asset that was the subject matter of the arrangement or transaction is no longer possible;

(*b*) the company has been indemnified for any loss or damage resulting from the arrangement or transaction; or

(*c*) a person who is not a party to the arrangement or transaction acquired rights in good faith, for value, and without actual notice of the contravention, and those rights would be affected by the avoidance.

(2) Whether or not the arrangement or transaction has been avoided, each of the persons specified in subsection (3) is liable –

(*a*) to account to the company for any gain that the person has made, directly or indirectly, by the arrangement or transaction; and

(*b*) jointly and severally with any other person so liable under this section, to indemnify the company for any loss or damage resulting from the arrangement or transaction.

(3) The persons are –

(*a*) a director of the company, or an entity connected with such a director –

(i) who acquires or is to acquire from the company a substantial non-cash asset under the arrangement; or

(ii) from whom the company acquires or is to acquire a substantial non-cash asset under the arrangement;

(*b*) the director with whom such an entity is connected; and

(*c*) any other director of the company who authorized the arrangement or transaction.

(4) Despite subsection (2) –

(*a*) the connected entity specified in subsection (3)(*a*) is not liable if the connected entity establishes that, at the time the arrangement was entered into, the connected entity did not know the circumstances constituting the contravention;

(*b*) the director specified in subsection (3)(*b*) is not liable if the director establishes that the director took all reasonable steps to secure the company's compliance with section 11.59; and

(*c*) a director specified in subsection (3)(*c*) is not liable if the director establishes that, at the time the arrangement or transaction was entered into, the director did not know the circumstances constituting the contravention.

(5) This section does not exclude the operation of any other Ordinance or rule of law by virtue of which the arrangement or transaction may be called in question or any liability to the company may arise.

11.61 Affirmation of contravening arrangement or transaction

(1) Despite section 11.60, an arrangement, or a transaction entered into by the company in pursuance of an arrangement, may no longer be avoided under that section if, within a reasonable period after it is entered into, the arrangement or transaction is affirmed.

(2) If an arrangement contravenes section 11.59 because it was entered into without the prescribed approval of the company's members, the arrangement, or a transaction entered into by the company in pursuance of the arrangement, must be affirmed by the company by a resolution of those members.

(3) If an arrangement contravenes section 11.59 because it was entered into without the prescribed approval of the holding company's members, the arrangement, or a transaction entered into by the company in pursuance of the arrangement, must be affirmed by the holding company by a resolution of those members.

(4) If an arrangement contravenes section 11.59 because it was entered into without the prescribed approval of the company's members and the prescribed approval of the holding company's members, the arrangement, or a transaction entered into by the company in pursuance of the arrangement, must be affirmed –

(*a*) by the company by a resolution of the company's members; and

(*b*) by the holding company by a resolution of the holding company's members.

(5) This section does not affect the validity of a company's or holding company's decision to affirm an arrangement or transaction if it is taken by unanimous consent of the company's or holding company's members.

11.62 Provisions supplementary to section 11.61

(1) The following requirements must be met in relation to a resolution of the members of any company under section 11.61 –

(*a*) in the case of a written resolution, a memorandum setting out the matters specified in subsection (3) is sent to every member at or before the time at which the proposed resolution is sent to the member; or

(*b*) in the case of a resolution at a meeting –

(i) a memorandum setting out the matters specified in subsection (3) is sent to every member together with the notice convening the meeting; and

(ii) if the company is a public company, the resolution is passed after disregarding every vote in favour of the resolution by a member specified in subsection (4).

(2) Subject to any provision of the company's articles, any accidental failure to send the memorandum to a member is to be disregarded for the purpose of determining whether the requirement specified in subsection (1)(*a*) or (*b*)(i) has been met.

(3) The matters specified for the purposes of subsection (1)(*a*) and (*b*)(i) are the particulars of the arrangement or transaction, including its nature, the substantial non-cash asset involved, and the parties to it.

(4) The member specified for the purposes of subsection (1)(*b*)(ii) is –

(*a*) one who is the director, or the entity connected with a director –

(i) who acquires or is to acquire from the company a substantial non-cash asset under the arrangement; or

(ii) from whom the company acquires or is to acquire a substantial non-cash asset under the arrangement;

(*b*) one who is the director with whom that entity is connected;

(*c*) one who is any other director of the company who authorized the arrangement or transaction; or

(*d*) one who holds any shares in the company in trust for the director specified in paragraph (*a*), (*b*) or (*c*) or that connected entity.

(5) Subsection (1)(*b*)(ii) does not prevent a member specified in subsection (4) from attending, being counted towards the quorum for, or taking part in the proceedings at, any meeting at which the decision is considered.

Division 6 – Material Interests in Transaction, Arrangement or Contract

11.63 Director must declare material interests

(1) If a director of a company is in any way, directly or indirectly, interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company that is significant in relation to the company's business, and the director's interest is material, the director must declare the nature and extent of the director's interest to the other directors.

(2) If an entity connected with a director of a public company is in any way, directly or indirectly, interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company that is significant in relation to the company's business, and the connected entity's interest is material, the director must declare the nature and extent of the connected entity's interest to the other directors.

(3) If a declaration made under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) A declaration of interest in a transaction, arrangement or contract that has been entered into must be made as soon as reasonably practicable. A declaration of interest in a proposed transaction, arrangement or contract must be made before the company enters into the transaction, arrangement or contract. Failure to comply with this requirement does not affect the underlying duty to make the declaration.

(5) This section does not require a director to declare an interest –

(*a*) if the director is not aware of the interest or the transaction, arrangement or contract in question; or

(*b*) if, or to the extent that, the interest concerns the terms of the director's service contract that have been or are to be considered by –

(i) a meeting of the directors; or

(ii) a committee of the directors appointed for the purpose under the company's constitution.

(6) For the purposes of subsection (5)(*a*), a director is regarded as being aware of matters of which the director ought reasonably to be aware.

(7) This section does not affect the operation of any other Ordinance or rule of law restricting a director of a company from having any interest in a transaction, arrangement or contract with the company.

11.64 Declaration to directors

(1) A declaration to directors under section 11.63 must be –

(*a*) made at a directors' meeting;

(*b*) made by notice in writing and sent by the director to the other directors; or

(*c*) made by general notice by the director to the other directors.

(2) A notice for the purposes of subsection (1)(*b*) –

(*a*) must be sent –

(i) in hard copy form; or

(ii) if the recipient has agreed to receive it in electronic form, in the electronic form so agreed; and

(*b*) must be sent –

(i) by hand or by post; or

(ii) if the recipient has agreed to receive it by electronic means, by the electronic means so agreed.

(3) If a declaration to directors under section 11.63 is made by notice in writing –

(*a*) the making of the declaration is to be regarded as forming part of the proceedings at the next directors' meeting after the notice is given; and

(*b*) section 10.31 applies as if the declaration had been made at that meeting.

(4) A general notice by a director for the purposes of subsection (1)(*c*) is a notice to the effect that –

(*a*) the director –

(i) has an interest (as member, officer, employee or otherwise) in a body corporate or firm specified in the notice; and

(ii) is to be regarded as interested in any transaction, arrangement or contract that may, after the effective date of the notice, be made with the specified body corporate or firm; or

(*b*) the director –

(i) is connected with a person specified in the notice (other than a body corporate or firm); and

(ii) is to be regarded as interested in any transaction, arrangement or contract that may, after the effective date of the notice, be made with the specified person.

(5) A general notice must state –

(*a*) the nature and extent of the director's interest in the specified body corporate or firm; or

(*b*) the nature of the director's connection with the specified person.

(6) A general notice is not effective unless –

(*a*) it is given at a directors' meeting; or

(*b*) the director takes reasonable steps to secure that it is brought up and read at the next directors' meeting after it is given.

11.65 Declaration to directors in case of company with sole director

(1) If a declaration to directors under section 11.63 is required of a sole director of a company that is required to have more than one director –

(*a*) the declaration must be recorded in writing;

(*b*) the making of the declaration is to be regarded as forming part of the proceedings at the next directors' meeting after the notice is given; and

(*c*) section 10.31 applies as if the declaration had been made at that meeting.

(2) This section does not affect the operation of section 11.69.

11.66 Application to shadow director

(1) Subject to subsections (2), (3) and (4), the provisions of this Division relating to the duty of a director to declare an interest under section 11.63 apply to a shadow director in the same manner as they apply to a director.

(2) Section 11.64(1)(*a*) and (6) does not apply to a shadow director.

(3) A general notice by a shadow director for the purposes of section 11.64(1)(*c*) is not effective unless it is given by notice in writing and sent by the shadow director to the other directors.

(4) A notice for the purposes of subsection (3) –

(*a*) must be sent –

(i) in hard copy form; or

(ii) if the recipient has agreed to receive it in electronic form, in the electronic form so agreed; and

(*b*) must be sent –

(i) by hand or by post; or

(ii) if the recipient has agreed to receive it by electronic means, by the electronic means so agreed.

11.67 Offence

(1) A director or shadow director who contravenes section 11.63(1) or (2) commits an offence and is liable to a fine at level 6.

(2) If a person is charged under subsection (1) for contravening section 11.63(2), it is a defence to establish that the person took all reasonable steps to secure compliance with that section.

Division 7 – Miscellaneous

11.68 Disclosure of management contract

(1) This section applies if –

(*a*) a company enters into a contract by which a person undertakes the management and administration of the whole or any substantial part of any business of the company; and

(*b*) the contract is not a contract of service with any director of the company or any person engaged in the full-time employment of the company.

(2) The directors' report for any year in which the contract is in force must include –

(*a*) a statement of the existence and duration of the contract; and

(*b*) the name of every director and shadow director interested in the contract, and the nature and extent of the interest.

(3) The company must keep the following available for inspection at its registered office or at a prescribed place –

(*a*) a copy of the contract;

(*b*) if the contract is not in writing, a written memorandum setting out the terms of the contract.

(4) The company must –

(*a*) retain the copy or memorandum for at least one year after the date of termination or expiry of the contract; and

(*b*) keep the copy or memorandum available for inspection during that time.

(5) If the copy or memorandum is kept available for inspection at a place other than the company's registered office, the company must notify the Registrar of the place, or any change in the place, at which the copy or memorandum is kept. The notice must be given to the Registrar in the specified form within 14 days after the copy or memorandum is first kept at that place or within 14 days after the change (as the case may be).

(6) If subsection (2), (3), (4) or (5) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

11.69 Contract with sole member who is also director

(1) This section applies if –

(*a*) a company having only one member enters into a contract with the member;

(*b*) the member is also a director of the company; and

(*c*) the contract is not entered into in the ordinary course of the company's business.

(2) Unless the contract is in writing, the company must ensure that the terms of the contract are set out in a written memorandum kept at the place where the books containing the minutes of the directors' meetings are kept.

(3) If a company contravenes subsection (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(4) A contravention of subsection (2) in relation to a contract does not affect the validity of the contract.

(5) This section does not exclude the operation of any other Ordinance or rule of law applying to contracts between a company and a director of the company.

(6) In this section –

"director" (董事) includes a shadow director.

11.70 Financial Secretary may amend certain sums

(1) Subject to subsection (2), the Financial Secretary may, by order published in the Gazette, amend any provision of this Part by substituting for any sum of money specified in the provision a sum specified in the order.

(2) An order under this section may not be made to amend the amount of a fine.

(3) An order under this section does not have effect in relation to anything done or not done before the order comes into operation.

(4) Proceedings in respect of any liability incurred before an order under this section comes into operation may be continued or instituted as if the order had not been made.

11.71 Transitional and saving arrangements for Division 2

(1) This section applies if –

(*a*) before the commencement of Division 2, a company entered into a transaction specified in section 157HA(3)(*a*) of the predecessor Ordinance;

(*b*) the transaction was entered into on the condition specified in section 157HA(4)(*b*) of the predecessor Ordinance; and

(*c*) that condition has not been satisfied before the commencement of Division 2.

(2) If the company has dispensed with the holding of annual general meeting in accordance with section 12.76, the specified condition continues to apply as if it provided –

(*a*) that the approval of the company is required on or before the last date on which the company would otherwise have been required to hold an annual general meeting; and

(*b*) that any liability falling on any person in connection with the transaction must be discharged within 6 months after that date if that approval is not forthcoming.

11.72 Transitional and saving arrangements for Division 3

(1) Despite the repeal of sections 163, 163A, 163B, 163C and 163D of the predecessor Ordinance, those sections continue to apply in relation to a loss of office or retirement specified in those sections that occurs before the commencement of Division 3.

(2) For the purposes of this section, a loss of office or retirement occurs –

(*a*) in the case of a directorship, when the person ceases to be a director; or

(*b*) in the case of any other office, when the person ceases to hold the office.

11.73 Transitional and saving arrangements for section 11.69

Despite the repeal of section 162B of the predecessor Ordinance, that section continues to apply in relation to a contract specified in that section and entered into before the commencement of section 11.69.

PART 12

COMPANY ADMINISTRATION AND PROCEDURE

Division 1 – Resolutions and Meetings

Subdivision 1 – Preliminary

12.1 Interpretation

(1) In this Division –

"circulation date" (傳閱日期), in relation to a written resolution or a proposed written resolution, means –

(*a*) the date on which copies of the resolution are sent to eligible members in accordance with section 12.7; or

(*b*) if copies are sent to eligible members on different days, the first of those days;

"electronic address" (電子地址) means any sequence or combination of letters, characters, numbers or symbols of any language or, any number, used for the purposes of sending or receiving a document or information by electronic means.

(2) For the purposes of this Division –

(*a*) in relation to a proposed written resolution, the eligible members are the members who would have been entitled to vote on the resolution on the circulation date of the resolution; and

(*b*) if the persons entitled to vote on the resolution change during the course of the day that is the circulation date of the resolution, the eligible members are the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement.

(3) Nothing in this Division affects any Ordinance or rule of law as to –

(*a*) things done otherwise than by passing a resolution;

(*b*) circumstances in which a resolution is or is not to be regarded as having been passed; or

(*c*) cases in which a person is precluded from alleging that a resolution has not been duly passed.

Subdivision 2 – Written Resolution

12.2 Written resolution

(1) Anything that may be done by a resolution of a company in general meeting may be done, without a meeting and without any previous notice being required, by a written resolution of the members of the company.

(2) Anything that may be done by a resolution of a meeting of a class of members of a company may be done, without a meeting and without any previous notice being required, by a written resolution of that class of members of the company.

(3) If a resolution is required under any Ordinance to be passed as an ordinary resolution or a special resolution, the resolution may be passed as a written resolution; and a reference in any Ordinance to an ordinary resolution or a special resolution includes a written resolution.

(4) A reference in any Ordinance to the date of passing of a resolution or the date of a meeting is, in relation to a written resolution, the date on which the written resolution is passed under section 12.10.

(5) A written resolution of a company has effect as if passed by –

(*a*) the company in general meeting; or

(*b*) a meeting of the relevant class of members of the company,

as the case may be, and a reference in any Ordinance to a meeting at which a resolution is passed or to members voting in favour of a resolution is to be construed accordingly.

(6) This section does not apply to –

(*a*) a resolution removing an auditor before the end of the auditor's term of office; or

(*b*) a resolution removing a director before the end of the director's term of office.

12.3 Power to propose written resolution

(1) A resolution may be proposed as a written resolution by –

(*a*) the directors of a company; or

(*b*) the members of a company representing not less than the requisite percentage of the total voting rights of all the members entitled to vote on the resolution.

(2) The requisite percentage mentioned in subsection (1)(*b*) is 2.5% or a lower percentage specified for this purpose in the company's articles.

12.4 Company's duty to circulate written resolution proposed by directors

If the directors of a company have proposed a resolution as a written resolution under section 12.3(1)(*a*), the company must circulate the resolution.

12.5 Members' power to request circulation of written resolution

(1) The members of a company may request the company to circulate a resolution that –

(*a*) may properly be moved; and

(*b*) is proposed as a written resolution under section 12.3(1)(*b*).

(2) If the members request a company to circulate a resolution, they may request the company to circulate with the resolution a statement of not more than 1 000 words on the subject matter of the resolution.

12.6 Company's duty to circulate written resolution proposed by members

(1) A company must circulate a resolution proposed as a written resolution under section 12.3(1)(*b*) and any statement mentioned in section 12.5(2) if it has received requests that it do so from the members of the company representing not less than the requisite percentage of the total voting rights of all the members entitled to vote on the resolution.

(2) The requisite percentage mentioned in subsection (1) is 2.5% or a lower percentage specified for this purpose in the company's articles.

(3) A request –

(*a*) may be sent to the company in hard copy form or in electronic form;

(*b*) must identify the resolution and any statement mentioned in section 12.5(2); and

(*c*) must be authenticated by the person or persons making it.

12.7 Circulation of written resolution

(1) If a company is required under section 12.4 or 12.6 to circulate a resolution proposed as a written resolution, the company must send at its own expense to every eligible member and every other member (if any) who is not an eligible member –

(*a*) a copy of the resolution; and

(*b*) if so required under section 12.5(2), a copy of a statement mentioned in that section.

(2) The company may comply with subsection (1) –

(*a*) by sending copies at the same time (so far as reasonably practicable) to all members in hard copy form or in electronic form or by making the copies available on a website;

(*b*) if it is possible to do so without undue delay, by sending the same copy to each member in turn (or different copies to each of a number of members in turn); or

(*c*) by sending copies to some members in accordance with paragraph (*a*) and sending a copy or copies to other members in accordance with paragraph (*b*).

(3) The company must send the copies (or if copies are sent to members on different days, the first of those copies) not more than 21 days after it becomes subject to the requirement under subsection (1) to send the copies.

(4) If the company sends a copy of a proposed written resolution or statement by making it available on a website, the copy is not validly sent for the purposes of this Subdivision unless the copy is available on the website throughout the period –

(*a*) beginning on the circulation date; and

(*b*) ending on the date on which the resolution lapses under section 12.12.

(5) The company must ensure that the copy of the proposed written resolution sent to an eligible member is accompanied by guidance as to –

(*a*) how to signify agreement to the resolution under section 12.10; and

(*b*) the date by which the resolution must be passed if it is not to lapse under section 12.12.

(6) If a company contravenes subsection (1), (3) or (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

(7) The validity of the resolution, if passed, is not affected by a contravention of subsection (1), (3) or (5).

12.8 Application not to circulate accompanying statement

(1) A company is not required to circulate a statement mentioned in section 12.5(2) if, on an application by the company or another person who claims to be aggrieved, the Court of First Instance is satisfied that the rights given by that section are being abused.

(2) The Court of First Instance may order the members who requested the circulation of the statement to pay the whole or part of the company's costs on an application under subsection (1), even if they are not parties to the application.

12.9 Company's duty to notify auditor of proposed written resolution

(1) If a company is required to send a resolution to a member of the company under section 12.7, it must, on or before the circulation date, send to the auditor of the company (if more than one auditor, to everyone of them) –

(*a*) a copy of the resolution; and

(*b*) a copy of any other document relating to the resolution that is required to be sent to a member of the company under that section.

(2) The copies may be sent to the auditor or auditors of the company in hard copy form or in electronic form.

(3) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(4) The validity of the resolution, if passed, is not affected by a contravention of subsection (1).

12.10 Procedure for signifying agreement to proposed written resolution

(1) A written resolution is passed when all eligible members have signified their agreement to it.

(2) A member signifies agreement to a proposed written resolution when the company receives from the member (or from someone acting on the member's behalf) a document –

(*a*) identifying the resolution to which it relates; and

(*b*) indicating the member's agreement to the resolution.

(3) The document –

(*a*) may be sent to the company in hard copy form or in electronic form; and

(*b*) must be authenticated by the member or by someone acting on the member's behalf.

(4) A member's agreement to a written resolution, once signified, may not be revoked.

12.11 Agreement signified by eligible members who are joint holders of shares

(1) If –

(*a*) 2 or more eligible members are joint holders of shares of a company; and

(*b*) the senior holder has signified his or her agreement to a proposed written resolution,

then the other joint holder or holders are to be regarded as having signified their agreement to the proposed written resolution for the purposes of section 12.10(1).

(2) For the purposes of this section, the senior holder of a share is determined by the order in which the names of the joint holders appear in the register of members of the company.

(3) Subsections (1) and (2) have effect subject to any provision of the company's articles.

12.12 Period for agreeing to proposed written resolution

(1) A proposed written resolution lapses if it is not passed before the end of –

(*a*) the period specified for this purpose in the company's articles; or

(*b*) if none is specified, the period of 28 days beginning on the circulation date.

(2) The agreement of a member to a proposed written resolution is ineffective if signified after the end of that period.

12.13 Company's duty to notify members and auditor that written resolution has been passed

(1) If a resolution of a company is passed as a written resolution, the company must, within 15 days after the resolution is passed, send a copy of the written resolution to –

(*a*) every member of the company; and

(*b*) the auditor of the company (if more than one auditor, to everyone of them).

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

12.14 Sending document relating to written resolution by electronic means

If a company has given an electronic address in any document containing or accompanying a proposed written resolution, it is to be regarded as having agreed that any document or information relating to that resolution may be sent by electronic means to that address (subject to any conditions or limitations specified in the document).

12.15 Relationship between this Subdivision and provisions of company's articles

(1) A provision of a company's articles is void in so far as it would have the effect that a resolution that is required by or otherwise provided for in an Ordinance could not be proposed and passed as a written resolution.

(2) Nothing in this Subdivision affects any provision of a company's articles authorizing the company to pass a resolution without a meeting, otherwise than in accordance with this Subdivision.

(3) Subsection (2) applies only if the resolution has been agreed to by all the members of the company who are entitled to vote on the resolution.

12.16 Application and saving

(1) This Subdivision applies to resolutions for which the circulation date is on or after the commencement of this Subdivision.

(2) Sections 116B (except subsections (7), (8), (9) and (10)), 116BA and 116BB of the predecessor Ordinance continue to apply to resolutions sent or circulated to any relevant member before the commencement of this Subdivision.

(3) In this section –

"relevant member" (有關成員) means a member whose signature is required by section 116B(1) of the predecessor Ordinance.

Subdivision 3 – Resolutions at Meetings

12.17 Resolution at general meeting

(1) A resolution of the members of a company is validly passed at a general meeting if –

(*a*) notice of the meeting and of the resolution is given;

(*b*) the meeting is held and conducted; and

(*c*) the resolution is passed,

in accordance with this Subdivision and Subdivisions 4, 5, 6, 7, 8 and 9 (and, if relevant, Subdivision 10) and the company's articles.

(2) If a provision of this Ordinance –

(*a*) requires a resolution of a company, or of the members (or of a class of members) of a company; and

(*b*) does not specify what kind of resolution is required,

what is required is an ordinary resolution unless the company's articles require a higher majority (or unanimity).

12.18 Ordinary resolution

(1) An ordinary resolution of the members (or of a class of members) of a company means a resolution that is passed by a simple majority.

(2) A resolution passed at a general meeting on a show of hands is passed by a simple majority if it is passed by a simple majority of –

(*a*) the members who (being entitled to do so) vote in person on the resolution; and

(*b*) the persons who vote on the resolution as duly appointed proxies of members entitled to vote on it.

(3) A resolution passed on a poll taken at a general meeting is passed by a simple majority if it is passed by members representing a simple majority of the total voting rights of all the members who (being entitled to do so) vote in person or by proxy on the resolution.

(4) Anything that may be done by an ordinary resolution may also be done by a special resolution.

12.19 Special resolution

(1) A special resolution of the members (or of a class of members) of a company means a resolution that is passed by a majority of at least 75%.

(2) A resolution passed at a general meeting on a show of hands is passed by a majority of at least 75% if it is passed by at least 75% of –

(*a*) the members who (being entitled to do so) vote in person on the resolution; and

(*b*) the persons who vote on the resolution as duly appointed proxies of members entitled to vote on it.

(3) A resolution passed on a poll taken at a general meeting is passed by a majority of at least 75% if it is passed by members representing at least 75% of the total voting rights of all the members who (being entitled to do so) vote in person or by proxy on the resolution.

(4) If a resolution is passed at a general meeting –

(*a*) the resolution is not a special resolution unless the notice of the meeting included the text of the resolution and specified the intention to propose the resolution as a special resolution; and

(*b*) if the notice of the meeting so specified, the resolution may only be passed as a special resolution.

(5) A reference to an extraordinary resolution of a company or of a meeting of any class of members of a company –

(*a*) contained in any Ordinance that was enacted or document that existed before 31 August 1984; and

(*b*) deemed, in relation to a resolution passed or to be passed on or after that date, to be a special resolution of the company or meeting under section 116(5) of the predecessor Ordinance,

continues to be deemed to be such a special resolution of the company or meeting.

12.20 Application and saving

(1) This Subdivision applies to resolutions (other than written resolutions) –

(*a*) of which notice is given on or after the commencement of this Subdivision; or

(*b*) that are proposed at a meeting of which notice is given on or after the commencement of this Subdivision, other than a meeting convened in accordance with a requisition made

before the commencement of this Subdivision under section 113 of the predecessor Ordinance.

(2) The predecessor Ordinance (including section 116) continues to apply to resolutions (other than written resolutions) –

(*a*) of which notice was given before the commencement of this Subdivision; or

(*b*) that are proposed at a meeting –

(i) of which notice was given before the commencement of this Subdivision; or

(ii) that is convened in accordance with a requisition made before the commencement of this Subdivision under section 113 of the predecessor Ordinance.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

(4) If copies of a requisition are deposited on more than one day, the references in this section to the date on which the requisition is made are to be construed as references to the first day on which the copies deposited are sufficient to require the company to act.

Subdivision 4 – Calling Meetings

12.21 Directors' power to call general meeting

The directors of a company may call a general meeting of the company.

12.22 Members' power to request directors to call general meeting

(1) The members of a company may request the directors to call a general meeting of the company.

(2) The directors are required to call a general meeting if the company has received requests to do so from members of the company representing at

least 5% of the total voting rights of all the members having a right to vote at general meetings.

(3) A request –

(*a*) must state the general nature of the business to be dealt with at the meeting; and

(*b*) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting.

(4) Requests may consist of several documents in like form.

(5) A request –

(*a*) may be sent to the company in hard copy form or in electronic form; and

(*b*) must be authenticated by the person or persons making it.

12.23 Directors' duty to call general meeting requested by members

(1) Directors required under section 12.22 to call a general meeting must call a meeting within 21 days after the date on which they become subject to the requirement.

(2) A meeting called under subsection (1) must be held on a date not more than 28 days after the date of the notice convening the meeting.

(3) If the requests received by the company identify a resolution that may properly be moved and is intended to be moved at the meeting, the notice of the meeting must include notice of the resolution.

(4) The business that may be dealt with at the meeting includes a resolution of which notice has been included in the notice of meeting in accordance with subsection (3).

(5) If the resolution is to be proposed as a special resolution, the directors are to be regarded as not having duly called the meeting unless the notice of the meeting includes the text of the resolution and specifies the intention to propose the resolution as a special resolution.

12.24 Members' power to call general meeting at company's expense

(1) If the directors –

(*a*) are required under section 12.22 to call a general meeting; and

(*b*) do not do so in accordance with section 12.23,

the members who requested the meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a general meeting.

(2) If the requests received by the company identify a resolution that may properly be moved and is intended to be moved at the meeting, the notice of the meeting must include notice of the resolution.

(3) The meeting must be called for a date not more than 3 months after the date on which the directors become subject to the requirement to call a meeting.

(4) The meeting must be called in the same manner, as nearly as possible, as that in which that meeting is required to be called by the directors of the company.

(5) The business that may be dealt with at the meeting includes a resolution of which notice has been included in the notice of meeting in accordance with subsection (2).

(6) Any reasonable expenses incurred by the members requesting the meeting by reason of the failure of the directors duly to call a meeting must be reimbursed by the company.

(7) Any sum so reimbursed must be retained by the company out of any sum due or to become due from the company by way of fees or other remuneration in respect of the services of the directors who were in default.

12.25 Members' power to call general meeting when there is no director etc.

(1) If at any time a company does not have any director or does not have sufficient directors capable of acting to form a quorum, any director, or any 2 or more members of the company representing at least 10% of the total voting rights of all the members having a right to vote at general meetings, may call a general meeting in the same manner, as nearly as possible, as that in which that meeting may be called by the directors of the company.

(2) Subsection (1) has effect in so far as the articles of the company do not make other provision in that behalf.

12.26 Power of Court of First Instance to order meeting

(1) This section applies if for any reason it is impracticable –

(*a*) to call a general meeting of a company in any manner in which general meetings of that company may be called; or

(*b*) to conduct the meeting in the manner prescribed by the company's articles or this Ordinance.

(2) The Court of First Instance may, either of its own motion or on application –

(*a*) by a director of the company; or

(*b*) by a member of the company who would be entitled to vote at the meeting,

order a general meeting of the company to be called, held and conducted in any manner the Court of First Instance thinks fit.

(3) If the order is made, the Court of First Instance may give any ancillary or consequential directions that it thinks expedient.

(4) Directions given under subsection (3) may include a direction that one member of the company present at the meeting in person or by proxy is to be regarded as constituting a quorum.

(5) A general meeting called, held and conducted in accordance with an order under subsection (2) is to be regarded for all purposes as a general meeting of the company duly called, held and conducted.

(6) The legal personal representative of a deceased member of a company is to be regarded in all respects, for the purposes of this section, as a member of the company having the same rights with respect to attending and voting at a meeting of the company as the deceased member would, if living, have had.

12.27 Application and saving

(1) Sections 12.22, 12.23 and 12.24 apply in relation to requests made on or after the commencement of those sections.

(2) Section 113 of the predecessor Ordinance continues to apply in relation to requisitions made before the commencement of sections 12.22, 12.23 and 12.24.

(3) Section 12.25 applies in relation to a meeting of which notice is given on or after the commencement of that section.

(4) Section 114A(1)(*b*) of the predecessor Ordinance continues to apply in relation to a meeting of which notice was given before the commencement of section 12.25.

(5) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

(6) If requests are made or copies of a requisition are deposited on more than one day, the references in this section to the date on which the request or requisition is made are to be construed as references to the first day on which the requests made or copies deposited are sufficient to require the company to act.

Subdivision 5 – Notice of Meetings

12.28 Notice required of general meeting

(1) A general meeting of a company (other than an adjourned meeting) must be called by notice of –

(*a*) in the case of an annual general meeting, at least 21 days; and

(*b*) in any other case –

(i) if the company is a limited company, at least 14 days; and

(ii) if the company is an unlimited company, at least 7 days.

(2) If the company's articles require a longer period of notice than that specified in subsection (1), a general meeting of a company (other than an adjourned meeting) must be called by notice of that longer period.

(3) A general meeting of a company is to be regarded, despite the fact that it is called by shorter notice than that specified in subsection (1) or in the company's articles, as having been duly called if it is so agreed –

(*a*) in the case of an annual general meeting, by all the members entitled to attend and vote at the meeting; and

(*b*) in any other case, by a majority in number of the members having the right to attend and vote at the meeting, being a majority together representing at least 95% of the total voting rights at the meeting of all the members.

12.29 Manner in which notice to be given

(1) Notice of a general meeting of a company must be given –

(*a*) in hard copy form or in electronic form; or

(*b*) by making the notice available on a website,

or partly by one of those means and partly by another.

(2) If a company has given an electronic address in a notice calling a meeting, it is to be regarded as having agreed that any document or information relating to proceedings at the meeting may be sent by electronic means to that address (subject to any conditions or limitations specified in the notice).

12.30 Publication of notice of general meeting on website

(1) Without limiting Part 18, notice of a general meeting is not validly given by a company by making it available on a website unless it is given in accordance with this section.

(2) When the company notifies a member of the availability of the notice on the website, the notification must –

(*a*) state that it concerns a notice of a company meeting;

(*b*) specify the place, date and time of the meeting; and

(*c*) in the case of an annual general meeting, state that it is an annual general meeting.

(3) The notice must be available on the website throughout the period beginning on the date of that notification and ending on the conclusion of the meeting.

12.31 Persons entitled to receive notice of general meeting

(1) Notice of a general meeting of a company must be sent to –

(*a*) every member of the company; and

(*b*) every director.

(2) In subsection (1), the reference to a member includes any person who is entitled to a share in consequence of the death or bankruptcy of a member, if the company has been notified of that person's entitlement.

(3) Subsections (1) and (2) have effect subject to any provision of the company's articles.

(4) In the case of a listed company, notice of a general meeting of the company must be sent to every member not entitled to vote at the meeting at the same time and in the same manner as notice of the meeting is sent to members who are so entitled.

(5) A company is only required to comply with subsection (4) if the company is required to send notice of a general meeting of the company to members who are entitled to vote at the general meeting.

(6) Despite subsection (4), if a meeting is called at any time by shorter notice than that specified in section 12.28(1) or in the company's articles, subsection (4) is to be regarded as having been complied with if the notice required to be sent under that subsection is sent as soon as practicable after that time.

12.32 Duty to give notice of general meeting to auditor

(1) If notice of a general meeting of a company or any other document relating to the general meeting is required to be sent to a member, the company must send a copy of it to its auditor (if more than one auditor, to everyone of them) at the same time as the notice or the other document is sent to the member.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

12.33 Contents of notice of general meeting

(1) A company must ensure that notice of a general meeting of the company –

(*a*) specifies the date and time of the meeting;

(*b*) specifies the place of the meeting (and if the meeting is to be held in 2 or more places, the principal place of the meeting and the other place or places of the meeting);

(*c*) states the general nature of the business to be dealt with at the meeting;

(*d*) in the case of a notice calling an annual general meeting, states that the meeting is an annual general meeting; and

(*e*) if a resolution is intended to be moved at the meeting –

(i) includes notice of the resolution; and

(ii) (where the company is not a wholly owned subsidiary) includes or is accompanied by a statement containing the information and explanation, if any, that is reasonably necessary to indicate the purpose of the resolution.

(2) Subsection (1)(*a*), (*b*) and (*c*) has effect subject to any provision of the company's articles.

(3) Subsection (1)(*e*) does not apply in relation to a resolution of which –

(*a*) notice has been included in the notice of meeting under section 12.23(3) or 12.24(2); or

(*b*) notice has been given under section 12.78.

(4) If a company contravenes subsection (1)(*e*), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(5) The validity of a resolution, if passed at a general meeting of a company, is not affected by a contravention of subsection (1)(*e*).

(6) Subsection (5) does not affect any rule of common law or of equity or any other Ordinance, as regards the validity of a resolution.

(7) In subsection (1)(*e*) –

"wholly owned subsidiary" (全資附屬公司) has the meaning given by section 9.13(10).[16]

12.34 Resolution requiring special notice

(1) If by any provision of this Ordinance special notice is required of a resolution, the resolution is not effective unless notice of the intention to move it has been given to the company at least 28 days before the meeting at which it is moved.

(2) The company must, if practicable, give its members notice of the resolution at the same time and in the same manner as it gives notice of the meeting.

(3) If that is not practicable, the company must give its members notice of the resolution at least 14 days before the meeting –

(*a*) by advertisement in a newspaper circulating generally in Hong Kong; or

(*b*) in any other manner allowed by the company's articles.

(4) If, after notice of the intention to move the resolution has been given to the company, a meeting is called for a date 28 days or less after the notice has been given, the notice is to be regarded as having been properly given, though not given within the time required.

12.35 Accidental failure to give notice of meeting or resolution

(1) If a company gives notice of –

(*a*) a general meeting; or

(*b*) a resolution intended to be moved at a general meeting,

any accidental failure to give notice to, or any non-receipt of notice by, any person entitled to receive notice must be disregarded for the purpose of determining whether notice of the meeting or resolution is duly given.

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[16] A consultation draft of Part 9 will be published later.

(2) Except in relation to notice given under section 12.23, 12.24 or 12.79, subsection (1) has effect subject to any provision of the company's articles.

12.36 Application and saving

(1) Sections 12.28, 12.29, 12.30, 12.31, 12.32 and 12.33 apply in relation to meetings of which notice is given on or after the commencement of those sections.

(2) The predecessor Ordinance (including sections 111(1), 114, 114A, 141(7) and 155B) continues to apply in relation to a meeting of which notice was given before the commencement of sections 12.28, 12.31 and 12.33.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of subsections (1) and (2) as given on the first of those days.

(4) Section 12.34 applies in relation to resolutions for which special notice is required if notice of the intention to move the resolution is given to the company on or after the commencement of that section.

(5) Section 116C of the predecessor Ordinance continues to apply to resolutions for which special notice is required if notice of the intention to move the resolution was given to the company before the commencement of section 12.34.

(6) Section 12.35 applies to meetings or resolutions of which notice is given on or after the commencement of that section.

(7) The reference in subsection (6) to cases in which notice is given on or after the commencement of section 12.35 includes cases in which notice would be regarded as so given if section 12.35 applied.

Subdivision 6 – Members' Statements

12.37 Members' power to request circulation of statement

(1) The members of a company may request the company to circulate, to members of the company entitled to receive notice of a general meeting, a statement of not more than 1 000 words with respect to –

(*a*) a matter mentioned in a proposed resolution to be dealt with at that meeting; or

(*b*) other business to be dealt with at that meeting.

(2) A company is required to circulate the statement if it has received requests to do so from –

(*a*) members representing at least 2.5% of the total voting rights of all the members who have a relevant right to vote; or

(*b*) at least 50 members who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least $2,000.

(3) In subsection (2), a "relevant right to vote" (相關表決權利) means –

(*a*) in relation to a statement with respect to a matter mentioned in a proposed resolution, a right to vote on that resolution at the meeting to which the requests relate; and

(*b*) in relation to any other statement, a right to vote at the meeting to which the requests relate.

(4) A request –

(*a*) may be sent to the company in hard copy form or in electronic form;

(*b*) must identify the statement to be circulated;

(*c*) must be authenticated by the person or persons making it; and

(*d*) must be received by the company at least 7 days before the meeting to which it relates.

12.38 Company's duty to circulate members' statement

(1) A company that is required under section 12.37 to circulate a statement must send a copy of it to each member of the company entitled to receive notice of the meeting –

(*a*) in the same manner as the notice of the meeting; and

(*b*) at the same time as, or as soon as reasonably practicable after, it gives notice of the meeting.

(2) Subsection (1) has effect subject to sections 12.39(2) and 12.40.

(3) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

12.39 Expenses of circulating members' statement

(1) The expenses of the company in complying with section 12.38 need not be paid by the members who requested the circulation of the statement if –

(*a*) the meeting to which the requests relate is an annual general meeting of the company; and

(*b*) requests sufficient to require the company to circulate the statement are received in time to enable the company to send a copy of the statement at the same time as it gives notice of the meeting.

(2) Otherwise –

(*a*) the expenses of the company in complying with section 12.38 must be paid by the members who requested the circulation of the statement unless the company resolves otherwise; and

(*b*) unless the company has previously so resolved, it is not bound to comply with that section unless there is deposited with or tendered to it, not later than 7 days before the meeting, a sum reasonably sufficient to meet its expenses in doing so.

12.40 Application not to circulate members' statement

(1) A company is not required to circulate a statement under section 12.38 if, on an application by the company or another person who claims to be aggrieved, the Court of First Instance is satisfied that the rights given by section 12.37 are being abused.

(2) The Court of First Instance may order the members who requested the circulation of the statement to pay the whole or part of the company's costs on an application under subsection (1), even if they are not parties to the application.

12.41 Application and saving

(1) This Subdivision applies to requests made on or after the commencement of this Subdivision.

(2) Section 115A of the predecessor Ordinance, in so far as it relates to the circulation of any statement in relation to an annual general meeting, continues to apply in relation to requisitions made to a company under section 115A(1)(*b*) of the predecessor Ordinance before the commencement of this Subdivision.

(3) If requests are made or copies of a requisition are deposited on more than one day, the references in this section to the date on which the request

or requisition is made are to be construed as references to the first day on which the requests made or copies deposited are sufficient to require the company to act.

Subdivision 7 – Procedure at Meetings

12.42 Meeting at 2 or more places

(1) A company may hold a general meeting at 2 or more places using any audio-visual technology that enables the members of the company to exercise their right to speak and vote at the meeting.

(2) Subsection (1) has effect subject to any provision of the company's articles.

12.43 Quorum at meeting

(1) If a company has only one member, that member present in person or by proxy is a quorum of a general meeting of the company.

(2) If that member of the company is a body corporate, that member present by its corporate representative is also a quorum of a general meeting of the company.

(3) Subject to subsection (1) and the provisions of a company's articles, 2 members present in person or by proxy is a quorum of a general meeting of the company.

(4) If a member of the company is a body corporate, that member present by its corporate representative counts towards a quorum of a general meeting of the company.

(5) In this section –

"corporate representative" (法團代表) means a person authorized under section 12.68 to act as the representative of the body corporate.

12.44 Chairperson of meeting

(1) A member may be elected to be the chairperson of a general meeting by a resolution of the company passed at the meeting.

(2) Subsection (1) is subject to any provision of the company's articles that states who may or who may not be chairperson.

12.45 Resolution passed at adjourned meeting

If a resolution is passed at an adjourned meeting of a company, the resolution is for all purposes to be regarded as having been passed on the date on which it was in fact passed, and is not to be regarded as having been passed on any earlier date.

12.46 Application and saving

(1) This Subdivision applies to meetings of which notice is given on or after the commencement of this Subdivision.

(2) The predecessor Ordinance (including sections 114A(1)(*c*) and (*d*), 114AA and 118) continues to apply to meetings of which notice was given before the commencement of this Subdivision.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

Subdivision 8 – Voting at Meetings

12.47 General rules on votes

(1) On a vote on a resolution on a show of hands at a general meeting –

(*a*) every member present in person has one vote; and

(*b*) every proxy present who has been duly appointed by a member entitled to vote on the resolution has one vote.

(2) If a member appoints more than one proxy, the proxies so appointed are not entitled to vote on the resolution on a show of hands.

(3) On a vote on a resolution on a poll taken at a general meeting –

(*a*) in the case of a company having a share capital –

(i) every member present in person has one vote for each share held by him or her; and

(ii) every proxy present who has been duly appointed by a member has one vote for each share held by that member; and

(*b*) in the case of a company not having a share capital –

(i) every member present in person has one vote; and

(ii) every proxy present who has been duly appointed by a member entitled to vote on the resolution has one vote.

(4) Subsections (1), (2) and (3) have effect subject to any provision of the company's articles.

(5) If any shares in a company are held in trust for the company, those shares do not, for so long as they are so held, confer any right to vote at a general meeting of the company.

12.48 Votes of joint holders of shares

(1) In the case of joint holders of shares of a company, only the vote of the senior holder who votes (and any proxies duly authorized by the senior holder) may be counted by the company.

(2) For the purposes of this section, the senior holder of a share is determined by the order in which the names of the joint holders appear in the register of members of the company.

(3) Subsections (1) and (2) have effect subject to any provision of the company's articles.

12.49 Declaration by chairperson on show of hands

(1) On a vote on a resolution at a general meeting on a show of hands, a declaration by the chairperson that the resolution –

(*a*) has or has not been passed; or

(*b*) passed by a particular majority,

is conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(2) An entry in respect of the declaration in minutes of the meeting recorded in accordance with section 12.82 is also conclusive evidence of that fact without the proof.

(3) This section does not have effect if a poll is demanded in respect of the resolution before or on the declaration under subsection (1) (and the demand is not subsequently withdrawn).

12.50 Right to demand poll

(1) A provision of a company's articles is void in so far as it would have the effect of excluding the right to demand a poll at a general meeting on any question other than –

(*a*) the election of the chairperson of the meeting; or

(*b*) the adjournment of the meeting.

(2) A provision of a company's articles is void in so far as it would have the effect of making ineffective a demand for a poll at a general meeting on any question other than those specified in subsection (1)(*a*) and (*b*), which is made –

(*a*) by at least 5 members having the right to vote at the meeting;

(*b*) by a member or members representing at least 5% of the total voting rights of all the members having the right to vote at the meeting; or

(*c*) by the chairperson of the meeting.

(3) The appointment of a proxy to vote on a matter at a general meeting of a company authorizes the proxy to demand, or join in demanding, a poll on that matter.

(4) In applying subsection (2), a demand by a proxy counts –

(*a*) for the purposes of subsection (2)(*a*), as a demand by the member; and

(*b*) for the purposes of subsection (2)(*b*), as a demand by a member representing the voting rights that the proxy is authorized to exercise.

12.51 Chairperson's duty to demand poll

If, before or on the declaration of the result on a show of hands at a general meeting, the chairperson of the meeting knows from the proxies received by the company that the result on a show of hands will be different from that on a poll, the chairperson must demand a poll.

12.52 Voting on poll

On a poll taken at a general meeting of a company, a member entitled to more than one vote need not, if the member votes –

(*a*) use all the votes; or

(*b*) cast all the votes the member uses in the same way.

12.53 Company's duty to record result of poll in minutes of general meeting

(1) In respect of a resolution decided on a poll taken at a general meeting of a company, the company must record in the minutes of proceedings of the general meeting –

(*a*) the result of the poll;

(*b*) the total number of votes that could be cast on the resolution;

(*c*) the number of votes in favour of the resolution; and

(*d*) the number of votes against the resolution.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

12.54 Place where voting document must be kept available for inspection

(1) This section applies in relation to any record or document relating to a vote cast at a general meeting on a resolution, including –

(*a*) the instrument appointing a proxy to vote at the meeting; and

(*b*) if a poll is taken at the meeting, the voting paper relating to the poll.

(2) A company must keep the record or document available for inspection at –

(*a*) the company's registered office; or

(*b*) a prescribed place.

(3) A company must –

(*a*) retain the record or document for at least 7 years from the date on which the vote is cast; and

(*b*) keep the record or document available for inspection during that time.

(4) A company must notify the Registrar of the place, or any change in the place, at which the record or document is kept for the purpose of this section. The notice must be given to the Registrar in the specified form within 14 days after the record or document is first kept at that place or within 14 days after the change (as the case may be).

(5) Subsection (4) does not apply in relation to any record or document that has been kept at the registered office of the company at all times since it came into existence.

(6) If a company contravenes subsection (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

12.55 Right of member to inspect voting document

The record or document to which section 12.54 applies must be open to inspection by any member of the company without charge.[17]

12.56 Saving for provisions of articles as to determination of entitlement to vote

Nothing in this Subdivision affects –

(*a*) any provision of a company's articles –

(i) requiring an objection to a person's entitlement to vote on a resolution to be made in accordance with the articles; and

(ii) for the determination of the objection to be final and conclusive; or

(*b*) the grounds on which such a determination may be questioned in legal proceedings.

12.57 Application and saving

(1) This Subdivision applies to meetings of which notice is given on or after the commencement of this Subdivision.

(2) The predecessor Ordinance (including sections 114A(1)(*e*), 114D, 114E and 116(2)) continues to apply to meetings of which notice was given before the commencement of this Subdivision.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

[17] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

Subdivision 9 – Proxies and Corporate Representatives

12.58 Right to appoint proxy

(1) Subject to subsection (2), a member of a company is entitled to appoint another person (whether a member or not) as a proxy to exercise all or any of the member's rights to attend and to speak and vote at a general meeting of the company.

(2) In the case of a company limited by guarantee, the company's articles may require that a proxy must be a member of the company and if the company's articles so require, a member of the company may only appoint another member as a proxy.

(3) In the case of a company having a share capital, a member of the company may appoint separate proxies to represent respectively the number of the shares held by the member that is specified in their instruments of appointment.

12.59 Notice of meeting to contain statement of rights etc.

(1) A company must ensure that in a notice calling a general meeting of the company, there must appear, with reasonable prominence, a statement informing the member of –

(*a*) the rights under section 12.58(1) and (3); and

(*b*) the requirement under section 12.58(2).

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(3) A contravention of subsection (1) does not affect the validity of the meeting or of anything done at the meeting.

12.60 Notice required of appointment of proxy etc.

(1) This section applies to –

(*a*) the appointment of a proxy; and

(*b*) any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy.

(2) A provision of the company's articles is void in so far as it would have the effect of requiring the appointment or document to be received by the company or another person earlier than the following time –

(*a*) in the case of a general meeting or adjourned general meeting, 48 hours before the time for holding the meeting or adjourned meeting;

(*b*) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll;

(*c*) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded.

(3) In calculating the periods mentioned in subsection (2), no account is to be taken of any part of a day that is –

(*a*) a public holiday; or

(*b*) a black rainstorm warning day or gale warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

12.61 Sending documents relating to proxies in electronic form

(1) If a company has given an electronic address in –

(*a*) an instrument of proxy issued by the company in relation to a general meeting; or

(*b*) an invitation to appoint a proxy issued by the company in relation to the meeting,

it is to be regarded as having agreed that any document or information relating to proxies for that meeting may be sent by electronic means to that address (subject to any conditions or limitations specified in the instrument or invitation).

(2) In subsection (1), documents relating to proxies include –

(*a*) the appointment of a proxy in relation to a general meeting;

(*b*) any document necessary to show the validity of, or otherwise relating to, the appointment of a proxy; and

(*c*) notice of the termination of the authority of a proxy.

12.62 Company-sponsored invitations to appoint proxies

(1) A company must not, for the purposes of a general meeting of the company, issue at its expense invitations to members to appoint as proxy a specified person or a number of specified persons unless the invitations are issued to all members entitled to be sent a notice of the meeting and to vote at the meeting by proxy.

(2) Subsection (1) is not contravened if –

(*a*) there is issued to a member at that member's request a form of appointment naming the proxy or a list of persons willing to act as proxy; and

(*b*) the form or list is available on request to all members entitled to vote at the meeting by proxy.

(3) If a company contravenes subsection (1), every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

12.63 Requirement as to instrument of proxy issued by company

(1) This section applies to an instrument of proxy issued to a member of a company by the company for use by the member for appointing a proxy to attend and vote at a general meeting of the company.

(2) The instrument of proxy must be such as to enable the member, according to the member's intention, to instruct the proxy to vote in favour of or

against (or, in default of instructions, to exercise the proxy's discretion in respect of) each resolution dealing with any business to be transacted at the meeting.

12.64 Chairing meeting by proxy

(1) A proxy may be elected to be the chairperson of a general meeting by a resolution of the company passed at the meeting.

(2) Subsection (1) is subject to any provision of the company's articles that states who may or who may not be chairperson.

12.65 Company-sponsored proxy's duty to vote in the way specified in appointment of proxy

(1) This section applies to a person who is named by a company as a proxy, whether the nomination is made in –

(*a*) an instrument of proxy issued by the company in relation to a general meeting; or

(*b*) an invitation to appoint a proxy issued by the company in relation to the meeting.

(2) If the person has been duly appointed as a proxy by a member entitled to vote at the meeting, that person must, subject to section 12.47 –

(*a*) vote as a proxy –

(i) on a show of hands; or

(ii) on a poll; and

(*b*) vote in the way specified by the member in the appointment of proxy.

(3) If the person has been duly appointed as a proxy by 2 or more members entitled to vote at the meeting and the members specify different ways to vote in their appointment of proxy, the proxy –

(*a*) must vote on a show of hands in the way specified by the member or members representing a simple majority of the

total voting rights that the proxy is authorized to exercise at the meeting; and

(*b*) if there is no majority, must not vote on a show of hands.

(4) A person who knowingly and wilfully contravenes subsection (2) or (3) commits an offence and is liable to a fine at level 3.

12.66 Notice required of termination of proxy's authority

(1) This section applies to notice that the authority of a person to act as proxy is terminated ("notice of termination").

(2) The termination of the authority of a person to act as proxy does not affect –

(*a*) whether there is a quorum at a general meeting (irrespective of whether the proxy has been counted in deciding the question);

(*b*) the validity of anything the person does as chairperson of a general meeting; or

(*c*) the validity of a poll demanded by the person at a general meeting,

unless the company receives notice of the termination before the commencement of the meeting.

(3) The termination of the authority of a person to act as proxy does not affect the validity of a vote given by that person unless the company receives notice of the termination –

(*a*) before the commencement of the meeting or adjourned meeting at which the vote is given; or

(*b*) in the case of a poll taken more than 48 hours after it is demanded, before the time appointed for the taking of the poll.

(4) If the company's articles require or permit members to give notice of termination to a person other than the company, the references in subsections (2) and (3) to the company receiving notice have effect as if they were –

(*a*) references to that person; or

(*b*) references to the company or that person,

as the case requires.

(5) Subsections (2) and (3) have effect subject to any provision of the company's articles that has the effect of requiring notice of termination to be received by the company or another person at a time earlier than that specified in those subsections.

(6) Subsection (5) is subject to subsection (7).

(7) A provision of the company's articles is void in so far as it would have the effect of requiring notice of termination to be received by the company or another person earlier than the following time –

(*a*) in the case of a general meeting or adjourned general meeting, 48 hours before the time for holding the meeting or adjourned meeting;

(*b*) in the case of a poll taken more than 48 hours after it was demanded, 24 hours before the time appointed for the taking of the poll;

(*c*) in the case of a poll taken not more than 48 hours after it was demanded, the time at which it was demanded.

(8) In calculating the periods mentioned in subsections (3)(*b*) and (7), no account is to be taken of any part of a day that is –

(*a*) a public holiday; or

(*b*) a black rainstorm warning day or gale warning day as defined in section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1).

12.67 Effect of member's voting in person on proxy's authority

(1) A proxy's authority in relation to a resolution is to be regarded as revoked if the member who has appointed the proxy –

(*a*) attends in person the general meeting at which the resolution is to be decided; and

(*b*) exercises, in relation to that resolution –

(i) the voting right attached to the shares in respect of which the proxy is appointed; or

(ii) if the company does not have a share capital, the voting right the member is entitled to exercise.

(2) A member who is entitled to attend, speak or vote (either on a show of hands or on a poll) at a general meeting remains so entitled in respect of that meeting or any adjournment of it, even though a valid appointment of a proxy has been delivered to the company by or on behalf of that member.

12.68 Representation of body corporate at meetings

(1) A body corporate may by resolution of its directors or other governing body –

(*a*) if it is a member of a company, authorize any person it thinks fit to act as its representative at any meeting of the company; and

(*b*) if it is a creditor (including a holder of debentures) of a company, authorize any person it thinks fit to act as its representative at any meeting of any creditors of the company held under the provisions of –

(i) this Ordinance; or

(ii) any debenture or trust deed or other instrument.

(2) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the body corporate which the person represents as that

body corporate could exercise if it were an individual member, creditor, or holder of debentures, of the company.

12.69 Representation of recognized clearing house at meetings

(1) A recognized clearing house within the meaning of section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap. 571) may, if it or its nominee is a member of a company, authorize any person or persons it thinks fit to act as its representative or representatives, at any meeting of the company.

(2) If more than one person is authorized under subsection (1), the authorization must specify the number and class of shares in respect of which each person is so authorized.

(3) A person authorized under subsection (1) is entitled to exercise the same powers on behalf of the recognized clearing house (or its nominee) as that clearing house (or its nominee) could exercise if it were an individual member of the company.

12.70 Saving for more extensive rights given by articles

Nothing in this Subdivision prevents a company's articles from giving more extensive rights to members or proxies than are given by this Subdivision.

12.71 Application and saving

(1) This Subdivision applies to meetings of which notice is given on or after the commencement of this Subdivision.

(2) The predecessor Ordinance (including sections 114C and 115) continues to apply to meetings of which notice was given before the commencement of this Subdivision.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

Subdivision 10 – Annual General Meetings

12.72 Interpretation

In this Subdivision –

"accounting reference period" (會計參照期) has the meaning given by section 9.6.

12.73 Requirement to hold annual general meeting

(1) Subject to subsections (2) and (3), a company must, in respect of each financial year of the company, hold a general meeting as its annual general meeting within the following period (in addition to any other meetings held during the period) –

(*a*) in the case of a private company or a company limited by guarantee, 9 months after the end of its accounting reference period by reference to which the financial year is to be determined; and

(*b*) in the case of any other company, 6 months after the end of its accounting reference period by reference to which the financial year is to be determined.

(2) If the accounting reference period mentioned in subsection (1) is the first accounting reference period of the company and is longer than 12 months, the company must hold a general meeting as its annual general meeting within the following period –

(*a*) in the case of a private company or a company limited by guarantee –

(i) 9 months after the anniversary of the company's incorporation; or

(ii) 3 months after the end of that accounting reference period,

whichever is the later; and

(*b*) in the case of any other company –

(i) 6 months after the anniversary of the company's incorporation; or

(ii) 3 months after the end of that accounting reference period,

whichever is the later.

(3) If a company has by a directors' resolution under section 9.7 or a notice given to the Registrar under that section, shortened an accounting reference period, the company must hold a general meeting as its annual general meeting within the following period –

(*a*) in the case of a private company or a company limited by guarantee –

(i) 9 months after the end of the shortened accounting reference period; or

(ii) 3 months after the shortening of the accounting reference period takes effect,

whichever is the later; and

(*b*) in the case of any other company –

(i) 6 months after the end of the shortened accounting reference period; or

(ii) 3 months after the shortening of the accounting reference period takes effect,

whichever is the later.

(4) A private company mentioned in subsections (1), (2) and (3) does not include a private company that is, at any time during the financial year, a subsidiary of a public company.

(5) If for any reason the Court of First Instance thinks fit to do so, it may, on an application made before the end of the period otherwise allowed for holding an annual general meeting in respect of a financial year of a company, by order extend that period by a further period specified in the order.

(6) If the period otherwise allowed for holding an annual general meeting in respect of a financial year of a company has been extended under subsection (5), the company must hold a general meeting as its annual general meeting within the period as so extended.

(7) If a company contravenes subsection (1), (2), (3) or (6), the Court of First Instance may, on application by any member of the company –

(*a*) call, or direct the calling of, a general meeting of the company; and

(*b*) give any ancillary or consequential directions that the Court of First Instance thinks expedient, including –

(i) a direction modifying or supplementing, in relation to the calling, holding and conducting of the meeting, the operation of the company's articles; and

(ii) a direction that one member of the company present in person or by proxy is to be regarded as constituting a meeting.

(8) Subject to any directions of the Court of First Instance, a general meeting held under subsection (7) is to be regarded as an annual general meeting of the company in respect of the financial year in respect of which the company has failed to hold an annual general meeting in accordance with this section.

(9) If a company contravenes subsection (1), (2), (3) or (6), or contravenes a direction given under subsection (7), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

12.74 Exemption of dormant company from requirement to hold annual general meeting

(1) A company that is a dormant company under section 1.5(1) is exempt from complying with section 12.73.

(2) If, during the period between the date on which a company becomes a dormant company under section 1.5(1) and the date on which the company ceases to be a dormant company under section 1.5(4), the company enters into an accounting transaction as defined in section 1.5(5), then –

(*a*) the exemption under subsection (1) ceases as from the date of the accounting transaction; and

(*b*) any shareholder of the company who knew or ought to have known about the accounting transaction and all directors of the company are personally liable for any debt or liability of the company arising out of the accounting transaction.

(3) In subsection (2)(*b*) –

"director" (董事) includes a shadow director.

12.75 Circumstances in which company not required to hold annual general meeting

(1) A company is not required to hold an annual general meeting in accordance with section 12.73 if –

(*a*) everything that is required or intended to be done at the meeting (by resolution or otherwise) is done by a written resolution; and

(*b*) a copy of each document (including any account or record) that under this Ordinance would otherwise be required to be laid before the company at the meeting or otherwise produced at the meeting is provided to each member, on or before the circulation date of the written resolution.

(2) A company is also not required to hold an annual general meeting in accordance with section 12.73 if –

(*a*) the company has only one member; or

(*b*) the company has by resolution passed in accordance with section 12.76(1) dispensed with the holding of the annual general meeting and has not revoked the resolution under section 12.77(1), and no member of the company has required the holding of the annual general meeting under section 12.76(5).

(3) If a company is not required to hold an annual general meeting under subsection (1) or (2) in respect of a financial year, the directors of the company are not required to lay the company's annual financial statement, the directors' report and a directors' remuneration report before the company in accordance with section 9.50 in respect of that financial year.

12.76 Dispensation with annual general meeting

(1) A company may, by resolution passed in accordance with subsection (3), dispense with the holding of annual general meetings in accordance with section 12.73.

(2) A resolution mentioned in subsection (1) may be passed by a written resolution or at a general meeting.

(3) Despite any other provision of this Ordinance, a resolution mentioned in subsection (1) is only to be regarded as passed if it has been passed by all members of the company who –

(*a*) are entitled to vote on the resolution on the date of the resolution; or

(*b*) in the case of a written resolution, are entitled to vote on the resolution on the circulation date of the resolution.

(4) A resolution under subsection (1) –

(*a*) has effect for –

(i) the financial year in respect of which the period specified in section 12.73 for holding an annual

general meeting of the company has not expired; and

(ii) subsequent financial years; and

(*b*) does not affect any liability already incurred by reason of default in holding an annual general meeting.

(5) If an annual general meeting would be required to be held in respect of a financial year but for this section, and the meeting has not been held, any member of the company may, by notice to the company not later than 3 months before the end of the period within which the company would be required to hold an annual general meeting in respect of that financial year but for this section, require the holding of an annual general meeting in respect of that financial year.

(6) A notice mentioned in subsection (5) must be given in hard copy form or in electronic form.

(7) If a notice mentioned in subsection (5) is given, section 12.73 applies in respect of the financial year to which the notice relates.

12.77 Revocation of resolution dispensing with annual general meeting

(1) A company may revoke a resolution mentioned in section 12.76(1) by passing an ordinary resolution to that effect.

(2) If a resolution mentioned in section 12.76(1) is revoked or otherwise ceases to have effect, the company –

(*a*) is required to hold an annual general meeting in accordance with section 12.73; but

(*b*) is not required to hold an annual general meeting in respect of a financial year that, but for this paragraph, would be required to be held within 3 months after the resolution ceases to have effect.

(3) Subsection (2) does not affect any obligation of the company to hold an annual general meeting in respect of a financial year in accordance with a notice given under section 12.76(5).

12.78 Members' power to request circulation of resolution for annual general meeting

(1) If a company is required to hold an annual general meeting under section 12.73, the members of the company may request the company to give, to members of the company entitled to receive notice of the annual general meeting, notice of a resolution that may properly be moved and is intended to be moved at that meeting.

(2) A company must give notice of a resolution if it has received requests that it do so from –

(*a*) the members of the company representing at least 2.5% of the total voting rights of all the members who have a right to vote on the resolution at the annual general meeting to which the requests relate; or

(*b*) at least 50 members who –

(i) have a right to vote on the resolution at the annual general meeting to which the requests relate; and

(ii) hold shares in the company on which there has been paid up an average sum, per member, of at least $2,000.

(3) A request –

(*a*) may be sent to the company in hard copy form or in electronic form;

(*b*) must identify the resolution of which notice is to be given;

(*c*) must be authenticated by the person or persons making it; and

(*d*) must be received by the company not later than –

(i) 6 weeks before the annual general meeting to which the requests relate; or

(ii) if later, the time at which notice is given of that meeting.

12.79 Company's duty to circulate resolution for annual general meeting

(1) A company that is required under section 12.78 to give notice of a resolution must send a copy of it at the company's own expense to each member of the company entitled to receive notice of the annual general meeting –

(*a*) in the same manner as the notice of the meeting; and

(*b*) at the same time as, or as soon as reasonably practicable after, it gives notice of the meeting.

(2) The business that may be dealt with at an annual general meeting includes a resolution of which notice is given in accordance with subsection (1).

(3) For the purposes of subsection (2), notice is to be regarded as having been given in accordance with subsection (1) despite the accidental omission to give notice to one or more members.

(4) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

12.80 Application and saving

(1) The repeal of section 115A of the predecessor Ordinance does not affect its application in relation to a requisition under section 115A(1)(*a*) of the predecessor Ordinance made to a company before the repeal.

(2) In the case of an existing company required to hold an annual general meeting under section 12.73 –

(*a*) section 111 of the predecessor Ordinance continues to apply to determine the date by which the company must

hold its first annual general meeting after the commencement of section 12.73; and

(*b*) section 12.73 applies in relation to subsequent annual general meetings.

(3) The repeal of section 111(2), (3), (4) and (5) of the predecessor Ordinance does not affect its operation in relation to a company if an application under section 111(2) of the predecessor Ordinance was made before the commencement of section 12.73.

(4) Sections 12.78 and 12.79 apply to requests made on or after the commencement of those sections.

(5) Section 115A of the predecessor Ordinance, in so far as it relates to giving notice of a resolution in relation to an annual general meeting, continues to apply in relation to requisitions made to a company under section 115A(1)(*a*) of the predecessor Ordinance before the commencement of sections 12.78 and 12.79.

(6) If requests are made or copies of a requisition are deposited on more than one day, the references in this section to the date on which the request or requisition is made are to be construed as references to the first day on which the requests made or copies deposited are sufficient to require the company to act.

Subdivision 11 – Records of Resolutions and Meetings

12.81 Written record where company has only one member

(1) This section applies if a company has only one member and that member takes any decision that –

(*a*) may be taken by the company in general meeting; and

(*b*) has effect as if agreed by the company in general meeting.

(2) The member must, unless the decision is taken by way of a written resolution, provide the company with a written record of that decision within 7 days after the decision is made.

(3) A person who contravenes subsection (2) commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(4) A contravention of subsection (2) does not affect the validity of any decision mentioned in that subsection.

12.82 Records of resolutions and meetings, etc.

(1) A company must keep records comprising –

(*a*) copies of all resolutions of members passed otherwise than at general meetings;

(*b*) minutes of all proceedings of general meetings; and

(*c*) all written records provided to the company in accordance with section 12.81(2).

(2) A company must keep the records under subsection (1) for at least 20 years from the date of the resolution, meeting or decision, as the case may be.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

12.83 Place where records must be kept available for inspection

(1) A company must keep the records mentioned in section 12.82 available for inspection at –

(*a*) the company's registered office; or

(*b*) a prescribed place.

(2) A company must notify the Registrar of the place, or any change in the place, at which the records mentioned in section 12.82 are kept for the

purpose of this section. The notice must be given to the Registrar in the specified form within 14 days after the records are first kept at that place or within 14 days after the change (as the case may be).

(3) Subsection (2) does not apply in relation to records that have been kept at the registered office of the company –

(*a*) at all times since they came into existence; or

(*b*) if they were in existence on 31 August 1984, at all times since then.

(4) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

12.84 Right to inspect and request copy

(1) The records required to be kept by a company under section 12.82 must be open to inspection by any member of the company without charge.[18]

(2) A member of the company is entitled, on request and on payment of a prescribed fee, to be provided with a copy of any of those records.

(3) The company must provide the member with the copy within a prescribed period after the request and prescribed fee are received by the company.

(4) If a company contravenes subsection (3) –

(*a*) the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues; and

[18] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

(*b*) the Court of First Instance may by order direct that the copy be provided to the person requesting it.

12.85 Records as evidence of resolutions etc.

(1) If the record of a resolution of members passed otherwise than at a general meeting is kept under section 12.82(1)(*a*) and purports to be signed by a director of the company or secretary of the company, then –

(*a*) the record is evidence of the passing of the resolution; and

(*b*) until the contrary is proved, the requirements of this Ordinance with respect to those proceedings are to be regarded as having been complied with.

(2) The minutes of proceedings of a general meeting, if purporting to be signed by the chairperson of that meeting or by the chairperson of the next general meeting, are evidence of the proceedings.

(3) If the record of the minutes of proceedings of a general meeting of a company is kept under section 12.82(1)(*b*), then, until the contrary is proved –

(*a*) the meeting is to be regarded as having been duly held and convened;

(*b*) all proceedings at the meeting are to be regarded as having been duly taken place; and

(*c*) all appointments of directors, managers or liquidators made at the meeting are to be regarded as valid.

(4) If a company has only one member and that member provides the company with a written record of a decision in accordance with section 12.81(2), the record is sufficient evidence of the decision having been taken by the member.

12.86 Registration of and requirements relating to certain resolutions, etc.

(1) This section applies to –

(*a*) a special resolution, other than a special resolution to change the name of a company passed under section 3.41;[19]

(*b*) a resolution agreed to by all the members of a company that, if not so agreed to, would not have been effective for its purpose unless passed as a special resolution;

(*c*) a resolution or agreement agreed to by all the members of a class that, if not so agreed to, would not have been effective for its purpose unless passed by some particular majority or otherwise in some particular manner;

(*d*) a resolution or agreement that effectively binds all the members of a class though not agreed to by all those members;

(*e*) a resolution requiring a company to be wound up voluntarily, passed under section 228(1)(*a*) of the Companies (Winding Up Provisions) Ordinance (Cap. 32);[20]

(*f*) a resolution varying any matter or provision in the articles of a company that is expressly authorized by the articles to be varied by ordinary resolution;

(*g*) an order of the Court of First Instance (which alters a company's constitution) a copy of which is required to be delivered to the Registrar under section 3.30(2)(*a*).

(2) The company must send a copy of the resolution or agreement to the Registrar within 15 days after it is passed or made.

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[19] A consultation draft of Part 3 will be published later.

[20] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

(3) The Registrar must keep a record of the copy of the resolution or agreement sent under subsection (2).

(4) If the company's articles have been registered under this Ordinance or any former Companies Ordinance, the company must ensure that a copy of the resolution, agreement or order of the Court of First Instance that is for the time being in force is embodied in or annexed to every copy of the articles issued, as the case may be –

(*a*) after the passing of the resolution; or

(*b*) after the making of the agreement or the order of the Court of First Instance.

(5) If the company's articles have not been registered under this Ordinance or any former Companies Ordinance, the company must send a copy of the resolution, agreement or order of the Court of First Instance that is for the time being in force to any member at that member's request, without charge.

(6) If the resolution or agreement is not in writing, a reference to a copy of the resolution or agreement in subsections (2), (3), (4) and (5) is to be construed as a written memorandum setting out the terms of the resolution or agreement.

(7) If a company contravenes subsection (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(8) If a company contravenes subsection (4) or (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(9) For the purposes of subsections (7) and (8), a liquidator of the company is to be regarded as an officer of the company.

12.87 Application and saving

(1) Sections 12.81, 12.82, 12.83, 12.84 and 12.85 apply in relation to resolutions passed, meetings held or decisions taken on or after the commencement of those sections.

(2) The predecessor Ordinance (including sections 116B(7), (8), (9) and (10), 116BC, 119, 119A and 120) continues to apply in relation to resolutions passed, meetings held or decisions taken before the commencement of sections 12.81, 12.82, 12.83, 12.84 and 12.85.

(3) Section 12.86 (except subsections (4) and (5)) applies in relation to resolutions passed, agreements and orders made on or after the commencement of that section.

(4) Section 117(1), (5) and (7) of the predecessor Ordinance continues to apply in relation to resolutions passed and agreements made, but not forwarded to the Registrar, before the commencement of section 12.86 (except subsections (4) and (5)).

(5) Section 12.86(4), (7), (8) and (9) applies in relation to a company's articles issued on or after the commencement of that section.

(6) Section 117(2), (6) and (7) of the predecessor Ordinance continues to apply in relation to a company's articles registered before the commencement of section 12.86(4).

(7) Section 12.86(5), (7), (8) and (9) applies if the request is received by the company on or after the commencement of that section.

(8) Section 117(3), (6) and (7) of the predecessor Ordinance continues to apply if the request is received by the company before the commencement of section 12.86(5).

Subdivision 12 – Application to Class Meetings

12.88 Application to class meetings of companies with share capital

(1) Subject to subsections (2) and (3), this Division (except Subdivision 10) applies, with necessary modifications, in relation to a meeting of holders of shares in a class of a company's shares as it applies in relation to a general meeting.

(2) Sections 12.22, 12.23, 12.24, 12.26 and 12.32 do not apply in relation to a meeting of holders of shares in a class of a company's shares.

(3) In addition to those sections mentioned in subsection (2), sections 12.43 and 12.50 do not apply in relation to a meeting in connection with the variation of the rights attached to shares in a class (a "variation of class rights meeting").

(4) The quorum for a variation of class rights meeting is –

(*a*) in the case of a meeting other than an adjourned meeting, 2 persons present in person or by proxy together holding at least one-third of the total voting rights of holders of shares in the class; and

(*b*) in the case of an adjourned meeting, one person present in person or by proxy holding any shares in the class.

(5) For the purposes of subsection (4), if a person is present by proxy, that person is regarded as holding only the shares in respect of which the proxy is authorized to exercise voting rights.

(6) At a variation of class rights meeting, any holder of shares in the class who is present in person or by proxy may demand a poll.

(7) For the purposes of this section –

(*a*) any amendment of a provision in a company's articles for the variation of the rights attached to shares in a class, or the insertion of such a provision into the articles, is itself to be regarded as a variation of those rights; and

(*b*) a reference to the variation of the rights attached to shares in a class includes the abrogation of those rights.

12.89 Application to class meetings of companies without share capital

(1) Subject to subsections (2) and (3), this Division (except Subdivision 10) applies, with necessary modifications, in relation to a meeting of a class of members of a company without a share capital as it applies in relation to a general meeting.

(2) Sections 12.22, 12.23, 12.24, 12.26 and 12.32 do not apply in relation to a meeting of a class of members.

(3) In addition to those sections mentioned in subsection (2), sections 12.43 and 12.50 do not apply in relation to a meeting in connection with the variation of the rights of a class of members (a "variation of class rights meeting").

(4) The quorum for a variation of class rights meeting is –

(*a*) in the case of a meeting other than an adjourned meeting, 2 members of the class present in person or by proxy together representing at least one-third of the total voting rights of members of the class; and

(*b*) in the case of an adjourned meeting, one member of the class present (in person or by proxy).

(5) At a variation of class rights meeting, any member present in person or by proxy may demand a poll.

(6) For the purposes of this section –

(*a*) any amendment of a provision in a company's articles for the variation of the rights of a class of members, or the insertion of such a provision into the articles, is itself to be regarded as a variation of those rights; and

(*b*) a reference to the variation of the rights of a class of members includes the abrogation of those rights.

12.90 Application and saving

(1) This Subdivision applies to meetings in relation to which the provisions applied by this Subdivision have effect.

(2) Section 63A(6) of the predecessor Ordinance continues to apply to meetings of which notice was given before the commencement of this Subdivision.

(3) If notice of a meeting is given over more than one day, it is to be regarded for the purposes of this section as given on the first of those days.

Division 2 – Registers

Subdivision 1 – Register of Members

12.91 Interpretation

In this Subdivision –

"branch register" (登記支冊) means, except in section 12.107, a branch register of members kept under section 12.102.

12.92 Register of members

(1) A company must keep in the English or Chinese language a register of its members.

(2) A company must enter in the register of its members –

(*a*) the names and addresses of the members;

(*b*) the date on which each person was entered in the register as a member; and

(*c*) the date on which any person ceased to be a member.

(3) In the case of a company having a share capital, the company must enter in the register of its members, with the names and addresses of the members, a statement of –

(*a*) the shares held by each member, distinguishing each share by its number so long as the share has a number; and

(*b*) the amount paid or agreed to be considered as paid on the shares of each member.

(4) A company must enter in the register of its members the particulars required under subsections (2) and (3) within 2 months after the company has received notice of the particulars concerned.

(5) In the case of a person mentioned in subsection (2)(*c*), all entries in the register relating to that person on the date on which the person ceased to be a member may be destroyed after the end of a period of 20 years from that date.

(6) A company must retain a copy of any details that were included in its register of members immediately before the commencement of subsection (5) until –

(*a*) 20 years after the commencement of that subsection; or

(*b*) if earlier, 20 years after the member concerned ceased to be a member.

(7) If a company contravenes subsection (1), (4) or (6), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.93 Place where register must be kept available for inspection

(1) A company must keep the register of its members available for inspection at –

(*a*) the company's registered office; or

(*b*) a prescribed place.

(2) A company must notify the Registrar of the place, or any change in the place, at which the register of its members is kept for the purpose of this section. The notice must be given to the Registrar in the specified form within 14 days after the register is first kept at that place or within 14 days after the change (as the case may be).

(3) Subsection (2) does not apply in relation to a register of members that has been kept at the registered office of the company –

(*a*) at all times since it came into existence; or

(*b*) if it was in existence on 31 August 1984, at all times since then.

(4) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.94 Statement that company has only one member

(1) If the number of members of a company falls to one, the company must, on the occurrence of that event, enter in the register of its members –

(*a*) a statement that it has only one member; and

(*b*) the date on which it became a company having only one member.

(2) If the membership of a company increases from one to 2 or more members, the company must, on the occurrence of that event, enter in the register of its members –

(*a*) a statement that it has ceased to have only one member; and

(*b*) the date on which that event occurred.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.95 Index of members

(1) A company having more than 50 members must keep an index of the names of the members of the company, unless the register of its members is in a form that constitutes in itself an index.

(2) The company must make any necessary alteration in the index within 7 days after the date on which any alteration is made in the register of its members.

(3) The company must ensure that the index contains, in respect of each member, a sufficient indication to enable the account of that member in the register to be readily found.

(4) The company must keep the index at the same place as the register of its members at all times.

(5) If a company contravenes subsection (1), (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.96 Right to inspect and request copy

(1) Except when the register of members of a company is closed under section 12.98, the register and the index of members' names must be open to inspection –

(*a*) by any member of the company without charge; and

(*b*) by any other person on payment of a prescribed fee.[21]

(2) A person is entitled, on request and on payment of a prescribed fee, to be provided with a copy of –

(*a*) the register of members of a company or the index of members' names; or

(*b*) any part of the register or index.

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[21] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

(3) The company must provide the person with the copy within a prescribed period after the request and prescribed fee are received by the company.

(4) When a person inspects the register, or the company provides the person with a copy of the register or any part of it, the company must inform the person of the most recent date (if any) on which alterations were made to the register.

(5) When a person inspects the index of members' names, or the company provides the person with a copy of the index or any part of it, the company must inform the person whether there is any alteration to the register that is not reflected in the index.

(6) If a company contravenes subsection (3), (4) or (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(7) If a company contravenes subsection (3), the Court of First Instance may by order direct that the copy be provided to the person requesting it.

(8) The Court of First Instance must not make an order under subsection (7) if it is satisfied that the rights given by subsection (2) are being abused.

12.97 Consequences of contravening requirements as to register owing to other person's default

If the register of members of a company is kept at the office of a person other than the company, and by reason of any default of that other person, the company contravenes section 12.96(3), then the power of the Court of First Instance under section 12.96(7) extends to the making of an order against that other person and that other person's officers and other employees.

12.98 Power to close register of members

(1) A company may, on giving notice in accordance with subsection (2), close for any time or times not exceeding in the whole 30 days in each year, the register of members of the company or the part of the register relating to members holding shares of any class.

(2) A notice for the purposes of subsection (1) –

(*a*) if the company is a listed company, must be given –

(i) in accordance with the listing rules applicable to the stock market; or

(ii) by advertisement in a newspaper circulating generally in Hong Kong; and

(*b*) in the case of any other company, must be given by advertisement in a newspaper circulating generally in Hong Kong.

(3) The period of 30 days mentioned in subsection (1) may be extended in respect of any year in relation to the register (or any part of the register) of members of a company, by a resolution passed in that year.

(4) The period of 30 days mentioned in subsection (1) must not be extended beyond 60 days in any year.

(5) A company must, on demand, provide any person seeking to inspect a register or part of a register that is closed under this section with a certificate signed by the secretary of the company stating the period for which, and by whose authority, it is closed.

(6) If a company contravenes subsection (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(7) In subsection (2) –

"listing rules" (《上市規則》) means the rules made under section 23 of the Securities and Futures Ordinance (Cap. 571) by a recognized exchange company that govern the listing of securities on a stock market it operates.

12.99 Power of Court of First Instance to rectify register

(1) If –

(*a*) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

(*b*) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

a person aggrieved, or any member of the company, or the company, may apply to the Court of First Instance for rectification of the register.

(2) If an application is made under subsection (1), the Court of First Instance may –

(*a*) refuse the application; or

(*b*) subject to section 4.35, [22] order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) Subject to section 4.35, on an application under subsection (1) the Court of First Instance –

(*a*) may decide any question relating to the title of any person who is a party to the application to have the person's name entered in or omitted from the register, whether the question arises –

(i) between members or alleged members; or

(ii) between members or alleged members on the one hand and the company on the other hand; and

(*b*) generally may decide any question necessary or expedient to be decided for rectification of the register.

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[22] A consultation draft of Part 4 will be published later.

(4) In the case of a company required by this Ordinance to send a list of its members to the Registrar, the Court of First Instance, when making an order for rectification of the register, must by its order direct notice of the rectification to be given to the Registrar.

12.100 Trusts not to be entered in register

No notice of any trust (whether expressed, implied or constructive) may be –

(*a*) entered in the register of members of a company; or

(*b*) receivable by the Registrar.

12.101 Register to be evidence

(1) In the absence of evidence to the contrary, the register of members is proof of any matters that are by this Ordinance required or authorized to be inserted in it.

(2) If in any proceedings under this Ordinance it is sought to challenge the accuracy of any entry in the register of members by evidence of any transaction, the evidence is not admissible for that purpose unless the transaction occurred not more than 20 years prior to the commencement of the proceedings.

12.102 Branch register of members

(1) A company having a share capital may, if it transacts business in a place outside Hong Kong, cause to be kept there a branch register of its members resident there if it is authorized to do so by its articles.

(2) A company that begins to keep a branch register must give to the Registrar a notice in the specified form within 14 days after doing so, stating the address where the branch register is kept.

(3) A company that keeps a register of members under a licence issued under section 103 of the predecessor Ordinance and continues to keep the register after the expiration of the licence must give to the Registrar a notice in

the specified form within 14 days after the expiration, stating the address where the register is kept.

(4) If a company contravenes subsection (2) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.103 Keeping of branch register

(1) A branch register must be kept in the same manner in which the company's register of members (in this section called the principal register) is by this Ordinance required to be kept.

(2) A company that keeps a branch register may only close the branch register in the same manner in which the principal register is closed under section 12.98 except that the advertisement before closing the register must be inserted in some newspaper circulating in the place in which the branch register is kept.

(3) A company that keeps a branch register must –

(*a*) transmit to its registered office a copy of every entry in its branch register as soon as may be after the entry is made; and

(*b*) cause to be kept at the place where the company's principal register is kept a duplicate of its branch register duly entered up from time to time.

(4) A duplicate of a branch register is to be regarded for all the purposes of this Ordinance as part of the principal register.

(5) Subject to the provisions of this Ordinance, a company may by its articles make any provision that it thinks fit respecting the keeping of branch registers.

(6) If a company contravenes subsection (3), the company, and every responsible person of the company, commit an offence, and each is liable to a

fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.104 Transactions in shares registered in branch register

(1) The shares registered in a branch register of a company must be distinguished from those registered in the register of members of the company.

(2) No transaction with respect to any shares registered in a branch register may, during the continuance of that registration, be registered in any other register.

12.105 Discontinuance of branch register

(1) A company may discontinue to keep a branch register.

(2) If a company discontinues keeping a branch register, all the entries in that register must be transferred to –

(*a*) some other branch register kept in the same place outside Hong Kong by the company; or

(*b*) the company's register of members.

12.106 Duty to notify Registrar of discontinuance etc. of branch register

(1) A company keeping a branch register must give to the Registrar a notice in the specified form of –

(*a*) any change in the address where the branch register is kept, within 14 days after the change; and

(*b*) if the company discontinues keeping the branch register, the discontinuance and the register to which all the entries have been transferred, within 14 days after the discontinuance.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a

fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.107 Provisions as to branch registers of non-Hong Kong companies kept in Hong Kong

If under the law in force in any place outside Hong Kong, companies incorporated under that law have power to keep in Hong Kong branch registers of their members resident in Hong Kong, the Financial Secretary may by order direct that –

(*a*) those branch registers must be kept at a place in Hong Kong as specified in the order;

(*b*) sections 12.96 and 12.99, subject to any modifications and adaptations specified in the order, apply to and in relation to those branch registers kept in Hong Kong as they apply to and in relation to the registers of members.

12.108 Application and saving

(1) The power given by section 12.92(5) is exercisable on or after the commencement of that section, whenever the period of 20 years specified in that section expires.

(2) Section 12.96(4) and (5) applies if a person –

(*a*) inspects a company's register of members or index of members' names on or after the commencement of that section; or

(*b*) is provided by a company on or after the commencement of that section with a copy of the company's register of members or any part of it,

whether the person's request to inspect, or be provided with a copy, was made before, on or after the commencement of that section.

(3) Section 12.101(2) applies to causes of action arising on or after the commencement of that section.

(4) The time limit for causes of action arising before the commencement of section 12.101(2) is –

(*a*) 20 years from the commencement of section 12.101(2); or

(*b*) 30 years (as provided by section 102(2) of the predecessor Ordinance) from the date on which the cause of action arose,

whichever expires first.

(5) Subsection (4) does not affect any lesser period of limitation.

Subdivision 2 – Register of Directors

12.109 Register of directors

(1) A company must keep in the English or Chinese language a register of its directors.

(2) A company must enter in the register of its directors the required particulars specified in section 12.111 of each person who is a director or reserve director (if any) of the company.

(3) A company must keep the register of its directors available for inspection at –

(*a*) the company's registered office; or

(*b*) a prescribed place.

(4) A company must notify the Registrar of the place, or any change in the place, at which the register of its directors is kept for the purpose of this section. The notice must be given to the Registrar in the specified form within 14 days after the register is first kept at that place or within 14 days after the change (as the case may be).

(5) Subsection (4) does not apply in relation to a register of directors that has been kept at the registered office of the company –

(*a*) at all times since it came into existence; or

(*b*) if it was in existence on 31 August 1984, at all times since then.

(6) If a company contravenes subsection (1), (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.110 Right to inspect and request copy

(1) The register of directors of a company must be open to inspection –

(*a*) by any member of the company without charge; and

(*b*) by any other person on payment of a prescribed fee.[23]

(2) A person is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the register of directors or any part of it.

(3) The company must provide the person with the copy within a prescribed period after the request and prescribed fee are received by the company.

(4) When a person inspects the register, or the company provides the person with a copy of the register or any part of it, the company must inform the person of the most recent date (if any) on which alterations were made to the register.

(5) If a company contravenes subsection (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(6) If a company contravenes subsection (3), the Court of First Instance may by order direct that the copy be provided to the person requesting it.

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[23] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

(7) The Court of First Instance must not make an order under subsection (6) if it is satisfied that the rights given by subsection (2) are being abused.

12.111 Particulars of directors to be registered

(1) If a company is a private company (other than one that is a member of a group of companies of which a listed company is a member), the register of its directors must contain the following particulars with respect to each director –

(*a*) if the director is a natural person –

(i) the present forename and surname, former forename or surname (if any), and aliases (if any);

(ii) the usual residential address; and

(iii) the number of the identity card or, if the director does not have an identity card, the number and issuing country of any passport held by the director; and

(*b*) if the director is a body corporate, the corporate name and the address of its registered or principal office.

(2) If a company is a public company, a company limited by guarantee, or a private company that is a member of a group of companies of which a listed company is a member, the register of its directors must contain the following particulars with respect to each director –

(*a*) the present forename and surname, former forename or surname (if any), and aliases (if any);

(*b*) the usual residential address; and

(*c*) the number of the identity card or, if the director does not have an identity card, the number and issuing country of any passport held by the director.

(3) If a company is a private company having only one member and that member is the sole director of the company, the register of its directors must contain the following particulars with respect to the reserve director of the company (if any) –

(*a*) the present forename and surname, former forename or surname (if any), and aliases (if any);

(*b*) the usual residential address; and

(*c*) the number of the identity card or, if the director does not have an identity card, the number and issuing country of any passport held by the director.

(4) In this section –

"forename" (名字) includes a Christian or given name;

"identity card" (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177);

"residential address" (住址) –

(*a*) does not include an address at a hotel unless the person to whom it relates is stated, for the purposes of this section, to have no other permanent address; and

(*b*) does not include a post office box number unless the number is coupled with a residential address;

"surname" (姓氏), for a person usually known by a title different from the person's surname, means that title.

(5) In this section, a reference to a former forename or surname does not include –

(*a*) in relation to a person –

(i) a forename or surname that was changed or ceased to be used before the person attained the age of 18 years; and

(ii) a forename or surname that has been changed or ceased to be used for a period of at least 20 years;

(*b*) in relation to a person usually known by a title different from the person's surname, the name by which the person was known before the adoption of or succession to the title; and

(*c*) in relation to a married woman, the name or surname by which she was known before the marriage.

(6) The Financial Secretary may, by order published in the Gazette, amend subsection (1), (2), (3), (4) or (5).

12.112 Duty to notify Registrar of appointment and change

(1) If a person is appointed as director of a company otherwise than under section 10.1(3) or (4) or section 10.2(2) or (3), the company must, within 14 days after the appointment, give to the Registrar a notice in the specified form containing –

(*a*) the director's particulars specified in the register of its directors; and

(*b*) if the person is a natural person, a statement, authenticated by the person, that he or she has accepted the appointment and has attained the age of 18 years.

(2) The company must, within 14 days after the nomination of a person as a reserve director of the company, give to the Registrar a notice in the specified form containing all the particulars with respect to that person that are required to be contained in the register of its directors.

(3) If a person is nominated as a reserve director of a private company, the company must, within 14 days after the nomination, give to the Registrar a statement in the specified form, authenticated by the person, that the person has accepted the nomination and has attained the age of 18 years.

(4) If a person ceases to be a director or reserve director of a company or there is any change in the particulars contained in the register of directors of a company, the company must, within 14 days after the cessation or change, give to the Registrar a notice in the specified form –

(*a*) specifying the cessation or change and the date on which it occurred; and

(*b*) containing other matters that are specified in the form.

(5) If a company contravenes subsection (1), (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.113 Duty of director to make disclosure

(1) A director of a company must give notice to the company of matters relating to the director that are required for the purposes of sections 12.111 and 12.112.

(2) A reserve director of a company must give notice to the company of matters relating to the reserve director that are required for the purposes of sections 12.111 and 12.112.

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable to a fine at level 4.

12.114 Registrar to keep an index of directors

(1) The Registrar must keep an index of every person who is a director of a company or a reserve director of a private company.

(2) The particulars contained in the index must, in respect of each director or reserve director, include –

(*a*) the name and address of the director or reserve director;

(*b*) the latest particulars sent to the Registrar in respect of the director or reserve director; and

(*c*) the name of each company of which the director or reserve director can be identified as a director or reserve director.

(3) The index kept under this section must be open to the inspection of any person on payment of a prescribed fee.

12.115 Application and saving

(1) On or after the commencement of section 12.109, the register of directors and secretaries kept by a company under section 158(1) of the predecessor Ordinance, in so far as it relates to the company's directors or reserve directors, is to be regarded as a register of directors kept under and for the purposes of section 12.109.

(2) An existing company need not comply with any provision of this Ordinance requiring the company's register of directors to contain particulars additional to those required by the predecessor Ordinance until the earlier of –

(*a*) the date to which the company makes up its first annual return made up to a date on or after the commencement of section 12.111; and

(*b*) the last date to which the company should have made up that return.

(3) Subsection (2) does not apply in relation to a director of whom particulars are first registered on or after the commencement of section 12.111 (whether the director was appointed before, on or after that commencement).

(4) Subsection (2) ceases to apply in relation to a director whose registered particulars fall to be altered on or after the commencement of section 12.111 (whether the change occurred before, on or after that commencement).

(5) Subsections (2), (3) and (4) do not affect the particulars required to be included in the company's annual return.

(6) On the commencement of section 12.111, an existing company must remove from its register of directors any entry relating to a shadow director.

(7) Section 12.112 applies as if the shadow director had ceased to be a director on the commencement of section 12.111.

(8) The removal by an existing company from its register of directors on or after the commencement of section 12.111 of particulars required by the predecessor Ordinance but not required by this Ordinance does not give rise to any duty to notify the Registrar under section 12.112.

(9) Section 12.112 applies in relation to –

(*a*) a change among a company's directors or reserve directors; or

(*b*) a change in the particulars contained in the register,

occurring on or after the commencement of section 12.111.

(10) Section 158 of the predecessor Ordinance continues to apply in relation to a change occurring before the commencement of section 12.111.

Subdivision 3 – Register of Secretaries

12.116 Register of secretaries

(1) A company must keep in the English or Chinese language a register of its secretaries.

(2) A company must enter in the register of its secretaries the required particulars specified in section 12.118 of a person who is, or persons who are the secretary or joint secretaries of the company.

(3) A company must keep the register of its secretaries available for inspection at –

(*a*) the company's registered office; or

(*b*) a prescribed place.

(4) A company must notify the Registrar of the place, or any change in the place, at which the register of its secretaries is kept for the purpose of this section. The notice must be given to the Registrar in the specified form within 14 days after the register is first kept at that place or within 14 days after the change (as the case may be).

(5) Subsection (4) does not apply in relation to a register of secretaries that has been kept at the registered office of the company –

(*a*) at all times since it came into existence; or

(*b*) if it was in existence on 31 August 1984, at all times since then.

(6) If a company contravenes subsection (1), (2), (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.117 Right to inspect and request copy

(1) The register of secretaries of a company must be open to the inspection –

(*a*) of any member of the company without charge; and

(*b*) of any other person on payment of a prescribed fee.[24]

(2) A person is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the register of secretaries or any part of it.

(3) The company must provide the person with the copy within a prescribed period after the request and prescribed fee are received by the company.

(4) When a person inspects the register, or the company provides the person with a copy of the register or any part of it, the company must inform the person of the most recent date (if any) on which alterations were made to the register.

(5) If a company contravenes subsection (3) or (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

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[24] Regulation will be made under clause 12.125 to make provision as to the time, duration and manner of inspection.

(6) If a company contravenes subsection (3), the Court of First Instance may by order direct that the copy be provided to the person requesting it.

(7) The Court of First Instance must not make an order under subsection (6) if it is satisfied that the rights given by subsection (2) are being abused.

12.118 Particulars of secretaries to be registered

(1) The register of secretaries of a company must contain the following particulars with respect to the secretary or, if there are joint secretaries, with respect to each of them –

(*a*) if the secretary is a natural person –

(i) the present forename and surname, former forename or surname (if any), and aliases (if any);

(ii) the correspondence address; and

(iii) the number of the identity card or, if the secretary or joint secretary does not have an identity card, the number and issuing country of any passport held by the secretary or joint secretary; and

(*b*) if the secretary is a body corporate, the corporate name and the address of its registered or principal office.

(2) If all the partners in a firm are joint secretaries of a company, the name and principal office of the firm may be stated instead of the particulars mentioned in subsection (1)(*a*) or (*b*).

(3) In this section –

"forename" (名字) includes a Christian or given name;

"identity card" (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177);

"surname" (姓氏), for a person usually known by a title different from the person's surname, means that title.

(4) For the purposes of subsection (1)(*a*)(ii), a correspondence address must be a place in Hong Kong and must not be a post office box number.

(5) In this section, a reference to a former forename or surname does not include –

(*a*) in relation to a person –

(i) a forename or surname that was changed or ceased to be used before the person attained the age of 18 years; and

(ii) a forename or surname that has been changed or ceased to be used for a period of at least 20 years;

(*b*) in relation to a person usually known by a title different from the person's surname, the name by which the person was known before the adoption of or succession to the title; and

(*c*) in relation to a married woman, the name or surname by which she was known before the marriage.

(6) The Financial Secretary may, by order published in the Gazette, amend subsection (1), (2), (3), (4) or (5).

12.119 Duty to notify Registrar of appointment and change

(1) If a person or persons are appointed as secretary or joint secretaries of a company otherwise than under section 10.24(2) or (3), the company must, within 14 days after the appointment, give to the Registrar a notice in the specified form containing –

(*a*) the secretary's or joint secretaries' particulars specified in the register of its secretaries; and

(*b*) if the person or any of the persons is a natural person, a statement, authenticated by the person, that he or she has accepted the appointment.

(2) If a person ceases to be a secretary of the company or there is any change in the particulars contained in the register of secretaries of a company, the company must, within 14 days after the cessation or change, give to the Registrar a notice in the specified form –

(*a*) specifying the cessation or change and the date on which it occurred; and

(*b*) containing other matters that are specified in the form.

(3) If a company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

12.120 Duty of secretary to make disclosure

(1) A secretary of a company must give notice to the company of matters relating to the secretary that are required for the purposes of sections 12.118 and 12.119.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 4.

12.121 Application and saving

(1) On or after the commencement of section 12.116, the register of directors and secretaries kept by a company under section 158(1) of the predecessor Ordinance, in so far as it relates to the company's secretaries or joint secretaries, is to be regarded as a register of secretaries kept under and for the purposes of section 12.116.

(2) An existing company need not comply with any provision of this Ordinance requiring the company's register of secretaries to contain particulars additional to those required by the predecessor Ordinance until the earlier of –

(*a*) the date to which the company makes up its first annual return made up to a date on or after the commencement of section 12.118; and

(*b*) the last date to which the company should have made up that return.

(3) Subsection (2) does not apply in relation to a secretary of whom particulars are first registered on or after the commencement of section 12.118 (whether the secretary was appointed before, on or after that commencement).

(4) Subsection (2) ceases to apply in relation to a secretary whose registered particulars fall to be altered on or after the commencement of section 12.118 (whether the change occurred before, on or after that commencement).

(5) Subsections (2), (3) and (4) do not affect the particulars required to be included in the company's annual return.

(6) In the case of an existing company –

(*a*) the relevant existing address of a secretary is to be regarded, on or after the commencement of section 12.118, as the correspondence address of the secretary; and

(*b*) an entry in the company's register of secretaries stating the relevant existing address is to be regarded, on or after the commencement of section 12.118, as complying with the requirement to state a correspondence address.

(7) The relevant existing address is the address that immediately before the commencement of section 12.118 appeared in the company's register of directors and secretaries as the usual residential address of the secretary or joint secretary.

(8) A notification of a change of a relevant existing address occurring before the commencement of section 12.118 that is received by the company on or after that commencement is to be regarded as being a notification of a change of correspondence address.

(9) The operation of subsections (6), (7) and (8) does not give rise to any duty to notify the Registrar under section 12.119.

(10) The removal by an existing company from its register of secretaries on or after the commencement of section 12.118 of particulars

required by the predecessor Ordinance but not required by this Ordinance does not give rise to any duty to notify the Registrar under section 12.119.

(11) Section 12.119 applies in relation to –

(*a*) a change among a company's secretaries; or

(*b*) a change in the particulars contained in the register,

occurring on or after the commencement of section 12.118.

(12) Section 158 of the predecessor Ordinance continues to apply in relation to a change occurring before the commencement of section 12.118.

Division 3 – Company Records

12.122 Meaning of "company records"

In this Division –

"company records" (公司紀錄) means any register, index, agreement, memorandum, minutes or other document required by this Ordinance to be kept by a company, but does not include accounting records.

12.123 Form of company records

(1) A company must adequately record for future reference the information required to be contained in any company records.

(2) Subject to subsection (1), company records may be –

(*a*) kept in hard copy form or in electronic form; and

(*b*) arranged in the manner that the directors of the company think fit.

(3) If the records are kept in electronic form, the company must ensure that they are capable of being reproduced in hard copy form.

(4) If any company records required by this Ordinance to be kept by a company are kept by the company by recording the information in question in electronic form, any duty imposed on the company under this Ordinance to allow inspection of, or to provide a copy of the company records or any part of

the company records is to be regarded as a duty to allow inspection of, or to provide, a reproduction of –

(*a*) the recording in hard copy form; or

(*b*) the relevant part of the recording in hard copy form.

(5) If a company contravenes subsection (1) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(6) In this section –

"in electronic form" (電子形式) means in the form of an electronic record;

"in hard copy form" (印本形式) means in a paper form or similar form capable of being read.

12.124 Duty to take precautions against falsification

(1) If company records are kept otherwise than by making entries in a bound book, a company must –

(*a*) take adequate precautions to guard against falsification; and

(*b*) take adequate steps to facilitate the discovery of the falsification.

(2) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

12.125 Regulations about keeping and inspection of company records and provision of copies

(1) The Financial Secretary may make regulations to –

(*a*) provide for the obligations of a company that is required by any provision of this Ordinance –

(i) to keep any company records;

(ii) to keep available for inspection any company records; or

(iii) to provide copies of any company records;

(*b*) prescribe the fees payable in respect of company records; and

(*c*) prescribe any other thing that is required or permitted to be prescribed under this Ordinance in respect of company records.

(2) The regulations may –

(*a*) prescribe places other than a company's registered office at which company records are required to be kept;

(*b*) make provision as to the time, duration and manner of inspection, including the circumstances in which and the extent to which the copying of information is permitted in the course of inspection;

(*c*) define what may be required of the company as regards the nature, extent and manner of extracting or presenting any information for the purposes of inspection or the provision of copies; and

(*d*) make provision as to the time within which a copy of company records must be provided.

(3) Regulations made under subsection (2)(*a*) may, in relation to a provision of this Ordinance requiring a company to keep any company records –

(*a*) prescribe a place –

(i) by reference to the company's principal place of business or the place at which the company keeps any other records; or

(ii) in any other way;

(*b*) provide that that provision is not complied with by keeping company records at a place prescribed in the regulations unless conditions prescribed in the regulations are met;

(*c*) prescribe more than one place in relation to that provision; and

(*d*) provide that that provision is not complied with by keeping company records at a place prescribed in the regulations unless all the company's records subject to that provision are kept there.

(4) Regulations made under subsection (1), (2) or (3) may provide that –

(*a*) if a company contravenes any of the regulations made under subsection (1), (2) or (3), an offence is committed by –

(i) the company; and

(ii) every responsible person of the company;

(*b*) a person who commits an offence mentioned in paragraph (*a*) is liable to a fine not exceeding level 5 and, in the case of a continuing offence, to a further fine not exceeding $1,000 for each day during which the offence continues;

(*c*) the Court of First Instance may, in prescribed circumstances, by order compel an immediate inspection of company records or direct that a copy of company records be sent to a person entitled to be provided with the copy;

(*d*) if company records are kept at the office of a person other than the company concerned, an order mentioned in

paragraph (*c*) may be made against that other person and that other person's officers and other employees; and

(*e*) the Court of First Instance must not make an order mentioned in paragraph (*c*) if it is satisfied that the rights of inspecting company records or the rights to be provided with a copy of company records are being abused.

(5) Nothing in any provision of this Ordinance or in the regulations made under this section is to be construed as preventing a company –

(*a*) from providing more extensive facilities than are required by the regulations; or

(*b*) if a fee may be charged, from charging a lesser fee than that prescribed or none at all.

Division 4 – Registered Office and Publication of Company Names

12.126 Registered office of company

(1) A company must have a registered office in Hong Kong to which all communications and notices may be addressed.

(2) The intended address of a company's registered office stated in the incorporation form registered in respect of the company is to be regarded as the address of its registered office with effect from the date of its incorporation until a notice of change in respect of the address is given to the Registrar under subsection (3).

(3) If the address of a company's registered office is changed, the company must give a notice of the change in the specified form to the Registrar within 14 days after the change.

(4) The Registrar must record the change a notice of which is given under subsection (3).

(5) The inclusion in the annual return of a company of a statement as to the address of its registered office does not satisfy the obligation imposed by subsection (3).

(6) If a company contravenes subsection (1) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

12.127 Requirement to disclose company name, etc.

(1) The Financial Secretary may make regulations to require companies –

(*a*) to display prescribed information in prescribed locations;

(*b*) to state prescribed information in prescribed descriptions of documents or communications; and

(*c*) to provide prescribed information on request to those they deal with in the course of their business.

(2) The regulations –

(*a*) may in prescribed circumstances require disclosure of the name of the company; and

(*b*) may make provision as to the manner in which any prescribed information is to be displayed, stated or provided.

(3) The regulations may provide that, for the purposes of any requirement to disclose a company's name, any variation between a word or words required to be part of the name and a permitted abbreviation of that word or those words (or vice versa) is to be disregarded.

12.128 Criminal consequences of failure to make required disclosures

Regulations made under section 12.127 may provide that –

(*a*) if a company contravenes any of the regulations made under that section, an offence is committed by –

(i) the company; and

(ii) every responsible person of the company;

(*b*) if any person who is acting on behalf of the company contravenes any of the regulations made under that section, an offence is committed by that person; and

(*c*) a person who commits an offence mentioned in paragraph (*a*) or (*b*) is liable to a fine not exceeding level 3 and, in the case of a continuing offence, to a further fine not exceeding $300 for each day during which the offence continues.

12.129 Civil consequence of failure to make required disclosures

If an officer of a company or a person on its behalf signs or authorizes to be signed on behalf of the company, any bill of exchange, promissory note, endorsement, cheque or order for money or goods in which the company's name is not mentioned in the manner as required by regulations made under section 12.127, that officer or person is personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount of it (unless it is duly paid by the company).

Division 5 – Annual Return

12.130 Requirement to deliver annual return

(1) A private company must in respect of every year (except the year of its incorporation) deliver to the Registrar an annual return specified in subsection (5) within 42 days after the company's return date.

(2) The company's return date is, in respect of a particular year, the anniversary of the date of the company's incorporation in that year.

(3) A public company or a company limited by guarantee must in respect of every financial year deliver to the Registrar an annual return specified in subsection (5) within 42 days after the company's return date.

(4) The company's return date is, in respect of a particular financial year –

(*a*) if the company is a public company, the date that is 6 months after the company's accounting reference date; and

(*b*) if the company is a company limited by guarantee, the date that is 9 months after the company's accounting reference date.

(5) An annual return under this section must –

(*a*) comply with the requirements under section 12.132; and

(*b*) be authenticated by a director or secretary of the company.

(6) If a company contravenes subsection (1) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(7) If a person is convicted of an offence under subsection (6), the magistrate may, in addition to any penalty that may be imposed, order that the person must, within a time specified in the order do the act that the person has failed to do.

(8) A person who contravenes an order under subsection (7) commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(9) In this section –

"accounting reference date" (會計參照日) has the meaning given by section 9.7.

12.131 Exemption of dormant company from requirement to deliver annual return

(1) A company that is a dormant company under section 1.5(1) is exempt from complying with section 12.130.

(2) If, during the period between the date on which a company becomes a dormant company under section 1.5(1) and the date on which the company ceases to be a dormant company under section 1.5(4), the company enters into an accounting transaction as defined in section 1.5(5), then –

(*a*) the exemption under subsection (1) ceases as from the date of the accounting transaction; and

(*b*) any shareholder of the company who knew or ought to have known about the accounting transaction and all directors of the company are personally liable for any debt or liability of the company arising out of the accounting transaction.

(3) In subsection (2)(*b*) –

"director" (董事) includes a shadow director.

12.132 Contents of annual return

(1) A company's annual return under section 12.130 must –

(*a*) be in the specified form; and

(*b*) contain, with respect to the company, the particulars specified in the form.

(2) Without limiting section 2.5, the Registrar may, for the purposes of this section, specify different forms or particulars in relation to different types of companies.

(3) Without limiting subsection (1), an annual return under section 12.130 must –

(*a*) contain the information specified in the Schedule; and

(*b*) be accompanied by the documents specified in that Schedule.

(4) The Registrar may, by order published in the Gazette, amend the Schedule.

12.133 Application and saving

(1) This Division and the Schedule apply to annual returns made up to a date on or after the commencement of this Division and the Schedule.

(2) Sections 107 and 109 of the predecessor Ordinance continue to apply to annual returns made up to a date before the commencement of this Division and the Schedule.

(3) A reference in this Ordinance to a company's last return, or to a return delivered in accordance with this Division, is to be construed as including (so far as necessary to ensure the continuity of the law) a return made up to a date before the commencement of this Division and the Schedule, or forwarded to the Registrar in accordance with the predecessor Ordinance.

SCHEDULE [ss. 12.132 & 12.133]

INFORMATION TO BE CONTAINED IN ANNUAL RETURN AND DOCUMENTS BY WHICH ANNUAL RETURN MUST BE ACCOMPANIED

PART 1

INFORMATION TO BE CONTAINED IN ANNUAL RETURN

1. An annual return under section 12.130(1) or (3) must contain the following information in respect of the company –

(*a*) the company name, its registered number and business name (if any);

(*b*) the type of company;

(*c*) the address of the registered office of the company;

(*d*) the date of the return;

(*e*) particulars of the total amount of the indebtedness of the company in respect of all mortgages and charges that –

(i) are required to be registered with the Registrar under this Ordinance; or

(ii) would have been required to be so registered if created after 1 January 1912;

(*f*) in the case of a company having a share capital –

(i) particulars relating to members and share capital of the company; and

(ii) if the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the amount of stock held by each of the existing members;

(*g*) in the case of a company not having a share capital, except for a company registered with an unlimited number of members, the number of members of the company;

(*h*) if any company records are kept at a place other than the company's registered office, the address of that place and the records that are kept there;

(*i*) particulars with respect to –

(i) the persons who at the date of the return are the directors of the company; and

(ii) any person who at that date is a secretary of the company or a reserve director of the company,

that are by this Ordinance required to be contained with respect to them in the register of directors and register of secretaries of a company.

2. In the case of a listed company, the particulars relating to members as required under section 1(*f*)(i) of this Schedule are limited to those relating to members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return.

3. In the case of a company that keeps a branch register of members in accordance with section 12.102(1), the particulars of the entries in that register need not be included in the annual return if copies of those entries have not been received at the registered office of the company. Those particulars must, so far as they relate to matters that are required to be contained in the annual return, be included in the next annual return after copies of those entries are received at the registered office of the company.

PART 2

ADDITIONAL INFORMATION TO BE CONTAINED IN ANNUAL RETURN OF PRIVATE COMPANY

1. An annual return under section 12.130(1) must also contain the following information in respect of the private company –

(*a*) a statement authenticated by a director or secretary of the company that the company has not –

(i) since the date of the last return; or

(ii) in the case of a first return, since the date of the incorporation of the company,

issued any invitation to the public to subscribe for any shares or debentures of the company; and

(*b*) if the annual return discloses the fact that the number of members of the company exceeds 50, a statement authenticated by a director or secretary of the company that the excess consists wholly of persons who, under

section 1.10(2), are excluded in the calculation of the number of members of the company.

PART 3

DOCUMENTS BY WHICH ANNUAL RETURN OF PUBLIC COMPANY OR COMPANY LIMITED BY GUARANTEE MUST BE ACCOMPANIED

1. An annual return under section 12.130(3) must be accompanied by –

(*a*) copies of the documents required to be sent to every member of the company under section 9.52, certified by a director or secretary of the company to be true copies; and

(*b*) if any of the documents mentioned in paragraph (*a*) is in a language other than English or Chinese, a certified translation (to be annexed to that document) in English or Chinese of the document.

PART 14

REMEDIES FOR PROTECTION OF COMPANIES' OR MEMBERS' INTERESTS

Division 1 – Preliminary

14.1 Interpretation

In this Part –

"company" (公司) includes a non-Hong Kong company.

Division 2 – Remedies for Unfair Prejudice to Members' Interests

14.2 Interpretation

(1) In this Division, a reference to a member of a company includes –

(*a*) the personal representative of a person who, immediately before the person's death, was a member of the company; and

(*b*) a trustee of, or a person beneficially interested in, the shares of the company by virtue of the will or intestacy of another person who, immediately before that other person's death, was a member of the company.

(2) In this Division, a reference to a past member of a company includes the personal representative of a person who, immediately before the person's death, was a past member of the company.

(3) For the purposes of this Division, a person is not a past member of a company unless –

(*a*) the person was, but is no longer, a member of the company; and

(*b*) the person ceased to be such a member on or after 15 July 2005.

14.3 When Court may order remedies

(1) The Court of First Instance may exercise the power under section 14.4(1)(*a*) and (2) if, on a petition by a member of a company, it considers that –

(*a*) the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members (including the member); or

(*b*) an actual or proposed act or omission of the company (including one done or made on behalf of the company) is or would be so prejudicial.

(2) The Court of First Instance may exercise the power under section 14.4(1)(*b*) and (2) if, on a petition by the Financial Secretary under section 19.44(3),[25] it considers that –

(*a*) a company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members; or

(*b*) an actual or proposed act or omission of a company (including one done or made on behalf of the company) is or would be so prejudicial.

(3) The Court of First Instance may exercise the power under section 14.4(4) if, on a petition by a past member of a company, it considers that at the time when the past member was a member of the company –

(*a*) the company's affairs were conducted in a manner unfairly prejudicial to the interests of the members at that time generally or of one or more members at that time (including the past member); or

[25] A consultation draft of Part 19 will be published later.

(*b*) an actual act or omission of the company (including one done or made on behalf of the company) was so prejudicial.

14.4 Remedies that Court may order

(1) The Court of First Instance may –

(*a*) for the purposes of section 14.3(1), make any order that it thinks fit for giving relief in respect of the matter mentioned in section 14.3(1)(*a*) or (*b*); and

(*b*) for the purposes of section 14.3(2), make any order that it thinks fit for giving relief in respect of the matter mentioned in section 14.3(2)(*a*) or (*b*).

(2) Without limiting subsection (1), the Court of First Instance –

(*a*) may make any or all of the following orders –

(i) an order –

(A) restraining the continuance of the conduct of the company's affairs in the manner mentioned in section 14.3(1)(*a*) or (2)(*a*);

(B) restraining the doing of the act mentioned in section 14.3(1)(*b*) or (2)(*b*); or

(C) requiring the doing of an act that, as mentioned in section 14.3(1)(*b*) or (2)(*b*), the company has omitted, or has proposed to omit, to do;

(ii) an order that proceedings that the Court thinks fit be brought in the company's name against any person, and on any terms, that the Court so orders;

(iii) an order appointing a receiver or manager of either or both of the following –

(A) the company's property, or any part of the property;

(B) the company's business, or any part of the business;

(iv) any other order that the Court thinks fit, whether –

(A) for regulating the conduct of the company's affairs in future;

(B) for the purchase of the shares of any member of the company by another member of the company;

(C) for the purchase of the shares of any member of the company by the company and the reduction accordingly of the company's capital; or

(D) for the purpose; and

(*b*) may order the company or any other person to pay any damages, and any interest on those damages, that the Court thinks fit to a member of the company whose interests have been unfairly prejudiced by the conduct of the company's affairs or by the act or omission.

(3) The Court of First Instance may, on making an order under subsection (2)(*a*)(iii), specify the powers and duties of, and fix the remuneration of, the receiver or manager.

(4) For the purposes of section 14.3(3), the Court of First Instance may order the company or any other person to pay any damages, and any interest on those damages, that the Court thinks fit to a member of the company at the material time whose interests were unfairly prejudiced by the conduct of the company's affairs or by the act or omission.

(5) To avoid doubt, a member, past or present, of a company is not entitled to recover, by way of damages under subsection (2)(*b*) or (4), any loss

that solely reflects the loss suffered by the company that only the company is entitled to recover under the common law.

(6) In this section –

"material time" (關鍵時間) means the time when the past member was a member of the company.

14.5 Alteration of constitution by Court order

(1) This section applies if a company's constitution is altered by an order under section 14.4.

(2) The alteration has the same effect, and this Ordinance applies to the constitution, as if the alteration were made by a resolution of the company.

(3) Despite anything in this Ordinance, the company has no power, without the leave of the Court of First Instance, to alter the constitution in a way that is inconsistent with the order.

(4) Within 14 days after the order is made, the company must deliver an office copy of the order to the Registrar for registration.

(5) If a company contravenes subsection (4), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(6) In this section, a reference to an alteration made to a company's constitution includes an addition made to the constitution.

14.6 Chief Justice may make rules

(1) Subject to the approval of the Legislative Council, the Chief Justice may make rules –

(*a*) for regulating proceedings under this Division; and

(*b*) for prescribing fees payable in respect of such proceedings.

(2) If the rules empower a person to put a question to another person, they may also provide that that other person's reply to the question may be used in evidence against that other person.

(3) The rules may empower the Court of First Instance –

(*a*) to fix any fee payable in respect of such proceedings that is not prescribed by the rules; and

(*b*) to vary the fee so fixed.

(4) The rules may provide that a fee payable to a person in respect of such proceedings is recoverable as a debt due to the person.

(5) A fee may be prescribed by the rules, or fixed or varied by the Court of First Instance under the rules, by reference to a scale of fees and percentages.

(6) A fee may be so prescribed, fixed or varied without reference to the amount of administrative or other costs incurred or likely to be incurred in relation to such proceedings.

(7) A fee so prescribed, fixed or varied is not invalid by reason only of the amount of the fee.

14.7 Transitional arrangements

(1) If, before 15 July 2005, a petition has been presented for an order under section 168A of the Companies Ordinance (Cap. 32) as in force immediately before that date, that section continues to apply in relation to the petition as if it had not been amended by section 4 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

(2) If, on or after 15 July 2005 but before the commencement of this Division, a petition has been presented for an order under section 168A of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, that section continues to apply in relation to the petition as if it had not been repealed.

Division 3 – Remedies for Others' Conduct in relation to Companies etc.

14.8 Application of section 14.9

(1) Section 14.9 applies if, in relation to a company –

(*a*) a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –

(i) a contravention of this Ordinance;

(ii) a default relating to a contravention of this Ordinance; or

(iii) a breach specified in subsection (4); or

(*b*) a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Ordinance to do.

(2) Section 14.9 also applies if, in relation to a company –

(*a*) a person had engaged, was engaging or was proposing to engage, before the commencement of this section, in –

(i) conduct that constituted or would constitute a contravention of the predecessor Ordinance and that would constitute a contravention of this Ordinance as well;

(ii) conduct that constituted or would constitute a default relating to a contravention of the predecessor Ordinance and that would constitute the same default relating to a contravention of this Ordinance as well; or

(iii) conduct that constituted or would constitute a breach specified in subsection (4); and

(*b*) the engagement or proposal still subsists.

(3) Section 14.9 also applies if, in relation to a company –

(*a*) a person had refused or failed, was refusing or failing, or was proposing to refuse or fail, before the commencement of this section, to do an act or thing that the person was required by the predecessor Ordinance to do;

(*b*) the person is required by this Ordinance to do the act or thing as well; and

(*c*) the refusal, failure or proposal still subsists.

(4) The breach specified for the purposes of subsection (1)(*a*)(iii) or (2)(*a*)(iii) is –

(*a*) a breach of the person's fiduciary duties owed to the company in any capacity other than as a director of the company;

(*b*) a breach of the person's fiduciary or other duties as a director of the company owed to the company; or

(*c*) a breach of the company's constitution.

(5) In this section, a reference to a default relating to a contravention of this Ordinance or the predecessor Ordinance is a reference to –

(*a*) an attempt to contravene the Ordinance;

(*b*) aiding, abetting, counselling or procuring another person to contravene the Ordinance;

(*c*) inducing or attempting to induce, whether by threats, promises or otherwise, another person to contravene the Ordinance;

(*d*) the person being in any way, directly or indirectly, knowingly concerned in, or a party to, a contravention of the Ordinance by another person; or

(*e*) conspiring with others to contravene the Ordinance.

14.9 Court may order remedies

(1) The Court of First Instance may, on application by the Financial Secretary under section 19.44(4) or (5), do any or all of the following –

(*a*) grant an injunction, on the terms that the Court thinks fit –

(i) in the case of section 14.8(1)(*a*) or (2), restraining the person from engaging in the conduct or requiring the person to do any act or thing; or

(ii) in the case of section 14.8(1)(*b*) or (3), requiring the person to do any act or thing;

(*b*) order the person to pay damages to any other person;

(*c*) declare any contract to be void or voidable to the extent specified in the order.

(2) The Court of First Instance may, on application by a member or creditor of the company whose interests have been, are or would be affected by the conduct or by the refusal or failure, do any or all of the following –

(*a*) grant an injunction, on the terms that the Court thinks fit –

(i) in the case of section 14.8(1)(*a*) or (2), restraining the person from engaging in the conduct or requiring the person to do any act or thing; or

(ii) in the case of section 14.8(1)(*b*) or (3), requiring the person to do any act or thing;

(*b*) order the person to pay damages to any other person;

(*c*) declare any contract to be void or voidable to the extent specified in the order.

(3) The Court of First Instance may grant an injunction under subsection (1)(*a*)(i) or (2)(*a*)(i) restraining a person from engaging in a conduct –

(*a*) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in the conduct;

(*b*) whether or not the person has previously engaged in the conduct; and

(*c*) whether or not there is an imminent danger of substantial damage to any other person if the person engages in the conduct.

(4) The Court of First Instance may grant an injunction under subsection (1)(*a*) or (2)(*a*) requiring a person to do an act or thing –

(*a*) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do the act or thing;

(*b*) whether or not the person has previously refused or failed to do the act or thing; and

(*c*) whether or not there is an imminent danger of substantial damage to any other person if the person refuses or fails to do the act or thing.

(5) To avoid doubt, a person is not entitled to recover, by way of damages under subsection (1)(*b*) or (2)(*b*), any loss that solely reflects the loss suffered by the company that only the company is entitled to recover under the common law.

14.10 Provisions supplementary to section 14.9

(1) The Court of First Instance may grant an interim injunction or interim damages, or both, on the terms and conditions that it thinks fit pending the determination of an application under section 14.9(1) or (2).

(2) The Court of First Instance may discharge or vary an injunction granted under subsection (1) or section 14.9(1) or (2).

14.11 Transitional arrangements

If, before the commencement of this Division, an application has been made for the purposes of section 350B of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, that section continues to apply in relation to the application as if it had not been repealed.

Division 4 – Derivative Action for Remedies for Misconduct against Companies etc.

14.12 Interpretation

In this Division –

"misconduct" (不當行為) means fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law;

"proceedings" (法律程序) means any proceedings (other than criminal proceedings) within the jurisdiction of the court.

14.13 Member of company or of associated company may bring or intervene in proceedings

(1) If misconduct is committed against a company, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, bring proceedings in respect of the misconduct before the Court on behalf of the company.

(2) If, because of misconduct committed against the company, a company fails to bring proceedings in respect of any matter, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, bring proceedings in respect of the matter before the court on behalf of the company.

(3) If, because of misconduct committed against the company, a company fails to diligently continue, discontinue or defend proceedings, a member of the company or of an associated company of the company may, with the leave of the Court of First Instance granted under section 14.14, intervene in

the proceedings before the court for the purpose of continuing, discontinuing or defending those proceedings on behalf of the company.

(4) The cause of action in relation to the proceedings under subsection (1) or (2) is vested in the company. Any of those proceedings must be brought in the name of, and the relief (if any) must be sought on behalf of, the company.

(5) The right to continue, discontinue or defend any proceedings intervened in under subsection (3) is vested in, and the relief (if any) must be sought on behalf of, the company.

(6) Subject to section 14.17, this Division does not affect any common law right of a member of a company, or a member of an associated company of a company, to bring proceedings on behalf of the company, or intervene in any proceedings to which the company is a party.

(7) This section does not prevent a member of a company, or of an associated company of a company, from bringing proceedings in respect of the company, or intervening in any proceedings to which the company is a party, on the member's own behalf in respect of any personal right.

14.14 Leave of Court to bring or intervene in proceedings

(1) On application by a member of a company or of an associated company of a company, the Court of First Instance may grant leave for the purposes of section 14.13(1), (2) or (3) if it is satisfied that –

(*a*) on the face of the application, it appears to be in the company's interests that leave be granted to the member;

(*b*) in the case of –

(i) an application for leave to bring proceedings under section 14.13(1) or (2), there is a serious question to be tried and the company has not itself brought the proceedings; or

(ii) an application for leave to intervene in proceedings under section 14.13(3), the company

has not diligently continued, discontinued or defended the proceedings; and

(*c*) except where leave is granted by the Court under subsection (5), the member has served a written notice on the company in compliance with subsections (3) and (4).

(2) The Court of First Instance may refuse to grant leave if it is satisfied that –

(*a*) in the case of an application for leave to bring proceedings under section 14.13(1) or (2), the member has, in the exercise of any common law right, brought proceedings on behalf of the company in respect of the same cause or matter; or

(*b*) in the case of an application for leave to intervene in proceedings under section 14.13(3), the member has, in the exercise of any common law right, intervened in the proceedings in question to which the company is a party.

(3) The written notice must be served on the company, at least 14 days before the member applies for leave in respect of the company, by leaving the notice at, or by sending the notice by post to –

(*a*) in the case of a company as defined by section 1.2(1), its registered office; or

(*b*) in the case of a non-Hong Kong company, the address of an authorized representative of the company shown in the Register.

(4) The written notice must state –

(*a*) the member's intention to apply for leave for the purposes of section 14.13(1), (2) or (3) in respect of the company; and

(*b*) the reasons for that intention.

(5) The Court of First Instance may grant leave to dispense with the service of a written notice for the purposes of subsection (1)(*c*).

14.15 Approval or ratification of conduct does not bar derivative action

(1) If a company's members approve or ratify any conduct, the approval or ratification –

(*a*) does not prevent a member of the company, or of an associated company of the company, from –

(i) bringing proceedings under section 14.13(1) or (2);

(ii) intervening in proceedings under section 14.13(3); or

(iii) applying for leave for the purposes of section 14.13(1), (2) or (3);

(*b*) is not a ground for the Court of First Instance to refuse to grant leave for the purposes of section 14.13(1), (2) or (3); or

(*c*) is not a ground for the court to determine the proceedings brought or intervened in by the member in favour of the defendant.

(2) Despite subsection (1), the court may, after having regard to the matters specified in subsection (3), take the approval or ratification into account in deciding what judgment or order to make in respect of –

(*a*) any proceedings brought or intervened in under section 14.13(1), (2) or (3); or

(*b*) an application for leave for the purposes of section 14.13(1), (2) or (3).

(3) The matters are –

(*a*) whether the members were acting for proper purposes, having regard to the company's interests, when they approved or ratified the conduct;

(*b*) to what extent those members were connected with the conduct, when they approved or ratified the conduct; and

(*c*) how well-informed about the conduct those members were, when they decided whether or not to approve or ratify the conduct.

14.16 No discontinuance or settlement of proceedings without leave of Court

If proceedings are brought or intervened in under section 14.13(1), (2) or (3), the proceedings must not be discontinued or settled without the leave of the Court of First Instance.

14.17 Court may dismiss derivative proceedings brought by member under common law etc.

(1) This section applies if –

(*a*) after the Court of First Instance grants leave to a member of a company, or of an associated company of a company, for the purposes of section 14.13(1) or (2), the member, in the exercise of any common law right, brings proceedings on behalf of the company in respect of the same cause or matter; or

(*b*) after the Court of First Instance grants leave to a member of a company, or of an associated company of a company, for the purposes of section 14.13(3), the member, in the exercise of any common law right, intervenes in the proceedings in question to which the company is a party.

(2) The Court of First Instance may –

(*a*) order to be amended any pleading or the indorsement of any writ in the proceedings brought under the common law, or in the intervention under the common law;

(*b*) order to be struck out such pleading or that indorsement, or anything in such pleading or that indorsement; and

(*c*) order the proceedings brought under the common law, or the intervention under the common law, to be stayed or dismissed or judgment to be entered accordingly.

(3) This section is in addition to, and does not derogate from, any power of the Court of First Instance given by the law.

14.18 Court's general powers to order and direct

(1) The Court of First Instance may make any order, and give any direction, that it thinks fit in respect of –

(*a*) any proceedings brought or intervened in under section 14.13(1), (2) or (3);

(*b*) an application for leave for the purposes of section 14.13(1), (2) or (3);

(*c*) a refusal to grant such leave; or

(*d*) an order under section 14.17(2).

(2) Without limiting subsection (1), the Court of First Instance may do any or all of the following under paragraph (*a*) or (*b*) of that subsection –

(*a*) make an interim order pending the determination of the proceedings or application;

(*b*) give a direction concerning the conduct of the proceedings or application;

(*c*) make an order directing the company, or an officer of the company –

(i) to provide, or not to provide, any information or assistance that the Court thinks fit for the purpose of the proceedings or application; or

(ii) to do, or not to do, any other act;

(*d*) make an order appointing an independent person to investigate and report to the Court on –

(i) the company's financial position;

(ii) the facts or circumstances that gave rise to the proceedings or application; or

(iii) the costs incurred by the parties to the proceedings or application, and by the member who brought or intervened in the proceedings or who made the application.

(3) If the Court of First Instance appoints an independent person under subsection (2)(*d*), it may –

(*a*) order any or all of the following persons to be liable for any expenses arising out of the investigation –

(i) the company;

(ii) the parties to the proceedings or application;

(iii) the member who brought or intervened in the proceedings or who made the application;

(*b*) review, vary or revoke an order made under paragraph (*a*); and

(*c*) make any other order that it thinks fit for the purposes of that subsection.

(4) The Court of First Instance may, in relation to one or more persons who are liable for any expenses under an order made or varied under subsection (3), determine the nature and extent of the liability of the person or each of the persons.

14.19 Court may order costs

(1) The Court of First Instance may make any order that it thinks fit about the costs –

(*a*) incurred or to be incurred in relation to –

(i) any proceedings brought or intervened in, or to be brought or intervened in, under section 14.13(1), (2) or (3); or

(ii) an application for leave for the purposes of section 14.13(1), (2) or (3); and

(*b*) incurred or to be incurred by the member, the company, or any other parties to the proceedings or application.

(2) An order may require the company to indemnify, out of its assets, the member against the costs incurred or to be incurred by that member in bringing or intervening in the proceedings or in making the application.

(3) The Court of First Instance may only make an order about costs (including the requirement as to indemnification) under this section in favour of the member if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings or making the application.

14.20 Transitional arrangements

If, before the commencement of this Division, an application has been made for leave to bring or intervene in proceedings under section 168BC of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, Part IVAA of the Companies Ordinance (Cap. 32) as in force immediately before that commencement continues to apply in relation to the application and, where leave is granted to bring or intervene in proceedings, to the proceedings so brought or intervened in, as if that Part had not been repealed.

Division 5 – Members' Inspection of Company's Records

14.21 Interpretation

In this Division –

"record" (紀錄) includes books and paper.

14.22 Court may order inspection of records

(1) On application by a required number of a company's members, the Court of First Instance may make an order –

(*a*) authorizing a person who is the applicant or one of the applicants to inspect any records of the company; or

(*b*) authorizing a person who is not the applicant or one of the applicants to inspect any records of the company on behalf of the applicant or applicants.

(2) The Court of First Instance may make an order authorizing a person to inspect records if it is satisfied that –

(*a*) the application is made in good faith; and

(*b*) the inspection is for a proper purpose.

(3) If the Court of First Instance makes an order authorizing a person to inspect records, the person may, unless the Court otherwise orders, make copies of the records.

(4) If the Court of First Instance makes an order authorizing a person to inspect records, it may make any other order that it thinks fit, including –

(*a*) an order requiring the company, or an officer of the company, to produce any records to the person;

(*b*) an order specifying the records that may be inspected by the person;

(*c*) an order requiring the applicant to pay the expenses reasonably incurred by the company in the inspection; and

(*d*) an order permitting the person to disclose any information or document obtained as a result of the inspection to any other person specified in the order.

(5) A person who complies with an order made under subsection (1) or (4) does not incur any civil liability by reason only of the compliance.

(6) In this section, a reference to a required number of a company's members is a reference to –

(*a*) the number of members that represents at least 2.5% of the voting rights of all the members having a right to vote at the company's general meetings at the date of application;

(*b*) the number of members that holds shares in the company on which there has been paid up an aggregate sum of at least $100,000; or

(*c*) at least 5 members of the company.

14.23 Preservation of secrecy

(1) If, on application by one or more members of a company, the Court of First Instance makes an order under section 14.22(1) authorizing a person to inspect records, the person must not, without the company's prior consent in writing, disclose any information or document obtained as a result of the inspection to another person who is not an applicant.

(2) Despite subsection (1), the person may disclose such information or document to another person if the disclosure is –

(*a*) required with a view to the institution of, or otherwise for the purpose of, any criminal proceedings;

(*b*) permitted in accordance with an order made under section 14.22(1) or (4); or

(*c*) permitted in accordance with law or a requirement made under law.

(3) If the Court of First Instance makes an order under section 14.22(1) authorizing a person to inspect records, the person must not, unless the Court otherwise orders, use any information or document obtained as a result of the inspection for any purpose other than the purpose for which the inspection is applied for.

(4) A person who contravenes subsection (1) or (3) commits an offence and is liable –

(*a*) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

14.24 Legal professional privilege

Section 14.22, or an order made under it, does not authorize a person to inspect any records containing information that is subject to legal professional privilege.

14.25 Transitional arrangements

If, before the commencement of this Division, an application has been made for an order for inspection under section 152FA of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, sections 152FA, 152FB, 152FC, 152FD and 152FE of the Companies Ordinance (Cap. 32) as in force immediately before that commencement continue to apply in relation to the application and, where an order for inspection is made, to the inspection, as if they had not been repealed.

PART 15

DISSOLUTION BY STRIKING OFF OR DEREGISTRATION

Division 1 – Striking off

Subdivision 1 – Registrar's Power to Strike off Name of Company not in Operation or Carrying on Business

15.1 Registrar may send inquiry letter to company

(1) If the Registrar has reasonable cause to believe that a company is not in operation or carrying on business, the Registrar may send to the company by post a letter inquiring whether the company is in operation or carrying on business.

(2) A letter must be addressed –

(*a*) to the company at its registered office;

(*b*) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or

(*c*) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(3) If the Registrar is of the opinion that the address of the company's registered office cannot be ascertained or that a letter under subsection (1) is unlikely to be received by the company, the Registrar may, instead of sending a letter under that subsection, publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Register, and the company dissolved, at the end of 3 months after the date of the notice.

15.2 Registrar must follow up if no answer to inquiry letter

(1) If the Registrar does not receive a reply to the letter within one month after sending it under section 15.1(1), the Registrar must, within 30 days after the end of that one month –

(*a*) subject to subsection (3), send to the company by registered post another letter referring to the letter sent under that section and stating that no reply to it has been received; and

(*b*) publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Register, and the company dissolved, at the end of 3 months after the date of the notice.

(2) A letter must be addressed –

(*a*) to the company at its registered office;

(*b*) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or

(*c*) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(3) The Registrar is not required to send a letter to the company under subsection (1)(*a*) if the Registrar is of the opinion that the address of the company's registered office cannot be ascertained or that the letter is unlikely to be received by the company.

15.3 Registrar may strike off company's name

(1) After publishing a notice under section 15.1(3) or 15.2(1)(*b*), the Registrar may, unless cause is shown to the contrary, strike the company's name off the Register at the end of 3 months after the date of the notice.

(2) The Registrar must publish in the Gazette a notice indicating that the company's name has been struck off the Register.

(3) On the publication of the notice under subsection (2), the company is dissolved.

Subdivision 2 – Striking off under Other Circumstances

15.4 Registrar's duty to act in case of company being wound up

(1) Subsection (2) applies if –

(*a*) a company is being wound up;

(*b*) the Registrar has reasonable cause to believe that –

(i) no liquidator is acting; or

(ii) the company's affairs are fully wound up; and

(*c*) the returns required to be made by the liquidator have not been made for 6 consecutive months.

(2) Subject to subsection (5), the Registrar must publish in the Gazette, and send to the company or the liquidator (if any), a notice that, unless cause is shown to the contrary, the company's name will be struck off the Register, and the company dissolved, at the end of 3 months after the date of the notice.

(3) A notice to be sent to a company must be addressed –

(*a*) to the company at its registered office;

(*b*) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or

(*c*) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(4) A notice to be sent to a liquidator must be addressed to the liquidator at the liquidator's last known address.

(5) The Registrar is not required to send a notice to the company or liquidator under subsection (2) if the Registrar is of the opinion that –

(*a*) the address of the company's registered office, or the name and address of the liquidator, as the case may be, cannot be ascertained; or

(*b*) the notice is unlikely to be received by the company or liquidator, as the case may be.

(6) After publishing a notice under subsection (2), the Registrar may, unless cause is shown to the contrary, strike the company's name off the Register at the end of 3 months after the date of the notice.

(7) The Registrar must publish in the Gazette a notice indicating that the company's name has been struck off the Register.

(8) On the publication of the notice under subsection (7), the company is dissolved.

15.5 Court may strike off name of company not appropriate to be wound up

(1) If, on application by the Registrar, it appears to the Court of First Instance that a company should be dissolved but, having regard to the company's assets or for other reasons, it would not be appropriate to wind up the company, the Court may order that the company's name be struck off the Register and the company dissolved.

(2) If an order is made, the company is dissolved on the date of the order.

Division 2 – Deregistration

15.6 Interpretation

(1) In this Division –

"company" (公司) excludes –

(*a*) a listed company; and

(*b*) a company specified in subsection (2).

(2) The company is –

(*a*) an authorized institution as defined by section 2(1) of the Banking Ordinance (Cap. 155);

(*b*) an insurer as defined by section 2(1) and (2) of the Insurance Companies Ordinance (Cap. 41);

(*c*) a corporation licensed under Part V of the Securities and Futures Ordinance (Cap. 571) to carry on a business in any regulated activity as defined by section 1 of Part 1 of Schedule 1 to that Ordinance;

(*d*) an associated entity, within the meaning of Part VI of the Securities and Futures Ordinance (Cap. 571), of a corporation mentioned in paragraph (*c*);

(*e*) an approved trustee as defined by section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);

(*f*) a company registered as a trust company under Part VIII of the Trustee Ordinance (Cap. 29);

(*g*) a company having a subsidiary that falls within paragraph (*a*), (*b*), (*c*), (*d*), (*e*) or (*f*); or

(*h*) a company that fell within paragraph (*a*), (*b*), (*c*), (*d*), (*e*), (*f*) or (*g*) at any time during the 5 years immediately before the application under section 15.7 is made.

(3) The Financial Secretary may, by order published in the Gazette, amend subsection (2).

15.7 Application for deregistration

(1) A company, or a director or member of a company, may apply to the Registrar for deregistration of the company.

(2) An application must not be made unless, at the time of the application –

(*a*) all the members agree to the deregistration;

(*b*) the company has not commenced operation or business, or has not been in operation or carried on business during the 3 months immediately before the application;

(*c*) the company has no outstanding liabilities;

(*d*) the company is not a party to any legal proceedings; and

(*e*) the company's assets do not consist of any immovable property situate in Hong Kong.

(3) An application must –

(*a*) be in the specified form;

(*b*) be accompanied by the prescribed fee; and

(*c*) be accompanied by a written notice from the Commissioner of Inland Revenue stating that the Commissioner has no objection to the company being deregistered.

(4) If the applicant is a company, it must nominate in the application a natural person to be given notice of the deregistration.

(5) The applicant must give the Registrar any further information that the Registrar may request in connection with an application.

(6) The Registrar may assume without inquiry that any information given in connection with an application is true unless it is proved to the Registrar's satisfaction, in an objection to the deregistration or otherwise, that the information is false.

(7) A person who, in connection with an application, knowingly or recklessly gives any information to the Registrar that is false or misleading in a material particular commits an offence and is liable –

(*a*) on conviction on indictment to a fine of $300,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

15.8 Registrar may deregister company

(1) On receiving an application under section 15.7, the Registrar must publish in the Gazette a notice of the proposed deregistration unless the Registrar is aware of a failure to comply with subsection (2), (3), (4) or (5) of that section.

(2) The notice must state that unless an objection to the deregistration is received within 3 months after the date of publication of the notice, the Registrar may deregister the company.

(3) If, at the end of those 3 months, the Registrar has not received any objection to the deregistration, the Registrar may deregister the company by publishing in the Gazette another notice declaring it to be deregistered on the date of publication of that other notice.

(4) On deregistering a company, the Registrar must also give notice of the deregistration to the applicant, or to the person nominated in the application to be given the notice.

(5) A company is dissolved on deregistration.

Division 3 – Property of Dissolved Company and Other Miscellaneous Matters

15.9 Dissolved company's property vested in Government

(1) If a company is dissolved under this Part, every property and right vested in or held on trust for the company immediately before the dissolution is vested in the Government as bona vacantia.

(2) Subsection (1) has effect subject to the possible restoration of the company to the Register under Division 4.

(3) If any property or right is vested in the Government under subsection (1), the property or right –

(*a*) remains subject to the liabilities imposed on the property or right by law; and

(*b*) does not have the benefit of any exemption that it might otherwise have as a property or right vested in the Government.

(4) Despite subsection (3)(*a*), the Government is only required to satisfy those liabilities out of the property or right to the extent that it is properly available to satisfy those liabilities.

(5) In this section –

(*a*) a reference to a property or right vested in or held on trust for a company includes a leasehold property and excludes a property or right held by the company on trust for any other person; and

(*b*) a reference to a liability imposed on a property or right by law includes a liability that –

(i) is a charge or claim on the property or right; and

(ii) arises under an Ordinance that imposes rates, taxes or other charges.

15.10 Disclaimer of dissolved company's property

(1) If any property or right, other than immovable property situate in Hong Kong, is vested in the Government under section 15.9(1), the Registrar may, on his or her own initiative or on written application by a person interested in the property or right, disclaim the Government's title to the property or right by a notice of disclaimer.

(2) If the Registrar disclaims the Government's title to any property or right on his or her own initiative, the Registrar must do so within 3 years after the date on which the fact that the property or right is vested in the Government under section 15.9(1) first came to the Registrar's notice.

(3) If the Registrar disclaims the Government's title to any property or right on application by a person, the Registrar must do so within whichever of the following periods ends first –

(*a*) 3 years after the date on which the fact that the property or right is vested in the Government under section 15.9(1) first came to the Registrar's notice;

(*b*) 3 months after the Registrar's receipt of the application.

(4) A notice of disclaimer is of no effect if it is signed after the end of the period within which the Registrar must disclaim the Government's title to the property or right.

(5) If a notice of disclaimer contains a statement that –

(*a*) the fact that the property or right is vested in the Government under section 15.9(1) first came to the Registrar's notice on a date specified in the statement; or

(*b*) no application for a disclaimer with respect to the property or right was received by the Registrar before a date specified in the statement,

the statement is sufficient evidence of the matter stated in it unless the contrary is proved.

(6) The Registrar must –

(*a*) register a notice of disclaimer;

(*b*) publish in the Gazette a copy of the notice; and

(*c*) send a copy of the notice to the person who made the application for the purposes of subsection (1).

(7) The right to disclaim under this section may be waived by or on behalf of the Government either expressly, or by taking possession or other act showing an intention to waive the right.

15.11 Effect of disclaimer

(1) If the Registrar disclaims the Government's title to any property or right under section 15.10, the property or right is to be regarded as not having been vested in the Government under section 15.9(1).

(2) A disclaimer –

(*a*) terminates, with effect on or after the date of the disclaimer, the company's rights, interests and liabilities in or in respect of the property or right disclaimed; and

(*b*) except so far as is necessary for the purpose of releasing the company from any liability, does not affect any other person's rights or liabilities.

15.12 Court may make vesting order

(1) On application by a person who –

(*a*) claims an interest in any property or right disclaimed under section 15.10; or

(*b*) is subject to a liability in respect of such property or right that is not discharged by the disclaimer,

the Court of First Instance may make an order for the vesting of the property or right in, or its delivery to, a person entitled to it, or a person subject to the liability mentioned in paragraph (*b*), or a trustee for a person so entitled or subject.

(2) An order may be made on the terms that the Court of First Instance thinks fit.

(3) An order for the vesting of a property or right in, or its delivery to, a person subject to a liability may only be made if it appears to the Court of First Instance that it would be just to do so for the purpose of compensating the person.

(4) On the making of an order for the vesting of a property or right in, or its delivery to, a person, the property or right is vested in the person without conveyance, assignment or transfer.

15.13 Transitional arrangements for disclaimer of property vested in Government under predecessor Ordinance

If any property or right, other than immovable property, is vested in the Government under section 292 of the predecessor Ordinance, sections 290C and 290D of the Companies Ordinance (Cap. 32) as in force immediately before the commencement of this Subdivision continue to apply in relation to a disclaimer of the Government's title to the property or right as if those sections had not been repealed.

15.14 Liabilities of directors etc. of dissolved company continue

Even though a company is dissolved under this Part, the liability (if any) of every director, manager and member of the company continues and may be enforced as if the company had not been dissolved.

15.15 Registrar may act as dissolved company's or liquidator's representative

(1) This section applies if –

(*a*) a company has been dissolved under this Part or section 291, 291A or 291AA of the predecessor Ordinance; and

(*b*) it is proved to the Registrar's satisfaction that –

(i) the company, if still existing, would be legally or equitably bound to carry out, complete or give effect to a dealing, transaction or matter; and

(ii) in order to carry out, complete or give effect to the dealing, transaction or matter, a purely administrative, not discretionary, act should have been done by or on behalf of the company, or should be done by or on behalf of the company if still existing.

(2) The Registrar may do the act, or cause the act to be done, as the company's or the liquidator's representative.

(3) The Registrar may execute or sign any relevant instrument or document, adding a memorandum stating that the Registrar has done so as the company's or the liquidator's representative.

(4) An instrument or document executed or signed by the Registrar under subsection (3) has the same effect as if the company, if still existing, had executed the instrument or document.

15.16 Former director must keep dissolved company's books and papers for 6 years

(1) If a company is dissolved under this Part, every person who was a director of the company immediately before the dissolution must ensure that the company's books and papers are kept for at least 6 years after the date of the dissolution.

(2) Subsection (1) does not apply to the books and papers that are otherwise required to be kept by another person under this Ordinance or any other Ordinance.

(3) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 3.

15.17 Court's power to wind up dissolved companies

(1) The Court of First Instance's power to wind up a company specified in subsection (2) is not exercisable unless the company is restored to the Register under Division 4.

(2) The company is –

(*a*) one whose name has been struck off the Register under section 15.3 or 15.4 and that is dissolved under that section; or

(*b*) one that has been deregistered, and is dissolved, under section 15.8.

Division 4 – Restoration to Register

Subdivision 1 – Administrative Restoration by Registrar

15.18 Application to Registrar for restoration of company

(1) If a company's name has been struck off the Register under section 15.3 or 15.4, and the company is dissolved under that section, a person who was a director or member of the company may apply to the Registrar for the restoration of the company to the Register.

(2) An application must be made within 6 years after the date of the dissolution. For this purpose, an application is made when it is received by the Registrar.

(3) An application must be accompanied by a statement –

(*a*) that the applicant was a director or member of the company; and

(*b*) that the conditions specified in section 15.19(2) are met.

(4) The Registrar may accept the statement as sufficient evidence of the matters mentioned in subsection (3)(*a*) and (*b*).

15.19 Conditions for granting application

(1) The Registrar must not grant an application made under section 15.18 unless all the conditions specified in subsection (2), and any other conditions that the Registrar thinks fit, are met.

(2) The conditions are –

(*a*) the company was, at the time its name was struck off the Register, in operation or carrying on business;

(*b*) if any immovable property situate in Hong Kong previously vested in or held on trust for the company has

been vested in the Government under section 15.9(1), the applicant has obtained, at the applicant's own costs, the Government's confirmation that it has no objection to the restoration; and

(*c*) the applicant has delivered to the Registrar the documents relating to the company that are necessary to bring up to date the records kept by the Registrar.

(3) For the purposes of subsection (2)(*b*), the costs for obtaining the Government's confirmation include the Government's costs, expenses and liabilities in dealing with the property or right during the period of dissolution, or in connection with the proceedings on the application, that may be demanded as a condition of giving the confirmation.

15.20 Registrar's decision on application

(1) The Registrar must notify the applicant of the decision on an application made under section 15.18.

(2) If the Registrar grants the application, the company is restored to the Register on the date on which notification is given under subsection (1), and the Registrar must register the notification and publish in the Gazette a notice of the restoration.

15.21 Registrar may restore company deregistered by mistake

(1) The Registrar may, on his or her own initiative, restore a company to the Register if satisfied that it has been deregistered, and is dissolved, under section 291AA of the predecessor Ordinance or section 15.8 as a result of a mistake of the Registrar.

(2) In subsection (1), a reference to a mistake of the Registrar excludes a mistake that is made on the basis of wrong or false information given by the applicant in connection with the application for deregistration.

(3) The Registrar may restore a company to the Register by publishing in the Gazette a notice declaring the restoration, and the restoration takes effect on the date of publication of the notice.

15.22 Effect of restoration

(1) If a company is restored to the Register under this Subdivision, it is to be regarded as having continued in existence as if it had not been dissolved.

(2) On application by any person, the Court of First Instance may give any direction, and make any order, as seems just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved.

(3) An application for the purposes of subsection (2) must be made within 3 years after the date of the restoration.

Subdivision 2 – Restoration by Court Order

15.23 Application to Court for restoration

(1) Where a company's name or a company has been struck off the register under section 291 or 291A of the predecessor Ordinance, and the company is dissolved under that section, an application to the Court of First Instance for the restoration of the company to the Register may be made by a person who –

(*a*) was a director or member or creditor of the company; and

(*b*) feels aggrieved by the striking off.

(2) Where a company has been deregistered, and is dissolved, under section 291AA of the predecessor Ordinance, an application to the Court of First Instance for the restoration of the company to the Register may be made by a person who feels aggrieved by the deregistration.

(3) Subsection (4) applies if –

(*a*) a company's name has been struck off the Register under section 15.3 or 15.4, and the company is dissolved under that section; or

(*b*) a company has been deregistered, and is dissolved, under section 15.8.

(4) An application to the Court of First Instance for the restoration of the company to the Register may be made –

(*a*) by a person who was a director or member or creditor of the company; or

(*b*) by any other person, including the Government, who appears to the Court to have an interest in the matter.

15.24 When application must be made

(1) Subject to subsections (2) and (4) –

(*a*) an application under section 15.23(1) must be made within 20 years after the date on which the notice was published in the Gazette under section 291(6), or on which the order was made under section 291A(1), of the predecessor Ordinance;

(*b*) an application under section 15.23(2) must be made within 20 years of the deregistration; and

(*c*) an application under section 15.23(4) must be made within 6 years after the date of the dissolution.

(2) An application under section 15.23 may be made at any time if the purpose of the application is to enable a person to bring proceedings against the company for damages for personal injury.

(3) Subsection (4) applies if –

(*a*) a company's name has been struck off the Register under section 15.3 or 15.4, and the company is dissolved under that section;

(*b*) an application has been made under section 15.18 for the restoration of the company to the Register; and

(*c*) the Registrar has refused the application.

(4) An application under section 15.23(4) must be made –

(*a*) within 6 years after the date of the dissolution or any further time that the Court of First Instance allows on application by the applicant; or

(*b*) if the period of 6 years has ended, within 28 days after the Registrar gives notification of the refusal under section 15.20(1).

(5) In this section –

"damages for personal injury" (人身傷害損害賠償) includes –

(*a*) any sum and damages claimed by virtue of section 20(2)(*b*)(i) of the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23);

(*b*) damages under the Fatal Accidents Ordinance (Cap. 22); and

(*c*) any compensation for death or incapacity under section 5, 6 or 32 of the Employees' Compensation Ordinance (Cap. 282);

"personal injury" (人身傷害) includes any disease and any impairment of a person's physical or mental condition.

15.25 Court's decision on application

(1) The Court of First Instance may grant an application made under section 15.23(1) if satisfied that –

(*a*) the company was, at the time its name or it was struck off, in operation or carrying on business; or

(*b*) it is otherwise just that the company be restored to the Register.

(2) The Court of First Instance may grant an application made under section 15.23(2) if satisfied that it is just that the company be restored to the Register.

(3) The Court of First Instance may grant an application made under section 15.23(4) if satisfied that –

(*a*) in the case of a company whose name has been struck off the Register –

(i) the company was, at the time the name was struck off, in operation or carrying on business; or

(ii) it is otherwise just that the company be restored to the Register; or

(*b*) in the case of a company that has been deregistered –

(i) any of the requirements specified in section 15.7(2)(*a*), (*b*), (*c*), (*d*) or (*e*) was not met; or

(ii) it is otherwise just that the company be restored to the Register.

(4) The Court of First Instance must not grant an application made pursuant to section 15.24(2) if it appears to the Court that the proceedings would fail by reason of an Ordinance limiting the time within which proceedings may be brought.

(5) In making a decision under subsection (4) not to grant an application, the Court of First Instance must have regard to its power under section 15.26(2) to direct that the period between the dissolution of the company and the making of the Court's order does not count for the purposes of the Ordinance.

(6) If the Court of First Instance grants an application made under section 15.23, the applicant must deliver to the Registrar for registration an office copy of the Court's order, and the restoration takes effect on the registration.

(7) After a company is restored to the Register under subsection (6), the Registrar must publish in the Gazette a notice of the restoration.

15.26 Effect of restoration

(1) If a company is restored to the Register under section 15.25, it is to be regarded as having continued in existence as if it had not been dissolved.

(2) The Court of First Instance may give any direction, and make any order, as seems just for placing the company and all other persons in the same position as nearly as may be as if the company had not been dissolved.

(3) The Court of First Instance may also give directions as to –

(*a*) the delivery to the Registrar of the documents relating to the company that are necessary to bring up to date the records kept by the Registrar;

(*b*) the payment of the Registrar's costs in connection with the proceedings for the restoration of the company to the Register; and

(*c*) if any property or right previously vested in or held on trust for the company has been vested in the Government under section 15.9(1), the payment of the Government's costs, expenses and liabilities in dealing with the property or right during the period of dissolution, or in connection with the proceedings on the application.

15.27 Transitional arrangements

(1) If, before the commencement of this Subdivision, an application has been made for the purposes of section 291(7) or 291A(2) of the Companies Ordinance (Cap. 32) as in force immediately before that commencement, that section continues to apply in relation to the application as if it had not been repealed.

(2) If, before the commencement of this Subdivision, an application has been made for the purposes of section 291AB(2) of the Companies

Ordinance (Cap. 32) as in force immediately before that commencement, section 291AB(2), (3), (4) and (5) of that Ordinance continues to apply in relation to the application as if it had not been repealed.

Subdivision 3 – Supplementary Provisions

15.28 Company's name on restoration

(1) If a company is restored to the Register under this Division, it is restored under its former name.

(2) Subsection (3) applies if, had the company applied on the date of the restoration to be registered by the former name, section 3.33[26] would have prohibited the company from being registered by that name.

(3) Within 28 days after the restoration, the company must –

(*a*) by a special resolution change its name; and

(*b*) give notice in the specified form of the change to the Registrar.

(4) If the company contravenes subsection (3) –

(*a*) the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues; and

(*b*) the Registrar may substitute the name of the company with –

(i) in the case of an English name, a new name that consists of the words "Company Registration Number" as its prefix, followed by the registration number of the company as stated in the certificate of incorporation; or

[26] A consultation draft of Part 3 will be published later.

(ii) in the case of a Chinese name, a new name that consists of the Chinese characters "公司註冊編號" as its prefix, followed by the registration number of the company as stated in the certificate of incorporation.

(5) If a company gives notice of a change of name under subsection (3)(*b*), or if the Registrar exercises the power under subsection (4)(*b*), the Registrar must, unless the company is prohibited by section 3.33 from being registered by the new name –

(*a*) enter the new name on the Register in place of the former name; and

(*b*) issue a certificate of change of name.

(6) The change of name has effect from the date on which the certificate of change of name is issued.

(7) A change of name under this section does not affect any rights or obligations of the company or render defective any legal proceedings by or against it. Any legal proceedings that could have been commenced or continued by or against it by its former name may be commenced or continued by or against it by its new name.

(8) In this section –

"former name" (前有名稱), in relation to a company restored to the Register under this Division, means the name that the company had immediately before it was dissolved.

15.29 Effect of restoration on bona vacantia property or right

(1) The Government may dispose of or otherwise deal with any property or right vested in it under section 292(1) of the predecessor Ordinance or section 15.9(1), or an interest in the property or right, in the same manner as it may dispose of or otherwise deal with any other property or right vested in it as

bona vacantia, even though the company may be restored to the Register under this Division.

(2) Subsections (3), (4) and (5) apply if the company is restored to the Register.

(3) The restoration does not –

(*a*) affect the disposition or dealing; or

(*b*) limit the effect of the restoration in relation to any other property or right previously vested in or held on trust for the company.

(4) If any property, right or interest is still vested in the Government at the time of the restoration, it revests in the company subject to any liability, interest or claim that was attached to the property, right or interest immediately before the revest.

(5) Subject to subsection (6), the Registrar must pay to the company –

(*a*) if the Registrar received any consideration for the property, right or interest disposed of or otherwise dealt with, an amount equal to –

(i) the amount of the consideration; or

(ii) the value of the consideration as at the date of the disposition or dealing; or

(*b*) if no consideration was received, an amount equal to the value of the property, right or interest disposed of or otherwise dealt with as at the date of the disposition or dealing.

(6) There may be deducted from the amount payable under subsection (5) the Registrar's reasonable costs in connection with the disposition or dealing to the extent that the costs have not been paid to the Registrar as a condition of a restoration under section 15.20 or pursuant to a direction under section 15.26.

PART 16

NON-HONG KONG COMPANIES

Division 1 – Preliminary

16.1 Interpretation

(1) In this Part –

"approved name" (經批准名稱), in relation to a registered non-Hong Kong company, means –

(*a*) the name entered in the Register under section 16.9(5)(*a*) or 16.12(5)(*a*); or

(*b*) the name by which the company was registered by virtue of section 337B(3) of the predecessor Ordinance;

"authorized representative" (獲授權代表), in relation to a registered non-Hong Kong company, means –

(*a*) a natural person resident in Hong Kong;

(*b*) a solicitor corporation as defined by section 2(1) of the Legal Practitioners Ordinance (Cap. 159);

(*c*) a corporate practice as defined by section 2(1) of the Professional Accountants Ordinance (Cap. 50); or

(*d*) a firm of solicitors or certified public accountants (practising),

that is authorized to accept on the company's behalf service of any process or notice required to be served on the company;

"corporate name" (法團名稱), in relation to a registered non-Hong Kong company, means a domestic name, or a translation of a domestic name, by which the company is registered in the Register;

"domestic name" (本土名稱), in relation to a non-Hong Kong company, means the name or names by which the company is registered in its place of incorporation;

"identity card" (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177);

"place of business" (營業地點) includes a share transfer office and a share registration office and excludes an office specified in subsection (3);

"procedural regulations" (《程序規例》) means regulations made under section 16.31;

"required details" (所需細節), in relation to an authorized representative, means –

(*a*) the name and address of the representative;

(*b*) the date on which the representative was authorized; and

(*c*) in the case of a natural person –

(i) the number of the representative's identity card; or

(ii) if the representative does not have an identity card, the number and issuing country of any passport held by the representative;

"secretary" (秘書) includes any person occupying the position of secretary (by whatever name called);

"solicitor" (律師) means a person who is qualified to act as a solicitor under the Legal Practitioners Ordinance (Cap. 159).

(2) In this Part, a reference to a certified translation, in English or Chinese, of a domestic name is a reference to an English or Chinese translation of that name as shown in a certified translation, in English or Chinese (as the case may be), of the certificate of incorporation (or its equivalent) of the non-Hong Kong company.

(3) The office specified for the purposes of the definition of "place of business" in subsection (1) is a local representative office established, or

maintained, with the Monetary Authority's approval, under section 46 of the Banking Ordinance (Cap. 155) by a bank as defined by subsection (9) of that section.

(4) The Financial Secretary may, by order published in the Gazette, amend subsection (3).

16.2 Certified copy

(1) For the purposes of this Part, a copy of a document is a certified copy if it is certified as a true copy of the document by a person specified in subsection (2).

(2) The person is –

(*a*) if the copy is certified in the non-Hong Kong company's place of incorporation –

(i) an official of the government of that place to whose custody the original of the document is committed;

(ii) a notary public practising in that place;

(iii) a lawyer practising in that place;

(iv) a professional accountant practising in that place;

(v) an officer of a court of law duly authorized by the law of that place to certify documents for any judicial or other legal purpose; or

(vi) a professional company secretary practising in that place;

(*b*) if the copy is certified in Hong Kong –

(i) a notary public practising in Hong Kong;

(ii) a solicitor practising in Hong Kong;

(iii) a certified public accountant (practising);

(iv) an officer of the court in Hong Kong who is authorized by law to certify documents for any judicial or other legal purpose;

(v) a consular officer of the non-Hong Kong company's place of incorporation; or

(vi) a professional company secretary practising in Hong Kong;

(*c*) an officer of the non-Hong Kong company; or

(*d*) an authorized representative of the registered non-Hong Kong company.

(3) The Secretary may, by order published in the Gazette, amend subsection (2).

Division 2 – Registration

16.3 Certain non-Hong Kong companies must apply for registration

(1) This section applies to –

(*a*) a non-Hong Kong company that establishes a place of business in Hong Kong on or after the commencement of this Part; and

(*b*) a non-Hong Kong company that –

(i) at that commencement, has a place of business in Hong Kong established before the commencement; and

(ii) had not complied with section 333 of the Companies Ordinance (Cap. 32) as in force immediately before that commencement.

(2) A non-Hong Kong company falling within subsection (1)(*a*) must, within one month after the establishment of the place of business, apply to the Registrar for registration as a registered non-Hong Kong company.

(3) A non-Hong Kong company falling within subsection (1)(*b*) must, within one month after the commencement of this Part, apply to the Registrar for registration as a registered non-Hong Kong company.

(4) An application under subsection (2) or (3) must –

(*a*) be in the specified form;

(*b*) contain the particulars prescribed by procedural regulations;

(*c*) contain the required details of at least one person who is proposed to be an authorized representative on registration of the non-Hong Kong company;

(*d*) be accompanied by the documents prescribed by procedural regulations; and

(*e*) be delivered to the Registrar.

(5) If none of the non-Hong Kong company's domestic names is in Roman script or in Chinese, an application under subsection (2) or (3) must also contain –

(*a*) where the company has one domestic name, a certified translation of that name in English or Chinese, or both; or

(*b*) where the company has more than one domestic name, a certified translation of one of those names in English or Chinese, or both.

(6) If a non-Hong Kong company contravenes subsection (2) or (3), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

16.4 Registration of non-Hong Kong company

(1) On receiving an application under section 16.3(2) or (3), the Registrar must register the non-Hong Kong company as a registered non-Hong Kong company.

(2) If the application is not required by section 16.3(5) to contain a certified translation of a domestic name, the Registrar must enter in the Register, as a corporate name –

(*a*) the non-Hong Kong company's domestic name in Roman script, or that company's domestic name in Chinese, or both; and

(*b*) the certified translation, in English or Chinese, of a domestic name (if any) contained in the application pursuant to procedural regulations.

(3) If the application contains a certified translation of a domestic name for the purposes of section 16.3(5), the Registrar must enter that translation in the Register as a corporate name.

(4) On registering a non-Hong Kong company under subsection (1), the Registrar must –

(*a*) issue to the company a certificate of registration, with the Registrar's signature, certifying the registration; and

(*b*) register the application and accompanying documents.

Division 3 – Addition, Change or Cessation of Corporate Name

16.5 Company must notify Registrar of addition, change or cessation of name or translation of name

(1) If, as a result of an addition of domestic name, a registered non-Hong Kong company has a new domestic name in Roman script or in Chinese, the company must, within one month after the date of the addition, deliver to the Registrar for registration a return containing the particulars of the addition.

(2) If, as a result of a change to a domestic name, a registered non-Hong Kong company has a new domestic name, the company must, within one month after the date of the change, deliver to the Registrar for registration a return containing the particulars of the change.

(3) If a name of a registered non-Hong Kong company ceases to be a domestic name, the company must, within one month after the date of the cessation, deliver to the Registrar for registration a return containing the particulars of the cessation.

(4) Subsection (2) or (3) does not apply unless the registered non-Hong Kong company is registered in the Register by the domestic name or a translation of it.

(5) A registered non-Hong Kong company must, within one month after the date of a decision mentioned in paragraph (*a*), (*b*) or (*c*), deliver to the Registrar for registration a return containing the particulars of the decision, and the certified translation of the domestic name, if –

(*a*) the company does not have a corporate name in Roman script, and it decides to adopt a certified translation, in English, of a domestic name, under which it is to carry on business in Hong Kong;

(*b*) the company does not have a corporate name in Chinese, and it decides to adopt a certified translation, in Chinese, of a domestic name, under which it is to carry on business in Hong Kong; or

(*c*) a translation of a domestic name of the company is entered in the Register as a corporate name, and it decides to replace the translation with another translation of the domestic name, under which it is to carry on business in Hong Kong.

(6) If a translation of a domestic name of a registered non-Hong Kong company is entered in the Register as a corporate name, and the company

decides that the translation will no longer be a name under which it is to carry on business in Hong Kong, the company must, within one month after the date of the decision, deliver to the Registrar for registration a return containing the particulars of the decision.

(7) A return under subsection (1), (2), (3), (5) or (6) must –

(*a*) be in the specified form; and

(*b*) be accompanied by the documents specified by the Registrar.

(8) A return under subsection (2) must also contain a certified translation of the new domestic name in English or Chinese, or both, if the new domestic name is neither in Roman script nor in Chinese.

(9) If a registered non-Hong Kong company contravenes subsection (1), (2), (3), (5) or (6), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

16.6 Registration of corporate name

(1) If the Registrar receives a return under section 16.5(1), (2), (3), (5) or (6), the Registrar must –

(*a*) make a note in the Register to the effect that there is a change of corporate name;

(*b*) issue to the registered non-Hong Kong company a fresh certificate of registration containing the current corporate name; and

(*c*) register the return and accompanying documents.

(2) If the Registrar receives a return under section 16.5(1), the Registrar must also enter in the Register, as a corporate name, the registered non-Hong Kong company's new domestic name.

(3) If the Registrar receives a return under section 16.5(2), and the return is not required by section 16.5(8) to contain a certified translation of a new domestic name, the Registrar must also enter in the Register, as a corporate name –

(*a*) the registered non-Hong Kong company's new domestic name; and

(*b*) the certified translation, in English or Chinese, of that domestic name (if any) contained in the return pursuant to procedural regulations.

(4) If the Registrar receives a return under section 16.5(2), and the return contains a certified translation of a new domestic name for the purposes of section 16.5(8), the Registrar must also enter that translation in the Register as a corporate name.

(5) If the Registrar receives a return under section 16.5(5), the Registrar must also enter in the Register, as a corporate name, the certified translation of the domestic name contained in the return.

(6) On a note being made under subsection (1)(*a*), a name entered in the Register as an approved name in relation to the old corporate name is no longer an approved name, and the Registrar must make another note in the Register to that effect.

(7) On an entry being made under subsection (2) or (3), a translation of a domestic name of the registered non-Hong Kong company that is entered in the Register as a corporate name of the company is no longer a corporate name if it is in the same language as the new domestic name, and the Registrar must make a note in the Register to that effect.

Division 4 – Regulation of Names Used by Registered Non-Hong Kong Companies to Carry on Business in Hong Kong

16.7 Registrar may serve notice to regulate use of corporate names or approved names

(1) The Registrar may serve a notice on a registered non-Hong Kong company if satisfied that a corporate name or approved name of the company –

(*a*) is the same as or is too like –

(i) a name that appears, or should have appeared, in the index of names kept under section 22C of the predecessor Ordinance or in the Index of Company Names on the material date; or

(ii) the name of a body corporate incorporated or established under an Ordinance before the material date; or

(*b*) gives so misleading an indication of the nature of the company's activities in Hong Kong as to be likely to cause harm to the public.

(2) A notice must be served on a registered non-Hong Kong company within 6 months beginning with the material date and must state the reasons for serving the notice.

(3) In this section –

"material date" (關鍵日期) –

(*a*) in relation to a domestic name, or a translation of a domestic name, of a registered non-Hong Kong company that is entered in the Register under section 16.4 as a corporate name, means the date on which the certificate of registration was issued under that section;

(*b*) in relation to a domestic name, or a translation of a domestic name, of a registered non-Hong Kong company that is entered in the Register under section 16.6 as a

corporate name, means the date on which the certificate of registration was issued under that section;

(*c*) in relation to a domestic name, or a translation of a domestic name, of a registered non-Hong Kong company that has already been entered in the Register as at the commencement of this Part, means –

(i) the date on which the company complied with section 333 of the predecessor Ordinance; or

(ii) if the company has delivered a return for registration under section 335 of the predecessor Ordinance, the date on which the certificate of registration was issued under that section;

(*d*) in relation to a name that is entered in the Register under section 16.9(5) or 16.12(5) as an approved name, means the date on which the certificate of registration was issued under that section; or

(*e*) in relation to a name by which the registered non-Hong Kong company was registered by virtue of section 337B(3) of the predecessor Ordinance as an approved name, means the date of the registration.

16.8 Effect of notice

(1) If a registered non-Hong Kong company is served with a notice under section 16.7(1) for a corporate name or approved name, the company must not, after the end of 2 months after the date of service, carry on business in Hong Kong under that name.

(2) If a registered non-Hong Kong company contravenes subsection (1), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence.

(3) A person who commits an offence under subsection (2) is liable to a fine at level 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

(4) This section does not invalidate any transaction entered into by the registered non-Hong Kong company.

16.9 Registration of approved name for carrying on business in Hong Kong

(1) If a registered non-Hong Kong company is served with a notice under section 16.7(1) for a corporate name or for an approved name in relation to a corporate name, the company may apply, in writing, to the Registrar for approval of another name, in relation to the corporate name, under which the company is to carry on business in Hong Kong.

(2) An application must be delivered to the Registrar.

(3) On receiving an application for approval of a name, the Registrar must approve the name unless satisfied that the name –

(*a*) is the same as or is too like –

(i) a name that appears, or should have appeared, in the Index of Company Names; or

(ii) the name of a body corporate incorporated or established under an Ordinance; or

(*b*) gives so misleading an indication of the nature of the registered non-Hong Kong company's activities in Hong Kong as to be likely to cause harm to the public.

(4) If the Registrar approves a name, the registered non-Hong Kong company may deliver to the Registrar for registration a return, in the specified form, specifying the name so approved.

(5) On receiving a return, the Registrar must, unless satisfied that the name specified in it is the same as a name that appears, or should have appeared, in the Index of Company Names –

(*a*) enter that specified name in the Register as the name, in relation to the corporate name, under which the registered non-Hong Kong company is to carry on business in Hong Kong;

(*b*) issue to the company a fresh certificate of registration containing the corporate name and the name so entered; and

(*c*) register the return.

(6) On the issue of the fresh certificate of registration, the name entered in the Register under subsection (5)(*a*) is, for all purposes of the law, the name under which the registered non-Hong Kong company is to carry on business in Hong Kong.

(7) Subsection (6) does not affect any rights or obligations vested in the registered non-Hong Kong company under the name for which the notice is served on the company under section 16.7(1).

(8) Subsection (6) does not render defective any legal proceedings by or against the registered non-Hong Kong company. If there are any legal proceedings that might have been commenced or continued by or against that company by the name for which the notice is served on that company under section 16.7(1), those proceedings may be commenced or continued by or against it by the name entered in the Register under subsection (5)(*a*) as an approved name in relation to the corporate name.

16.10 Withdrawal of notice

(1) After a registered non-Hong Kong company is served with a notice under section 16.7(1) for a corporate name or for an approved name in relation

to a corporate name, the Registrar may, on written application by the company, withdraw the notice.

(2) If the notice is withdrawn, section 16.8(1) ceases to apply to the registered non-Hong Kong company.

(3) If, after the notice is served, a name is entered in the Register as an approved name in relation to the corporate name, the Registrar must, on withdrawing the notice –

(*a*) make a note in the Register to the effect that the name is no longer an approved name; and

(*b*) issue to the registered non-Hong Kong company a fresh certificate of registration containing the name for which the notice is served.

16.11 Setting aside of notice

(1) Within 3 weeks after being served with a notice under section 16.7(1) for a corporate name or for an approved name in relation to a corporate name, a registered non-Hong Kong company may apply to the Court of First Instance to set aside the notice, and the Court may set it aside or confirm it.

(2) If the Court of First Instance sets aside the notice, the registered non-Hong Kong company must deliver a sealed copy of the Court order to the Registrar as soon as practicable after the order is made.

(3) If, after the notice is served, a name is entered in the Register as an approved name in relation to the corporate name, the Registrar must, on receiving a sealed copy of the Court order –

(*a*) make a note in the Register to the effect that the name is no longer an approved name; and

(*b*) issue to the registered non-Hong Kong company a fresh certificate of registration containing the name for which the notice is served.

16.12 Change of approved name

(1) A registered non-Hong Kong company may apply, in writing, to the Registrar for change of an approved name, in relation to a corporate name, under which the company is to carry on business in Hong Kong.

(2) An application must be delivered to the Registrar.

(3) On receiving an application for change of an approved name, the Registrar must approve the new name unless satisfied that the new name –

(*a*) is the same as or is too like –

(i) a name that appears, or should have appeared, in the Index of Company Names; or

(ii) the name of a body corporate incorporated or established under an Ordinance; or

(*b*) gives so misleading an indication of the nature of the registered non-Hong Kong company's activities in Hong Kong as to be likely to cause harm to the public.

(4) If the Registrar approves a new name, the registered non-Hong Kong company may deliver to the Registrar for registration a return, in the specified form, specifying the new name so approved.

(5) On receiving a return, the Registrar must, unless satisfied that the new name specified in it is the same as a name that appears, or should have appeared, in the Index of Company Names –

(*a*) enter the new name in the Register as the name, in relation to the corporate name, under which the registered non-Hong Kong company is to carry on business in Hong Kong;

(*b*) make a note in the Register to the effect that there is a change of approved name;

(*c*) issue to the company a fresh certificate of registration containing the corporate name and the new approved name; and

(*d*) register the return.

(6) On the issue of the fresh certificate of registration, the new approved name is, for all purposes of the law, the name under which the registered non-Hong Kong company is to carry on business in Hong Kong.

(7) Subsection (6) does not affect any rights or obligations vested in the registered non-Hong Kong company under the corporate name or the old approved name.

(8) Subsection (6) does not render defective any legal proceedings by or against the registered non-Hong Kong company. If there are any legal proceedings that might have been commenced or continued by or against that company by the corporate name or the old approved name, those proceedings may be commenced or continued by or against it by the new approved name in relation to the corporate name.

Division 5 – Authorized Representatives of Registered Non-Hong Kong Companies

16.13 Company must keep authorized representative's required details registered in Register

(1) This section applies if –

(*a*) a person is registered in the Register as an authorized representative of a registered non-Hong Kong company;

(*b*) the person ceases to be such a representative; and

(*c*) after the cessation, no person is registered in the Register as an authorized representative of the company.

(2) Within one month after the person ceases to be an authorized representative of the registered non-Hong Kong company, that company must deliver to the Registrar for registration under section 16.18(1) a return in respect of another person as an authorized representative of the company.

(3) Subsection (2) does not apply to the registered non-Hong Kong company if, when the person ceases to be an authorized representative of that

company, it has ceased to have a place of business in Hong Kong for at least 11 months.

(4) If a registered non-Hong Kong company contravenes subsection (2), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

16.14 Termination of authorization

(1) A person registered in the Register as an authorized representative of a registered non-Hong Kong company may terminate the authorization by sending to the company's registered office (or the equivalent) in its place of incorporation a written notice of termination stating the date of termination.

(2) A registered non-Hong Kong company may terminate the authorization of a person registered in the Register as an authorized representative of the company by sending to the person's address shown in the Register a written notice of termination stating the date of termination.

(3) After sending a notice of termination under subsection (1) or (2), the sender must, within one month after the date of the notice, notify the Registrar, in writing, of the date of termination.

(4) A notification under subsection (3) must –

(*a*) be in the specified form; and

(*b*) be accompanied by the documents prescribed by procedural regulations.

(5) A notification under subsection (3) –

(*a*) if given by a person registered as an authorized representative of a registered non-Hong Kong company, must contain a statement by the person that the company

has been notified of the termination under subsection (1); or

(*b*) if given by a registered non-Hong Kong company, must contain a statement by the company that the person registered as an authorized representative of the company has been notified of the termination under subsection (2).

(6) If an authorization is terminated under subsection (1) or (2), the termination takes effect on whichever is the later of the following –

(*a*) the date of termination stated in the notice of termination;

(*b*) the expiration of 21 days after subsection (3) is complied with.

Division 6 – Returns and Accounts of Registered Non-Hong Kong Companies

16.15 Company must deliver annual return for registration

(1) Within 42 days after each anniversary of the date on which the certificate of registration was issued under section 16.4(4)(*a*) or the predecessor Ordinance, a registered non-Hong Kong company must deliver to the Registrar a return for registration.

(2) A return must –

(*a*) be in the specified form;

(*b*) contain the particulars prescribed by procedural regulations; and

(*c*) be accompanied by the documents prescribed by procedural regulations.

(3) If a registered non-Hong Kong company contravenes subsection (1), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in

the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(4) If a registered non-Hong Kong company, or an officer or agent of a registered non-Hong Kong company, is convicted of an offence under subsection (3), the magistrate may, in addition to any penalty that may be imposed, order the company, or the officer or agent, to deliver to the Registrar a return for registration within a time specified in the order.

(5) If a registered non-Hong Kong company, or an officer or agent of a registered non-Hong Kong company, fails to comply with an order under subsection (4), the company, or the officer or agent, commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

16.16 Company must deliver accounts for registration

(1) This section applies if a registered non-Hong Kong company is required to publish its accounts, or to deliver copies of its accounts to any person in whose office the accounts may be inspected as of right by members of the public –

(*a*) by the law of its place of incorporation; or

(*b*) by either of the following, but not by the law of its place of incorporation –

(i) the law of any other jurisdiction where it is registered as a company;

(ii) the rules of any stock exchange or similar regulatory bodies in that jurisdiction.

(2) When the registered non-Hong Kong company delivers to the Registrar a return for registration under section 16.15, it must also deliver to the Registrar for registration –

(*a*) in the case of subsection (1)(*a*), a certified copy of its latest published accounts for a period of at least 12 months that comply with the law of its place of incorporation; or

(*b*) in the case of subsection (1)(*b*), a certified copy of its latest published accounts for a period of at least 12 months that comply with any of the law or rules mentioned in subparagraphs (i) and (ii) of that subsection.

(3) If a registered non-Hong Kong company contravenes subsection (2), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(4) If a registered non-Hong Kong company, or an officer or agent of a registered non-Hong Kong company, is convicted of an offence under subsection (3), the magistrate may, in addition to any penalty that may be imposed, order the company, or the officer or agent, to deliver to the Registrar the certified copy of any accounts mentioned in subsection (2)(*a*) or (*b*) for registration within a time specified in the order.

(5) If a registered non-Hong Kong company, or an officer or agent of a registered non-Hong Kong company, fails to comply with an order under subsection (4), the company, or the officer or agent, commits an offence and is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

(6) In this section, a reference to a certified copy of any accounts is, if the accounts are not in English or Chinese, a reference to a certified translation of the accounts in English or Chinese.

16.17 Directors may revise accounts not complying with certain requirement

(1) If a certified copy of any accounts has been delivered to the Registrar for registration under section 336 of the predecessor Ordinance or section 16.16, and it appears to the directors of the registered non-Hong Kong company that the accounts did not comply with the regulatory requirement specified in subsection (2), those directors may revise the accounts.

(2) The regulatory requirement is –

(*a*) in relation to the accounts of a registered non-Hong Kong company to which section 336(1) of the predecessor Ordinance or section 16.16(1)(*a*) applies, the law of its place of incorporation; or

(*b*) in relation to the accounts of a registered non-Hong Kong company to which section 336(2) of the predecessor Ordinance or section 16.16(1)(*b*) applies –

(i) the law of any other jurisdiction where it is registered as a company; or

(ii) the rules of any stock exchange or similar regulatory bodies in that jurisdiction.

(3) A revision of the accounts must be confined to –

(*a*) those aspects in which the accounts did not comply with the regulatory requirement specified in subsection (2); and

(*b*) other necessary consequential revisions.

(4) If the directors of a registered non-Hong Kong company decide to revise any accounts under subsection (1), the company must, as soon as practicable after the decision, deliver to the Registrar for registration a warning statement, in the specified form, that the accounts will be so revised.

(5) If a registered non-Hong Kong company contravenes subsection (4), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the

contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

16.18 Company must deliver return for registration in case of change of certain particulars

(1) If there is, in relation to a registered non-Hong Kong company, a change specified in subsection (2), the company must, within one month after the date of the change, deliver to the Registrar for registration a return containing the particulars of the change.

(2) The change is one made in –

(*a*) the charter, statutes or memorandum (including articles, if any) of the registered non-Hong Kong company, or other instruments defining the company's constitution;

(*b*) the directors, secretary (or, where there are joint secretaries, each of them) or authorized representatives of the company;

(*c*) the particulars of the directors, secretary (or, where there are joint secretaries, each of them) or authorized representatives of the company delivered to the Registrar under this Part; or

(*d*) the address of the company's principal place of business in Hong Kong or of its registered office (or the equivalent), or its principal place of business, in its place of incorporation.

(3) A return must –

(*a*) be in the specified form;

(*b*) contain the particulars prescribed by procedural regulations; and

(*c*) be accompanied by the documents prescribed by procedural regulations.

(4) If a registered non-Hong Kong company contravenes subsection (1), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

Division 7 – Other Obligations

16.19 Non-Hong Kong company must state names, place of incorporation, etc.

(1) A non-Hong Kong company must, in every prospectus inviting subscriptions for its shares or debentures in Hong Kong –

(*a*) state its place of incorporation; and

(*b*) if applicable, state in legible characters that the liability of its members is limited.

(2) A non-Hong Kong company must, on every place where it carries on business in Hong Kong –

(*a*) conspicuously exhibit its name and its place of incorporation; and

(*b*) if applicable, conspicuously exhibit a notice of the fact that the liability of its members is limited.

(3) A non-Hong Kong company must, in every bill-head, letter paper, notice and other official publication of the company in Hong Kong –

(*a*) state in legible characters its name and its place of incorporation; and

(*b*) if applicable, state in legible characters that the liability of its members is limited.

(4) If a non-Hong Kong company is in liquidation, it must, in every advertisement of the company in Hong Kong –

(*a*) state in legible characters its name and its place of incorporation; and

(*b*) if applicable, state in legible characters that the liability of its members is limited.

(5) If a non-Hong Kong company is in liquidation, it must comply with subsection (6) –

(*a*) when exhibiting its name under subsection (2); or

(*b*) when stating its name under subsection (3) or (4).

(6) The non-Hong Kong company must –

(*a*) if its name is in a language other than Chinese, add "(in liquidation)" after the name;

(*b*) if its name is in Chinese, add "(正進行清盤)" after the name; or

(*c*) if its name is in Chinese and in a language other than Chinese –

(i) add "(正進行清盤)" after the name in Chinese; and

(ii) add "(in liquidation)" after the name in that other language.

(7) If a non-Hong Kong company contravenes subsection (1), (3), (4) or (5), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5.

(8) If a non-Hong Kong company contravenes subsection (2), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 3 and, in the case of a

continuing offence, to a further fine of $300 for each day during which the offence continues.

(9) In this section, a reference to a non-Hong Kong company's name is –

(*a*) in the case of a registered non-Hong Kong company, a reference to the company's corporate name; or

(*b*) in the case of a registered non-Hong Kong company with an approved name, in relation to a corporate name, shown in the Register, a reference to the company's corporate name and approved name.

16.20 Registered non-Hong Kong company must notify Registrar of commencement of liquidation etc.

(1) Within 14 days after the later of the dates specified in subsection (2), a registered non-Hong Kong company must deliver to the Registrar for registration a notice, in the specified form, containing –

(*a*) the particulars specified in subsection (3); and

(*b*) if a person is appointed as liquidator or provisional liquidator, the further particulars specified in subsection (4).

(2) The dates are –

(*a*) the date of commencement of any proceedings for the liquidation of the registered non-Hong Kong company; and

(*b*) the date on which the notice of commencement of such proceedings was served on the company according to the law of the place in which those proceedings are commenced.

(3) The particulars are –

(*a*) the date of commencement of the proceedings for the liquidation of the registered non-Hong Kong company;

(*b*) the country where the proceedings are commenced; and

(*c*) whether the liquidation is a voluntary or compulsory liquidation, or is in another mode of liquidation as specified in the notice under subsection (1).

(4) The further particulars are –

(*a*) whether the person is appointed as liquidator or provisional liquidator;

(*b*) whether the person is a sole liquidator, or one of the joint, or joint and several, liquidators;

(*c*) the date of the appointment; and

(*d*) the following details of the person –

(i) in the case of a natural person, the present forename and surname, the address, and the number of the identity card or, if the person does not have an identity card, the number and issuing country of any passport held by the person; or

(ii) in any other case, the name and the address.

(5) Subsection (6) applies if –

(*a*) any change occurs in the particulars contained in a notice under subsection (1);

(*b*) a liquidator or provisional liquidator is appointed after such a notice is delivered to the Registrar for registration; or

(*c*) the liquidator or provisional liquidator whose name is contained in such a notice has ceased to hold office as such.

(6) Within 14 days after the change, appointment or cessation, the registered non-Hong Kong company must deliver to the Registrar for registration

a notice, in the specified form, containing the particulars of the change, the further particulars specified in subsection (4) of the liquidator or provisional liquidator appointed, or the date of the cessation to hold office as liquidator or provisional liquidator.

(7) If a registered non-Hong Kong company contravenes subsection (1) or (6), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(8) In this section –

"forename" (名字) includes a Christian or given name;

"surname" (姓氏), in the case of a person usually known by a title different from the person's surname, means the title.

16.21 Registered non-Hong Kong company must notify Registrar of cessation of place of business in Hong Kong

(1) If a registered non-Hong Kong company ceases to have a place of business in Hong Kong, the company must, within 7 days after the cessation, deliver to the Registrar a notice, in the specified form, of that fact.

(2) On receiving a notice, the Registrar must –

(*a*) register the notice in relation to the registered non-Hong Kong company; and

(*b*) enter in the Register a statement that the company has ceased to have a place of business in Hong Kong.

(3) If a registered non-Hong Kong company contravenes subsection (1), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 3 and, in

the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

16.22 Authorized representative of registered non-Hong Kong company must notify Registrar of dissolution

(1) If a registered non-Hong Kong company is dissolved, an authorized representative of the company must, within 14 days after the date of dissolution, deliver to the Registrar –

(*a*) a notice, in the specified form, of that fact; and

(*b*) a certified copy of the instrument effecting the dissolution or, in the case of an instrument not in English or Chinese, a certified translation of the instrument in English or Chinese.

(2) On receiving a notice and document under subsection (1), the Registrar must –

(*a*) register the notice and document in relation to the registered non-Hong Kong company; and

(*b*) enter in the Register a statement that the company has been dissolved.

(3) If an authorized representative of a registered non-Hong Kong company contravenes subsection (1), the authorized representative commits an offence and is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(4) If a person is charged under subsection (3), it is a defence to establish that the person took all reasonable steps to secure compliance with subsection (1).

Division 8 – Striking off

16.23 Registrar may send inquiry letter to registered non-Hong Kong company

(1) If the Registrar has reasonable cause to believe that a registered non-Hong Kong company has ceased to have a place of business in Hong Kong, the Registrar may send to the company by post a letter inquiring whether the company has ceased to have a place of business in Hong Kong.

(2) A letter must be addressed –

(*a*) to an authorized representative of the registered non-Hong Kong company whose required details are shown in the Register; or

(*b*) if no required details of authorized representatives of the company are shown in the Register, to any place of business established by the company in Hong Kong.

(3) If the Registrar is of the opinion that a letter under subsection (1) is unlikely to be received by the registered non-Hong Kong company, the Registrar may, instead of sending a letter under that subsection, publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Register, and the company will no longer be a registered non-Hong Kong company, at the end of 3 months after the date of the notice.

16.24 Registrar must follow up if no answer to inquiry letter

(1) If the Registrar does not receive a reply to the letter within one month after sending it under section 16.23(1), the Registrar must, within 30 days after the end of that one month –

(*a*) subject to subsection (3), send to the registered non-Hong Kong company by registered post another letter referring to the letter sent under that section and stating that no reply to it has been received; and

(*b*) publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Register, and the company will no longer be a registered

non-Hong Kong company, at the end of 3 months after the date of the notice.

(2) A letter must be addressed –

(*a*) to an authorized representative of the registered non-Hong Kong company whose required details are shown in the Register; or

(*b*) if no required details of authorized representatives of the company are shown in the Register, to any place of business established by the company in Hong Kong.

(3) The Registrar is not required to send a letter to the registered non-Hong Kong company under subsection (1)(*a*) if the Registrar is of the opinion that the letter is unlikely to be received by the company.

16.25 Registrar may strike off registered non-Hong Kong company's name

(1) After publishing a notice under section 16.23(3) or 16.24(1)(*b*), the Registrar may, unless cause is shown to the contrary, strike the registered non-Hong Kong company's name off the Register at the end of 3 months after the date of the notice.

(2) The Registrar must publish in the Gazette a notice indicating that the non-Hong Kong company's name has been struck off the Register.

(3) On the publication of the notice under subsection (2), the non-Hong Kong company is no longer a registered non-Hong Kong company.

(4) The non-Hong Kong company must not have a place of business in Hong Kong as long as it is not a registered non-Hong Kong company.

(5) If a non-Hong Kong company contravenes subsection (4), the company, and every officer or agent of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

16.26 Application to Registrar for restoration of non-Hong Kong company

(1) This section applies if a non-Hong Kong company's name –

(*a*) has been struck off the Register under section 16.25; or

(*b*) has been struck off the register of companies by virtue of section 339A(2) of the predecessor Ordinance.

(2) A person who is a director or member of the non-Hong Kong company may apply to the Registrar for the restoration of the company to the Register.

(3) An application must be made within 6 years after the date of the striking off. For this purpose, an application is made when it is received by the Registrar.

(4) An application must be accompanied by a statement –

(*a*) that the applicant is a director or member of the non-Hong Kong company; and

(*b*) that the conditions specified in section 16.27(2) are met.

(5) The Registrar may accept the statement as sufficient evidence of the matters mentioned in subsection (4)(*a*) and (*b*).

16.27 Conditions for granting application

(1) The Registrar must not grant an application made under section 16.26 unless all the conditions specified in subsection (2), and any other conditions that the Registrar thinks fit, are met.

(2) The conditions are –

(*a*) the non-Hong Kong company had, at the time its name was struck off the Register, a place of business in Hong Kong; and

(*b*) the applicant has delivered to the Registrar the documents relating to the non-Hong Kong company that are necessary to bring up to date the records kept by the Registrar.

16.28 Registrar's decision on application

(1) The Registrar must notify the applicant of the decision on an application made under section 16.26.

(2) If the Registrar grants the application, the non-Hong Kong company is restored to the Register on the date on which notification is given under subsection (1), and the Registrar must register the notification and publish in the Gazette a notice of the restoration.

(3) On the restoration, the striking off is to be regarded as not having taken place.

Division 9 – Miscellaneous

16.29 Service of process or notice

(1) Subject to subsections (3) and (4), any process or notice required to be served on a registered non-Hong Kong company is sufficiently served if –

(*a*) it is addressed to an authorized representative of the company whose required details are shown in the Register; and

(*b*) it is left at, or sent by post to, the representative's last known address.

(2) Subsections (3) and (4) apply if –

(*a*) no required details of authorized representatives of a registered non-Hong Kong company are shown in the Register; or

(*b*) every one of the company's authorized representatives refuses to accept service on behalf of the company or the process or notice cannot be served on any of them.

(3) Any process or notice required to be served on the registered non-Hong Kong company is sufficiently served if it is left at, or sent by post to, any place of business established by the company in Hong Kong.

(4) In the case of a registered non-Hong Kong company that no longer has a place of business in Hong Kong, any process or notice required to be served on the company is sufficiently served –

(*a*) if –

(i) it is sent by registered post to the company's registered office (or the equivalent) in the company's place of incorporation at the address as shown in the Register; and

(ii) a copy of it is sent by registered post to the company's principal place of business (if any) in the company's place of incorporation at the address as shown in the Register; or

(*b*) where no such addresses are shown in the Register, if it is left at, or sent by post to, any place in Hong Kong at which the company has had a place of business within the previous 12 months.

16.30 Chief Executive in Council may make regulations

(1) The Chief Executive in Council may by regulations provide for the application of this Ordinance in relation to the accounts that have been revised under section 16.17.

(2) Those regulations may –

(*a*) make different provisions according to whether the accounts have been revised by –

(i) supplementing the accounts with another document that shows the revisions; or

(ii) replacing the accounts;

(*b*) require a registered non-Hong Kong company to take the steps specified in the regulations in relation to the accounts that have been revised;

(*c*) apply this Ordinance to the accounts that have been revised subject to such additions, exceptions and modifications as specified in the regulations; and

(*d*) provide for incidental, consequential and transitional provisions.

(3) Those regulations may provide that any of the following is an offence –

(*a*) a failure to take all reasonable steps to secure compliance as respects the accounts that have been revised with –

(i) a specified provision of the regulations; or

(ii) a specified provision of this Ordinance as having effect under the regulations;

(*b*) a contravention of –

(i) a specified provision of the regulations; or

(ii) a specified provision of this Ordinance as having effect under the regulations.

(4) Those regulations may –

(*a*) provide that –

(i) an offence committed wilfully is punishable by a fine not exceeding $300,000, or by a term of imprisonment not exceeding 12 months, or by both such fine and imprisonment; and

(ii) an offence not committed wilfully is punishable by a fine not exceeding $300,000;

(*b*) provide that, in the case of a continuing offence, such an offence is punishable by a further fine not exceeding $2,000 for each day during which the offence continues; and

(*c*) provide for any specified defence to be available in proceedings for such an offence.

16.31 Financial Secretary may make regulations

(1) The Financial Secretary may by regulations prescribe –

(*a*) the particulars to be contained in an application under section 16.3(2) or (3);

(*b*) the documents to accompany an application under section 16.3(2) or (3);

(*c*) the documents to accompany a notification under section 16.14(3);

(*d*) the particulars to be contained in a return under section 16.15(1) or 16.18(1); and

(*e*) the documents to accompany a return under section 16.15(1) or 16.18(1).

(2) The Financial Secretary may by regulations –

(*a*) provide that an application under section 16.3(2) or (3), or a return under section 16.5(2), may contain a certified translation of a domestic name of the non-Hong Kong company; and

(*b*) provide for the procedures and requirements for the purpose.

(3) Subsection (2) does not apply to an application or return that is required by section 16.3(5) or 16.5(8) to contain a certified translation of a domestic name.

16.32 Transitional arrangements

(1) If, immediately before the commencement of Division 2, there was a pending application for registration under section 333(1) of the predecessor Ordinance, the application is to be regarded as an application for registration made under section 16.3(2).

(2) If –

(*a*) a return was delivered to the Registrar for registration under section 335(2) of the Companies Ordinance (Cap. 32) as in force immediately before the commencement of Division 3; and

(*b*) as at that commencement, the Registrar has not registered the return and issued a fresh certificate of registration under section 335(3) of that Ordinance because the Registrar has not received all the documents mentioned in section 335(2)(*b*) of that Ordinance,

the return is to be regarded as a return delivered to the Registrar for registration under section 16.5.

(3) Despite the repeal of section 337B of the predecessor Ordinance, a notice that was served under that section, and was in force immediately before the commencement of Division 4, continues in force and has effect as if it were a notice served under section 16.7.

(4) If, before the commencement of Division 8, the Registrar has sent a letter to a non-Hong Kong company under section 291(1) of the predecessor Ordinance inquiring whether the company has ceased to have a place of business in Hong Kong, the provisions of that Ordinance relating to the striking off the register of companies of the names of defunct companies continue to extend and apply by virtue of section 339A(2) of that Ordinance as if those provisions, and that section 339A(2), had not been repealed.

16.33 Savings for certificates previously issued

(1) This section applies to a certificate –

(*a*) that was issued under –

(i) section 333(3) or (5) of the Companies Ordinance (Cap. 32) as in force from time to time before 14 December 2007; or

(ii) section 333AA(2)(*c*) or 335(3) of the Companies Ordinance (Cap. 32) as in force immediately before the commencement of this Part; and

(*b*) that was in force immediately before that commencement.

(2) Despite the repeal of those sections, the certificate continues in force and has effect as if it were a certificate issued under section 16.4(4)(*a*) or 16.6(1)(*b*), as the case may be.

PART 17

COMPANIES NOT FORMED, BUT REGISTRABLE, UNDER THIS ORDINANCE

Division 1 – Preliminary

17.1 Interpretation

In this Part –

"constitutional document" (章程性質文件), in relation to an eligible company, means –

(*a*) an Ordinance constituting or regulating the company; or

(*b*) a non-statutory constitutional document of the company;

"eligible company" (合資格公司) means a company –

(*a*) formed after 1 May 1865 in pursuance of an Ordinance other than this Ordinance or a former Companies Ordinance; or

(*b*) otherwise constituted after that date according to law;

"non-statutory constitutional document" (不屬法定的章程性質文件), in relation to an eligible company, means any deed of settlement, or other instrument, constituting or regulating the company.

Division 2 – Registration of Eligible Companies

17.2 Registrar may register eligible company

(1) The Registrar may, on application by an eligible company, register the company as –

(*a*) an unlimited company; or

(*b*) a company limited by guarantee.

(2) An application for the purposes of subsection (1) must be in the specified form.

(3) An application for the purposes of subsection (1) must be accompanied by –

(*a*) a copy of every constitutional document of the eligible company; and

(*b*) in the case of an application for registration as a company limited by guarantee, a copy of the resolution complying with section 17.5(2).

(4) A registration under subsection (1) is not invalid by reason only of it having taken place with a view to the eligible company being wound up.

17.3 General restrictions on Registrar's power to register

(1) If the liability of the members of an eligible company is limited by an Ordinance or otherwise according to law, the Registrar must not register the company under this Part.

(2) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless –

(*a*) if the company has an English name only –

(i) the name by which the company is to be registered has "Limited" as the last word of that name; and

(ii) a Chinese equivalent of it that the company may use has "有限公司" as the last 4 Chinese characters of the equivalent;

(*b*) if the company has a Chinese name only –

(i) the name by which the company is to be registered has "有限公司" as the last 4 Chinese characters of that name; and

(ii) an English equivalent of it that the company may use has "Limited" as the last word of the equivalent; or

(*c*) if the company has both an English name and a Chinese name –

(i) the English name by which the company is to be registered has "Limited" as the last word of that name; and

(ii) the Chinese name by which the company is to be registered has "有限公司" as the last 4 Chinese characters of that name.

17.4 Registrar must not register without members' assent

(1) The Registrar must not register an eligible company under this Part as an unlimited company unless there is assent to the registration by a majority of the members present at a general meeting of the company convened for the purpose.

(2) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless there is assent to the registration by at least 75% of the members present at a general meeting of the company convened for the purpose.

(3) For the purposes of this section, in computing a majority, or 75%, of the members where a poll is demanded, the number of votes to which each member is entitled according to the eligible company's regulations must be taken into account.

(4) In this section, a reference to a member present at a general meeting is –

(*a*) a reference to a member present in person; or

(*b*) if proxies are allowed by the eligible company's regulations, a reference to a member present by proxy.

17.5 Registrar must not register without resolution declaring amount of guarantee

(1) The Registrar must not register an eligible company under this Part as a company limited by guarantee unless the members pass a resolution that complies with subsection (2).

(2) The resolution must declare that each person who is a member of the eligible company undertakes that if the company is wound up while the person is such a member, or within one year after the person ceases to be such a member, the person will contribute an amount required of the person, not exceeding a specified amount, to the company's assets –

(*a*) for the payment of the company's debts and liabilities contracted before the person ceases to be such a member;

(*b*) for the payment of the costs and expenses of winding up the company; or

(*c*) for the adjustment, among the contributories, of their rights.

17.6 Eligible company must pay registration fee

Before the Registrar registers an eligible company under this Part, the company must pay a prescribed fee to the Registrar for the registration.

17.7 Registrar must issue certificate of registration

On registering an eligible company under this Part, the Registrar must issue to it a certificate of registration, with the Registrar's signature or printed signature.

Division 3 – Consequences of Registration

17.8 Application

This Division applies if an eligible company is registered under this Part as an unlimited company or a company limited by guarantee.

17.9 Status, property, rights and liabilities of eligible company

(1) On being issued with a certificate of registration under section 17.7, the eligible company is to be regarded as having been incorporated under this Ordinance as an unlimited company or a company limited by guarantee, whichever is applicable.

(2) Subsection (1) does not operate to create a new legal entity for the eligible company.

(3) The registration does not affect the eligible company's property.

(4) The registration does not affect the eligible company's rights and liabilities in respect of –

(*a*) any debt or obligation incurred by or on behalf of, or owed to, the company before the registration; or

(*b*) any contract entered into by or on behalf of the company before the registration.

17.10 Continuation of existing proceedings

(1) Subject to subsection (2), any action or other legal proceedings that are, at the time of registration, pending by or against the eligible company, or any of its officers or members, may be continued in the same manner as if the registration had not taken place.

(2) Execution must not be issued against the effects of a member of the eligible company on any judgment, decree or order obtained in any such pending action or proceedings.

(3) If the eligible company's property and effects are insufficient to satisfy the judgment, decree or order, an order may be obtained for winding up the company.

17.11 Continuation of existing constitutional document

(1) The provisions in a constitutional document of the eligible company are to be regarded as conditions and regulations of the company in the same manner and with the same incidents as if those provisions were, had the company been formed under this Ordinance, contained in the articles with which the company would have been formed.

(2) In subsection (1), a reference to a constitutional document of an eligible company includes, in the case of an eligible company registered as a company limited by guarantee, the resolution complying with section 17.5(2).

17.12 Eligible company may substitute articles for non-statutory constitutional document

(1) The eligible company may alter the form of its constitution by substituting articles for a non-statutory constitutional document of the company.

(2) An alteration must be made by special resolution.

17.13 This Ordinance applies to eligible company

(1) Subject to section 17.14, this Ordinance applies to the eligible company and its officers, members, contributories and creditors in the same manner in all respects as if the company had been formed under this Ordinance.

(2) Despite anything in a constitutional document of the eligible company, a provision of this Ordinance applies to the company if the provision relates to an unlimited company's registration as a limited company.

17.14 Exceptions to section 17.13(1)

(1) The eligible company may not adopt as its articles any or all of the provisions of the model articles prescribed under section 3.16,[27] unless those provisions are adopted by special resolution.

[27] A consultation draft of Part 3 will be published later.

(2) Subject to section 17.15, the eligible company does not have any power to alter a provision in an Ordinance relating to the company.

(3) If the eligible company is wound up, a person specified in subsection (5) is a contributory –

(*a*) liable to pay or contribute to the payment of –

(i) the company's debts and liabilities contracted before the registration;

(ii) any sum for the adjustment of the rights of the members among themselves in respect of those debts and liabilities; and

(iii) the costs and expenses of winding up the company, so far as relating to those debts and liabilities; and

(*b*) liable to contribute to the company's assets all sums due from the person in respect of the liability under paragraph (*a*).

(4) In the event of the death, bankruptcy or insolvency of such a contributory, the provisions of this Ordinance with respect to the personal representatives, and to the trustees of bankrupt or insolvent contributories, apply.

(5) The person specified for the purposes of subsection (3) is a person who is liable to pay or contribute to the payment of the eligible company's debts and liabilities contracted before the registration.

17.15 Eligible company's power to alter constitution

This Ordinance does not derogate from any power, vested in the eligible company, by virtue of a constitutional document of the company, of altering its constitution or regulations.

PART 18

COMMUNICATIONS TO AND BY COMPANIES

Division 1 – Preliminary

18.1 Interpretation

(1) In this Part –

"address" (地址) includes a number, or any sequence or combination of letters, characters, numbers or symbols of any language, used for the purpose of sending or receiving a document or information by electronic means;

"applicable provision" (適用條文) –

(*a*) in Division 3, means a provision of this Ordinance that authorizes or requires the document or information to be sent or supplied to a company; or

(*b*) in Division 4, means a provision of this Ordinance that authorizes or requires the document or information to be sent or supplied by a company to another person;

"business day" (辦公日) means a day that is not –

(*a*) a general holiday; or

(*b*) a black rainstorm warning day or gale warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap. 1);

"document" (文件), except in Division 2, excludes a document that is issued for the purpose of any legal proceedings.

(2) In this Part –

(*a*) a reference to sending a document, except in Division 2 –

(i) includes supplying, delivering, forwarding or producing the document and, in the case of a notice, giving the document; and

(ii) excludes serving the document; and

(*b*) a reference to supplying information includes sending, delivering, forwarding or producing the information.

(3) For the purposes of this Part, a person sends a document, or supplies information, by post if the person posts a prepaid envelope containing the document or information.

18.2 Minimum period specified for purposes of sections 18.8(3), 18.11(4) and 18.13(6)

(1) This section specifies the minimum period of the notice of revocation, in relation to an agreement between a company and another person, for the purposes of sections 18.8(3), 18.11(4) and 18.13(6).

(2) The minimum period is whichever is the longer of the following –

(*a*) a period of 7 days;

(*b*) the period set out in subsection (3) or (4).

(3) If that other person is not a company, the period set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(*b*) where that other person is a debenture holder of the company, the period specified for the purpose in the instrument creating the debenture; or

(*c*) where that other person is not such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the period set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(*b*) where the company is a member of that other person, the period specified for the purpose in the person's articles;

(*c*) where that other person is a debenture holder of the company or where the company is a debenture holder of that other person, the period specified for the purpose in the instrument creating the debenture; or

(*d*) where neither that other person nor the company is such a member or holder, the period specified for the purpose in any agreement between the person and the company.

18.3 Period specified for purposes of sections 18.8(7)(*a*), 18.11(7)(*a*) and 18.13(9)(*b*)

(1) This section specifies –

(*a*) the period, in relation to a document or information sent or supplied to a company by another person, for the purposes of section 18.8(7)(*a*); and

(*b*) the period, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 18.11(7)(*a*) and 18.13(9)(*b*).

(2) The period is whichever is the longer of the following –

(*a*) a period of 48 hours;

(*b*) the period set out in subsection (3) or (4).

(3) If that other person is not a company, the period set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(*b*) where that other person is a debenture holder of the company, the period specified for the purpose in the instrument creating the debenture; or

(*c*) where that other person is not such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the period set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the period specified for the purpose in the company's articles;

(*b*) where the company is a member of that other person, the period specified for the purpose in the person's articles;

(*c*) where that other person is a debenture holder of the company or where the company is a debenture holder of that other person, the period specified for the purpose in the instrument creating the debenture; or

(*d*) where neither that other person nor the company is such a member or holder, the period specified for the purpose in any agreement between the person and the company.

(5) In calculating a period of hours mentioned in subsection (2)(*a*), any part of a day that is not a business day is to be disregarded.

18.4 Time specified for purposes of sections 18.8(7)(*b*), 18.9(5)(*a*), 18.11(7)(*b*) and 18.12(5)(*a*)

(1) This section specifies –

(*a*) the time, in relation to a document or information sent or supplied to a company by another person, for the purposes of sections 18.8(7)(*b*) and 18.9(5)(*a*); and

(*b*) the time, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 18.11(7)(*b*) and 18.12(5)(*a*).

(2) The time is whichever is the later of the following –

(*a*) the time at which the document or information would be delivered in the ordinary course of post;

(*b*) the time set out in subsection (3) or (4).

(3) If that other person is not a company, the time set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the time specified for the purpose in the company's articles;

(*b*) where that other person is a debenture holder of the company, the time specified for the purpose in the instrument creating the debenture; or

(*c*) where that other person is not such a member or holder, the time specified for the purpose in any agreement between the person and the company.

(4) If that other person is a company, the time set out for the purposes of subsection (2)(*b*) is –

(*a*) where that other person is a member of the company, the time specified for the purpose in the company's articles;

(*b*) where the company is a member of that other person, the time specified for the purpose in the person's articles;

(*c*) where that other person is a debenture holder of the company or where the company is a debenture holder of that other person, the time specified for the purpose in the instrument creating the debenture; or

(*d*) where neither that other person nor the company is such a member or holder, the time specified for the purpose in any agreement between the person and the company.

18.5 Address specified for purposes of sections 18.11(3)(*b*)(iii) and 18.12(2)(*b*)

(1) This section specifies the address, in relation to a document or information sent or supplied by a company to another person, for the purposes of sections 18.11(3)(*b*)(iii) and 18.12(2)(*b*).

(2) Subject to subsections (3) and (4), the address is –

(*a*) an address specified for the purpose by that other person generally or specifically; or

(*b*) an address to which a provision of this Ordinance authorizes or requires the document or information to be sent or supplied.

(3) If that other person (whether or not a company) is a member, debenture holder, director or secretary of the company, the address is –

(*a*) the address specified in subsection (2); or

(*b*) the person's address as shown in the company's register of members, register of debenture holders, register of directors or register of secretaries.

(4) If that other person is a company, the address is –

(*a*) the address specified in subsection (2); or

(*b*) its registered office.

(5) If the company is unable to obtain an address specified in subsection (2), (3) or (4), the address is that other person's address last known to the company.

18.6 Effect of this Part on sending documents etc. to Registrar

In its application in relation to documents or information to be sent or supplied to the Registrar, this Part has effect subject to Part 2.

Division 2 – Service of Document on Company

18.7 Service of document

A document may be served on a company by leaving it at, or sending it by post to, the company's registered office.

Division 3 – Other Communication to Company by Person who is not Company

18.8 Communication in electronic form

(1) This section applies if a document or information is sent or supplied, in electronic form, to a company by a person who is not a company.

(2) The document or information is sent or supplied to the company for the purposes of an applicable provision if –

(*a*) the company –

(i) has agreed, generally or specifically, that the document or information may be sent or supplied to it in electronic form and has not revoked the agreement; or

(ii) is regarded under a provision of this Ordinance as having so agreed;

(*b*) the document or information is sent or supplied –

(i) by electronic means to an address –

(A) specified for the purpose by the company generally or specifically; or

(B) regarded under a provision of this Ordinance as having been so specified for the purpose; or

(ii) by hand or by post to an address specified in subsection (4); and

(*c*) the document or information is sent or supplied in a form, and by a means, that, in the person's reasonable opinion, will enable the recipient –

(i) to read the document or information, or, to the extent that it consists of images, to see the document or information, with the naked eye or with the eye with suitable corrective lens; and

(ii) to retain a copy of the document or information.

(3) The company has not revoked the agreement for the purposes of subsection (2)(*a*)(i) unless it has given the person a notice of revocation of not less than the period specified in section 18.2.

(4) The address specified for the purposes of subsection (2)(*b*)(ii) is –

(*a*) an address specified for the purpose by the company generally or specifically;

(*b*) the company's registered office; or

(*c*) an address to which a provision of this Ordinance authorizes or requires the document or information to be sent or supplied.

(5) For the purposes of an applicable provision that authorizes or requires the document or information to be authenticated, the document or information is sufficiently authenticated if –

(*a*) the person's identity is confirmed in a manner specified by the company; or

(*b*) where no manner has been specified, the communication contains or is accompanied by a statement of the person's identity, and the company has no reason to doubt the truth of the statement.

(6) If the document or information is sent or supplied by a person on behalf of another, subsection (5) does not affect any provision of the company's articles under which the company may require reasonable evidence of the former's authority to act on behalf of the latter.

(7) If the document or information is sent or supplied to a company for the purposes of an applicable provision, it is to be regarded as being received by the company –

(*a*) where the document or information is sent or supplied by electronic means, at the end of the period specified in section 18.3 after it is sent or supplied;

(*b*) where the document or information is sent or supplied by post, at the time specified in section 18.4; or

(*c*) where the document or information is sent or supplied by hand, at the time when the document or information is delivered.

18.9 Communication in hard copy form

(1) This section applies if a document or information is sent or supplied, in hard copy form, to a company by a person who is not a company.

(2) The document or information is sent or supplied to the company for the purposes of an applicable provision if the document or information is sent or supplied by hand or by post to –

(*a*) an address specified for the purpose by the company generally or specifically;

(*b*) the company's registered office; or

(*c*) an address to which a provision of this Ordinance authorizes or requires the document or information to be sent or supplied.

(3) For the purposes of an applicable provision that authorizes or requires the document or information to be authenticated, the document or information is sufficiently authenticated if it is signed by the person.

(4) If the document or information is sent or supplied by a person on behalf of another, subsection (3) does not affect any provision of the company's articles under which the company may require reasonable evidence of the former's authority to act on behalf of the latter.

(5) If the document or information is sent or supplied to a company for the purposes of an applicable provision, it is to be regarded as being received by the company –

(*a*) where the document or information is sent or supplied by post, at the time specified in section 18.4; or

(*b*) where the document or information is sent or supplied by hand, at the time when the document or information is delivered.

18.10 Communication in other forms

(1) This section applies if a document or information is sent or supplied, otherwise than in electronic or hard copy form, to a company by a person who is not a company.

(2) The document or information is sent or supplied to the company for the purposes of an applicable provision if the document or information is sent or supplied in a form or manner that has been agreed by the company.

Division 4 – Other Communication by Company to Another Person

18.11 Communication in electronic form

(1) Subject to subsection (2), this section applies if a document or information is sent or supplied, in electronic form, by a company to another person.

(2) This section does not apply if the document or information is sent or supplied by the company to that other person by making it available on a website.

(3) The document or information is sent or supplied to that other person for the purposes of an applicable provision if –

(*a*) that other person –

(i) where that other person is not a company, has agreed, generally or specifically, that the document or information may be sent or supplied to the person in electronic form and has not revoked the agreement; or

(ii) where that other person is a company, has so agreed and has not revoked the agreement, or is

regarded under a provision of this Ordinance as having so agreed;

(*b*) the document or information is sent or supplied –

(i) by electronic means to an address –

(A) where that other person is not a company, specified for the purpose by that other person generally or specifically; or

(B) where that other person is a company, so specified for the purpose, or regarded under a provision of this Ordinance as having been so specified for the purpose;

(ii) by hand to that other person; or

(iii) by hand or by post to an address specified in section 18.5; and

(*c*) the document or information is sent or supplied in a form, and by a means, that, in the company's reasonable opinion, will enable the recipient –

(i) to read the document or information, or, to the extent that it consists of images, to see the document or information, with the naked eye or with the eye with suitable corrective lens; and

(ii) to retain a copy of the document or information.

(4) That other person has not revoked the agreement for the purposes of subsection (3)(*a*) unless the person has given the company a notice of revocation of not less than the period specified in section 18.2.

(5) For the purposes of an applicable provision that authorizes or requires the document or information to be authenticated, the document or information is sufficiently authenticated if –

(*a*) the company's identity is confirmed in a manner specified by that other person; or

(*b*) where no manner has been specified, the communication contains or is accompanied by a statement of the company's identity, and that other person has no reason to doubt the truth of the statement.

(6) If the document or information is sent or supplied by a person on behalf of the company to another company, subsection (5) does not affect any provision of that other company's articles under which that other company may require reasonable evidence of the person's authority to act on behalf of the company for which the document or information is sent or supplied.

(7) If the document or information is sent or supplied to that other person for the purposes of an applicable provision, it is to be regarded as being received by that other person –

(*a*) where the document or information is sent or supplied by electronic means, at the end of the period specified in section 18.3 after it is sent or supplied;

(*b*) where the document or information is sent or supplied by post, at the time specified in section 18.4; or

(*c*) where the document or information is sent or supplied by hand, at the time when the document or information is delivered.

18.12 Communication in hard copy form

(1) This section applies if a document or information is sent or supplied, in hard copy form, by a company to another person.

(2) The document or information is sent or supplied to that other person for the purposes of an applicable provision if the document or information is sent or supplied –

(*a*) by hand to that other person; or

(*b*) by hand or by post to an address specified in section 18.5.

(3) For the purposes of an applicable provision that authorizes or requires the document or information to be authenticated, the document or information is sufficiently authenticated if it is signed by a director or secretary of the company or by an officer of the company authorized for the purpose.

(4) If the document or information is sent or supplied by a person on behalf of the company to another company, subsection (3) does not affect any provision of that other company's articles under which that other company may require reasonable evidence of the person's authority to act on behalf of the company for which the document or information is sent or supplied.

(5) If the document or information is sent or supplied to that other person for the purposes of an applicable provision, it is to be regarded as being received by that other person –

(*a*) where the document or information is sent or supplied by post, at the time specified in section 18.4; or

(*b*) where the document or information is sent or supplied by hand, at the time when the document or information is delivered.

18.13 Communication by means of website

(1) Subject to subsection (2), this section applies if a document or information is sent or supplied by a company to another person by making it available on a website.

(2) This section does not apply if the document or information is sent or supplied by a member of a company to the company.

(3) The document or information is sent or supplied to that other person for the purposes of an applicable provision if –

(*a*) that other person –

(i) has agreed, generally or specifically, that the document or information may be sent or supplied by the company to the person by making it

available on a website, or is regarded under subsection (4) or (5) as having so agreed; and

(ii) has not revoked the agreement;

(*b*) the document or information is sent or supplied in a form, and by a means, that, in the company's reasonable opinion, will enable the recipient –

(i) to read the document or information, or, to the extent that it consists of images, to see the document or information, with the naked eye or with the eye with suitable corrective lens; and

(ii) to retain a copy of the document or information;

(*c*) the company has notified that other person of the matters specified in subsection (7); and

(*d*) the company has made the document or information available on the website throughout –

(i) the period specified by the applicable provision; or

(ii) where no period is specified, the period of 28 days beginning with the date on which the notification under paragraph (*c*) is sent to that other person.

(4) For the purposes of subsection (3)(*a*)(i), a person who is a member of the company is regarded as having agreed that the document or information may be sent or supplied by the company to the person by making it available on a website if –

(*a*) the company's members have resolved, or the company's articles contain a provision to the effect, that documents or information generally may be so sent or supplied by the company to its members;

(*b*) the company has individually requested the person to agree that documents or information generally, or the

document or information, may be so sent or supplied by the company to the person and has not received a response to the request within 28 days beginning with the date on which the request was sent; and

(*c*) the request –

(i) stated clearly the effect of a failure to respond within those 28 days; and

(ii) was sent at least 12 months after a prior request made to the person for the purposes of paragraph (*b*) in respect of the same or a similar class of documents or information.

(5) For the purposes of subsection (3)(*a*)(i), a person who is a debenture holder of the company is regarded as having agreed that the document or information may be sent or supplied by the company to the person by making it available on a website if –

(*a*) the instrument creating the debenture contains a provision to the effect, or the equivalent debenture holders have resolved in accordance with the provisions of that instrument, that documents or information generally may be so sent or supplied by the company to those holders;

(*b*) the company has individually requested the person to agree that documents or information generally, or the document or information, may be so sent or supplied by the company to the person and has not received a response to the request within 28 days beginning with the date on which the request was sent; and

(*c*) the request –

(i) stated clearly the effect of a failure to respond within those 28 days; and

(ii) was sent at least 12 months after a prior request made to the person for the purposes of paragraph (*b*) in respect of the same or a similar class of documents or information.

(6) That other person has not revoked the agreement for the purposes of subsection (3)(*a*)(ii) unless the person has given the company a notice of revocation of not less than the period specified in section 18.2.

(7) The matters specified for the purposes of subsection (3)(*c*) are –

(*a*) the presence of the document or information on the website;

(*b*) if the document or information is not available on the website on the date of the notification, the date on which it will be so available;

(*c*) the address of the website;

(*d*) the place on the website where the document or information may be accessed; and

(*e*) how to access the document or information.

(8) For the purposes of subsection (3)(*d*), a failure to make a document or information available on a website throughout the period mentioned in that subsection is to be disregarded if –

(*a*) the document or information is made available on the website for part of that period; and

(*b*) the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid.

(9) If the document or information is sent or supplied to that other person for the purposes of an applicable provision –

(*a*) it is to be regarded as being sent or supplied on whichever is the later of the following –

(i) the date on which the document or information is first made available on the website;

(ii) the date on which a notification under subsection (3)(*c*) is sent; and

(*b*) it is to be regarded as being received by that other person at the end of the period specified in section 18.3 after whichever is the later of the following –

(i) the time when the document or information is first made available on the website;

(ii) the time when that other person receives a notification under subsection (3)(*c*).

(10) In this section –

"equivalent debenture holders" (相應債權證持有人), in relation to a person to whom a document or information is sent or supplied by a company, means the debenture holders of the company ranking equally for all purposes with the person.

18.14 Communication in other forms

(1) This section applies if a document or information is sent or supplied by a company to another person otherwise than in electronic or hard copy form or by making it available on a website.

(2) The document or information is sent or supplied to that other person for the purposes of an applicable provision if the document or information is sent or supplied in a form or manner that has been agreed by that other person.

18.15 Joint holders of shares or debentures

(1) This section applies if –

(*a*) a provision of this Ordinance authorizes or requires a document or information to be sent or supplied by a company to the holders of its shares or debentures; and

(*b*) a document or information must be sent to joint holders of the shares or debentures.

(2) Subject to anything in the company's articles, the document or information is sent or supplied to the joint holders for the purposes of the provision if the document or information is sent or supplied to –

(*a*) each of the joint holders; or

(*b*) the holder whose name appears first in the company's register of members or register of debenture holders.

(3) Subject to anything in the company's articles, anything to be agreed or specified by the holders for the purposes of this Division must be agreed or specified by all the joint holders.

18.16 Death or bankruptcy of holder of shares

(1) This section applies if –

(*a*) a provision of this Ordinance authorizes or requires a document or information to be sent or supplied by a company to the holders of its shares; and

(*b*) a holder of the shares is dead or bankrupt.

(2) Subject to anything in the company's articles, the document or information is sent or supplied to that holder for the purposes of the provision if the document or information –

(*a*) is sent or supplied to the persons claiming to be entitled to the shares in consequence of the death or bankruptcy by name, or by the title of representatives of the deceased, or trustee of the bankrupt, or by any like description, at the address within Hong Kong supplied for the purpose by the persons so claiming; or

(*b*) until such an address has been so supplied, is sent or supplied in any manner in which it might have been sent or supplied if the death or bankruptcy had not occurred.

18.17 Member or debenture holder may require hard copy

(1) A member or debenture holder of a company may, within 28 days after the date of receiving from the company a document or information, otherwise than in hard copy form, request the company to send or supply to the member or holder the document or information in hard copy form.

(2) The company must send or supply to the member or holder the document or information in hard copy form, free of charge –

(*a*) within 21 days after the date of receiving the request; or

(*b*) if the document or information requires an action to be taken by the member or holder on or before a date, at least 7 days before the date.

(3) Subsection (2)(*b*) does not apply unless the member or holder makes a request under subsection (1) at least 14 days before the date mentioned in subsection (2)(*b*).

(4) If a company contravenes subsection (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.