CO Rewrite
重寫《公司條例》

CO Rewrite

Rewrite of the Companies Ordinance

Consultation Paper

Draft Companies Bill Second Phase Consultation

May 2010

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 the draft clauses of the Companies Bill ("CB"). The first phase of the public consultation, covering Parts 1 to 2, 10 to 12 and 14 to 18 of the CB, was conducted between 17 December 2009 and 16 March 2010. The second phase consultation now covers the remaining parts of the CB, namely Parts 3 to 9, 13 and 19 to 20*. Several issues are also highlighted for consultation.

2. After considering the views and comments, we will refine the CB. We aim to introduce it into the Legislative Council by the end of 2010.

3. A list of questions for consultation is set out for ease of reference after Chapter 5. Please send your comments to us on or before **6 August 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 Nick AU YEUNG, Assistant Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2528 9156 (phone), (852) 2869 4195 (fax), or nickauyeung@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.

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* A revised Part 1 with some added and revised definitions is also included in the Consultation Draft.

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 Nick AU YEUNG (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
FRC	Financial Reporting Council
FRCO	Financial Reporting Council Ordinance (Cap 588)
FS	Financial Secretary
FSTB	Financial Services and the Treasury Bureau
HKEx	Hong Kong Exchanges and Clearing Limited
HKICPA	Hong Kong Institute of Certified Public Accountants
LegCo	Legislative Council
Listing Rules	Non-statutory rules made by the Stock Exchange of Hong Kong, as contractual obligations that listed companies undertake to the Stock Exchange of Hong Kong to fulfill
NZCA	New Zealand Companies Act 1993
Registrar	Registrar of Companies
SCA	Singapore Companies Act (Cap 50)
SCCLR	Standing Committee on Company Law Reform

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 consultation, covering Parts 1, 2, 10 to 12 and 14 to 18 of the CB, was conducted from 17 December 2009 to 16 March 2010. This current second phase consultation covers the remaining Parts, namely Parts 3 to 9, 13, 19 and 20*.

3. This paper will:

   (a) highlight several issues for consultation; and

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

Issues Highlighted for Consultation

4. While we welcome public views on all draft clauses of the CB contained in this second phase consultation, there are several specific issues which we would like to highlight in particular for consultation:

   (a) we have attempted to streamline the rules on giving financial assistance by a company for the purpose of acquiring its own shares in a manner similar to the NZCA. The details are set out in Division 5 of Part 5 of the CB. However, the New Zealand model does not completely address the issue of the provisions being "a trap for the unwary", particularly for private companies. We therefore propose to revisit the option of abolishing the financial assistance rules for private companies *(Chapter 2)*;

   (b) we propose to drop the proposal to impose a requirement for all listed companies and unlisted companies where members holding not less than 5% of voting rights have so requested to prepare separate directors' remuneration reports along the lines of those prepared under the UKCA 2006. The main concerns are (a) improvements to the

* A revised Part 1 with some added and revised definitions is also included in the Consultation Draft.

disclosure of the remuneration of directors of listed companies is better pursued through amendments to the Listing Rules and/or the SFO and (b) the requirements on directors' remuneration reports are designed primarily for listed companies and would be too onerous for private companies *(Chapter 3)*;

(c) we propose some minor changes to the provisions concerning the investigation of a company's affairs and enquiry into a company's affairs that may be exercised by the FS, as well as new provisions empowering the Registrar to obtain documents, records and information in certain circumstances *(Chapter 4)*; and

(d) we would like to seek views on whether a company should be required to give reasons explaining its refusal to register a transfer of shares *(Chapter 5).*

Future Work

5. This consultation will last until 6 August 2010. We will refine the CB in the light of public comments received and introduce the CB into LegCo by the end of 2010.

CHAPTER 1

INTRODUCTION

Background

1.1 In mid-2006, the FSTB 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.

1.2 In rewriting the CO, we have conducted extensive consultation on major reform proposals. We have benefited from the advice of the SCCLR, as well as that of four dedicated AGs and the Joint Government/HKICPA Working Group[1]. We have also commissioned an external legal consultant[2] to study and formulate proposals on certain complex areas of the CO. Furthermore, we conducted three public consultations in 2007 and 2008 to gauge views on certain complex subjects.

1.3 Based on the views received as well as the recommendations of the SCCLR and AGs, we have prepared the draft CB for further public consultation. Given that the draft CB is lengthy, we are conducting the public consultation on the draft clauses in two phases. We issued the consultation document and the draft clauses of the first phase consultation on 17 December 2009[3]. Details about the background and the guiding principles of the CO rewrite have already been set out in the first phase consultation paper[4]. The first phase consultation covered Parts 1 to 2, 10 to 12 and 14 to 18 of the CB.

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1 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.

2 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.

3 FSTB, *Consultation Paper on Draft Companies Bill – First Phase Consultation* and *Companies Bill – Consultation Draft: Parts 1, 2, 10-12 & 14-18* (December 2009) (available at http://www.fstb.gov.hk/fsb/co_rewrite).

4 FSTB, "Chapter 1: Introduction", *Consultation Paper on Draft Companies Bill – First Phase Consultation* (December 2009).

1.4 The second phase consultation now covers **Parts 3 to 9, 13 and 19 to 20**[5]. The framework of the draft CB indicating the Parts covered in each phase is at **Appendix 1**.

1.5 As set out in the first phase consultation paper, the key legislative changes in the CB that are relevant to this second phase consultation includes:

Enhancing Corporate Governance

- Improving disclosure of company information by requiring public companies and larger private companies to furnish more analytical and forward-looking business review as part of the directors' report (Part 9);

- Strengthening auditors' rights to obtain information for performing their duties (Part 9).

Ensuring Better Regulations

- Removing disclosure requirements in the Tenth and Eleventh Schedules of the CO that duplicate with financial reporting standards (Part 9);

- Streamlining and updating the regime of registration of charges (Part 8);

- Giving the Registrar powers to obtain documents, records and information for the enforcement of certain provisions (Part 19);

- Updating the provisions on company investigations (Part 19);

- Empowering the Registrar to compound specified offences (Part 20).

Business Facilitation

- Allowing more private companies and small guarantee companies to take advantage of simplified accounting and reporting requirements so as to save their compliance and business costs (Part 9);

- Introducing an alternative court-free procedure for the reduction of share capital based on a solvency test (Part 5);

- Allowing all companies to purchase their own shares out of capital subject to a solvency test (Part 5);

[5] A revised Part 1 with some added and revised definitions is also included in the Consultation Draft. Some savings/transitional provisions and the consequential amendments to other Ordinances are not covered in the Consultation Draft. These provisions and amendments will be added to the CB when it is finalised for introduction into LegCo.

- Streamlining the financial assistance provisions (Part 5) (We are inviting comments on whether the financial assistance rules should be further streamlined in Chapter 2);

- Introducing a court-free statutory amalgamation procedure for wholly-owned intra-group companies (Part 13);

- Making the keeping and use of a common seal optional (Part 3).

Modernising the Law

- Abolishing the par value regime and adopting a mandatory system of no-par for all companies with a share capital (Part 4);

- Removing the requirement for authorised capital (Part 4).

Other Relevant Legislative Initiatives

Companies (Amendment) Bill 2010

1.6 To tie in with the launch of CR's services for electronic incorporation of companies and filing of documents in late 2010/early 2011, the Companies (Amendment) Bill 2010[6] was introduced into LegCo on 3 February 2010. Amendments will also be made to the Business Registration Ordinance (Cap 310) to facilitate one-stop simultaneous application for company incorporation and business registration. With simultaneous application in place, processing of an electronic application for incorporation of a local company and business registration will be shortened from an average of four working days under the existing system to within one day. This will put Hong Kong on a par with comparable jurisdictions like the UK and Singapore. The proposed amendments are being examined by a LegCo Bills Committee.

1.7 The Bill also introduces a number of other amendments to the CO to facilitate business and enhance corporate governance. The significant amendments include:

(a) expediting the company name approval process while giving the Registrar new powers to enhance enforcement against abuses of the company name registration system, including acting upon a court order

[6] The Companies (Amendment) Bill 2010 is available at http://www.legco.gov.hk/yr09-10/english/bills/b201001221.pdf.

to direct a company to change its infringing name, and substituting that name with the company's registration number if it fails to comply with the Registrar's direction;

(b) facilitating companies to communicate with their members through electronic means and websites;

(c) expanding the scope of statutory derivative action by allowing a member of a related company to commence or intervene in a statutory derivative action on behalf of the company; and

(d) introducing technical amendments to the CO to remove, or provide exceptions to, the limitations arising from provisions in the CO that compel the use of paper documents of title and paper instruments of transfer in relation to shares and debentures.

Phase Two of CO Rewrite

1.8 In view of the extensive nature of the CO rewrite exercise, we have adopted a phased approach by first tackling the core company provisions which affect the daily operation of 790 000 live companies in Hong Kong. The winding-up and insolvency-related provisions, which are mainly administered by the Official Receiver's Office, will be reviewed in Phase Two of the rewrite exercise which is expected to be launched after the CB has been enacted by LegCo. Pending the Phase Two rewrite, a number of Parts in the current CO (e.g. Part IVA - Disqualification of Directors and Part V - Winding Up) will remain in Cap 32 which will be renamed the Companies (Winding-up Provisions) Ordinance[7]. Upon the completion of the entire rewrite exercise, the remaining provisions in Cap 32 which are covered by the Phase Two rewrite will be merged into the new Companies Ordinance.

1.9 Other than the CO rewrite exercise, there are several reviews relating to the CO being undertaken in parallel. These reviews are briefly outlined below.

The Prospectus Regime

1.10 The rewrite exercise does not cover provisions concerning prospectus in the CO (namely sections 37 to 44B, section 48A, sections 342 to 343, the Third and Fourth Schedules as well as the Seventeenth to the Twenty-second Schedules) as the prospectus regime in the CO is under separate review by the SFC.

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[7] This is a provisional title and is subject to change. The CB, upon passage by LegCo, will be assigned a new chapter number.

1.11 The SFC has proposed to transfer the regulation of public offers of shares or debentures which are structured products currently under the CO prospectus regime to the offers of investments regime in the SFO[8]. Under the proposal, unless an exemption applies, unlisted structured products (regardless of their legal form), their offering documents and marketing materials will have to be authorised under the SFO before being offered to the public. This will allow the SFC greater flexibility to regulate public offers of unlisted structured products by setting out appropriate standards in the new Code on Unlisted Structured Investment Products. We intend to introduce the relevant legislative amendments into LegCo within 2010.

1.12 The SFC is also examining other reform proposals concerning the prospectus regime (including transferring the whole prospectus regime from the CO to the SFO, changing the regulatory focus of the prospectus regime from the documents containing the offer to the act of offering, and other measures to modernise the regime). The SFC aims to issue a public consultation paper in the first half of 2011 before finalising the proposals.

Scripless Securities

1.13 The SFC, the HKEx and the Federation of Share Registrars Limited jointly issued a consultation paper on 30 December 2009 on a proposed operational model to introduce a scripless securities market in Hong Kong[9]. The scripless consultation closed on 31 March 2010. Meanwhile, as a first step in the entire legislative process for implementing a scripless securities market, we have included technical amendments in the Companies (Amendment) Bill 2010 to remove, or provide exceptions to, the limitations arising from the provisions on scrip-based shares and debentures presently found in the CO (see paragraph 1.7(d) above). These technical amendments will lay the foundation for implementing a scripless securities market in Hong Kong. They also aim to help the market focus discussions on specifics of the proposed operational model which was the subject of the scripless consultation. The proposed amendments, if approved by LegCo, will come into operation only when the market is ready to implement a scripless model.

1.14 Additionally, further legislative amendments, including to the SFO and the CO, will be pursued as necessary to provide for the regulation of the scripless environment and persons who play a key role in that environment.

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8 See SFC, *Consultation Paper on Possible Reforms to the Prospectus Regime in the Companies Ordinance and the Offers of Investments Regime in the Securities and Futures Ordinance* (October 2009) (available at www.sfc.hk).

9 SFC, HKEx and Federation of Share Registrars Limited, *Joint Consultation Paper on a Proposed Operational Model for Implementing a Scripless Securities Market in Hong Kong* (December 2009) (available at http://www.sfc.hk, http://www.hkex.com.hk/index.htm and http://www.fedsrltd.com/index.php).

These amendments will need to take into account the operational model that is eventually agreed upon, and must therefore be developed in light of responses to the scripless consultation. Any such further amendments will be aligned with and incorporated into the CB as appropriate.

Insolvent Trading

1.15 The FSTB issued a consultation paper on 29 October 2009 on the review of the legislative proposals to introduce a corporate rescue procedure in Hong Kong[10]. The public consultation ended on 28 January 2010. One of the proposals is to make directors and shadow directors of a company personally liable for the debts of the company which traded while insolvent if they knew or ought reasonably to have known that the company was insolvent or there was no reasonable prospect that the company could avoid becoming insolvent. Under the proposal, the liquidator of a company will be empowered to make an application to the court to seek a declaration that a responsible director or shadow director is liable for insolvent trading when the company goes into liquidation.

1.16 The proposed insolvent trading provisions are intended to be applicable to companies in general and not only in the context of companies undergoing the proposed corporate rescue procedure. Subject to the outcome of the consultation, the provisions may be introduced by way of amendments to the CO.

Outline of Consultation Paper

1.17 This consultation paper should be read together with the Consultation Draft of Parts 1, 3 to 9, 13 and 19 to 20 of the CB being published in parallel. It comprises the following:

- **Chapters 2 to 5** highlight specific issues for consultation. They are:

  (a) financial assistance by a company for acquisition of its own shares (*Chapter 2*);

  (b) directors' remuneration report (*Chapter 3*);

  (c) investigations and enquiries (*Chapter 4*); and

  (d) notice of refusal to register a transfer of shares (*Chapter 5*).

[10] FSTB, *Consultation Paper on Review of Corporate Rescue Procedure Legislative Proposals* (October 2009) (available at http://www.fstb.gov.hk/fsb/ppr/consult/index.htm).

- A **list of all the questions** for consultation will be set out after Chapter 5.

- **Explanatory notes** on the draft clauses of Parts 1, 3 to 9, 13 and 19 to 20.

Seeking Comments

1.18 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, 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.

Future Work

1.19 This consultation will last until 6 August 2010. We will revise the draft CB, taking into account the comments received during the consultation. Our aim is to introduce the CB into the LegCo by the end of 2010.

CHAPTER 2

FINANCIAL ASSISTANCE BY A COMPANY FOR ACQUISTION OF ITS OWN SHARES

2.1 We have streamlined the financial assistance provisions in a manner similar to the NZCA in the CB. The details can be found in the Explanatory Notes on Part 5 and the draft clauses in Division 5 of Part 5 of the CB. We would however like to seek comments on the option of abolishing the prohibition on financial assistance[11] for private companies, as an alternative to the said new rules on financial assistance.

Background

2.2 Section 47A of the CO imposes a broad prohibition on a Hong Kong company (and its subsidiaries) giving financial assistance to a party (other than the company itself) for the purpose of acquiring shares in the company. Certain exceptions are set out in section 47C and special restrictions apply to listed companies (section 47D). Unlisted companies are provided with an additional exception premised upon passing a solvency test and subject to a special resolution of the shareholders (section 47E)[12]. One of the purposes of the prohibition is to prevent the resources of a company and its subsidiaries being used to assist a purchaser of the shares in the company which might be prejudicial to the interests of creditors or shareholders not involved in the relevant acquisition.

2.3 However, the rules on financial assistance have become so complex and the case law has imposed an increasingly broad interpretation on the prohibition such that companies would have to incur substantial costs and expenses to try to understand the rules so as to ensure that the rules are not violated. In some cases, directors acting in good faith involved in transactions intended for the benefit of the company but unwary of the prohibition may be caught without even knowing that they had violated the law. We believe this is particularly relevant to private companies which have relatively fewer resources and may not always be able to afford the cost of obtaining legal advice.

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[11] The financial assistance prohibition referred to in this Chapter is the prohibition under the CO against the provision by a Hong Kong company (or any of its subsidiaries) of financial assistance for the purpose of acquiring the shares in the Hong Kong company. This is different from the requirements relating to the giving of "financial assistance" in Listing Rules (e.g. in chapters 13, 14 & 14A), which are requirements imposed on the giving of "financial assistance" in a general sense (e.g. granting credit, lending money, providing security for, or guaranteeing a loan) and not just relating to the acquisition of a company's own shares.

[12] The assistance must be provided out of distributable profits to the extent that the net assets are reduced by the assistance.

2.4 The possibility of innocuous transactions being penalised by the prohibition has caused some concern. A case in point is where a payment by a company's subsidiary of a small fee for preparing an accountant's report for a genuine arms length acquisition of its holding company's shares was considered to be unlawful for breach of the rule prohibiting financial assistance[13]. The acquisition was clearly in the shareholders' interest, was not prejudicial to the company, and carried no additional risks for its creditors[14]. The directors in this case were found to be in breach of their fiduciary duties to the company and held personally liable to restore the amount of the assistance to the company. As seen in this case, the most difficult area of the financial assistance rules is identifying financial assistance (which may sometimes be referred to as "a trap for the unwary"), rather than what to do about it once it has been identified[15]. Indeed, if the fee concerned had been paid by the holding company, no question of financial assistance would probably have arisen[16].

2.5 In the topical public consultation[17] conducted in the third quarter in 2008, we asked whether the current financial assistance provisions should be streamlined in a manner similar to the NZCA. While respondents generally considered that the current provisions should not be retained as they are, views were divided on the changes to be introduced, with a slight majority proposing that the current financial assistance provisions should be streamlined in a manner similar to the NZCA. Quite a number of respondents supported the abolition of the prohibition in respect of private companies (as the UK has done) to remove complex and costly procedures.

2.6 We have attempted to streamline the financial assistance provisions in a manner similar to the NZCA. The details are set out in Division 5 of Part 5 of the CB and the relevant Explanatory Notes on Part 5. Generally

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13 *Chaston v SWP Group Ltd* [2003] 1 BCLC 675.

14 See Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 8th edn, 2008), page 347, at paragraph 13 to 30.

15 See Nigel Davis, "Financial Assistance: Time for a Little Recap and a Lot of Reform", *Hong Kong Lawyer*, August 2007, pages 49 to 55, which discusses the problems associated with the financial assistance rules.

16 This is because the fees only came within the statutory definition of "financial assistance" because the assistance was of a type which materially reduced the net assets of the company. The subsidiary held few assets and so the fees were relatively significant compared with the subsidiary's assets. But the fees would not have been significant compared with the assets of the holding company. So if the holding company had paid the fees, the assistance would not have been caught by the statutory definition. See Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 8th edn, 2008), page 346, at footnote 248.

17 See FSTB, *Consultation Paper on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (July 2008), paragraphs 3.35 to 3.41 and *Consultation Conclusions on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (February 2009), paragraphs 48 to 51 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

speaking, a company will be allowed to give financial assistance[18], regardless of the source of funds, subject to satisfaction of the solvency test and compliance with requisite procedures applicable to the following three scenarios where:

(a) the amount of financial assistance will not exceed 5% of the shareholders' fund (**Clause 5.79**);

(b) unanimous approval of the shareholders is obtained for the financial assistance (**Clause 5.80**); or

(c) a notice is given to shareholders regarding the financial assistance and allowing shareholders to object to the court (**Clauses 5.81 to 5.85**).

In each case, the financial assistance must also be in the interests of the company.

2.7 Adopting the New Zealand model does not completely address the issue of the provisions being "a trap for the unwary", particularly for private companies which have fewer resources and the costs of obtaining legal advice could be a heavy burden for them. While we are open to comments on how the financial assistance rules can be further streamlined, there appears to be grounds for revisiting the option of abolishing the financial assistance rules for private companies. We would like to invite further public views on the option of abolishing the restrictions on financial assistance for private companies before taking a final decision.

Considerations

2.8 We need to strike a reasonable balance between two concerns, namely (a) addressing the problem of a "trap for the unwary", particularly for private companies; and (b) preserving the protection for small investors, which is particularly relevant to public companies.

2.9 It may be argued that only the abolition option can offer a satisfactory solution to the problem of "a trap for the unwary", especially for private companies. Streamlining the provisions would simplify the "whitewash" procedures and benefit the well advised, but probably not private companies which may not always be able to afford the costs of obtaining legal advice.

[18] There are certain qualifications and exceptions to financial assistance (such as the principal purpose exception, the distribution of dividends lawfully made, the lending of money in the ordinary course of business or pursuant to an employee share option scheme). Financial assistance within these exclusions or carve-outs are not prohibited, and consequently do not need authorisation via the solvency based procedures in subdivision 4 in Division 5 in Part 5. See subdivision 3 in Division 5 in Part 5 for these exceptions.

2.10 Some jurisdictions have opted for abolition of the financial assistance prohibition. The financial assistance prohibition has long been abolished in the United States and a number of provinces in Canada (British Columbia, Alberta, Ontario and Québec). It was repealed in its entirety in the federal Canada Business Corporations Act in 2001. More recently the UK abolished it for private companies. It has been retained for public companies, largely because the Second European Community Directive was thought to stand in the way of a full elimination[19].

2.11 In considering whether the financial assistance rules should be abolished for private companies, it is worth mentioning that the prohibition on financial assistance was a statutory development and was not enunciated by the 19th century judges as part of the capital maintenance regime and may not have any impact on the company's legal capital. If a company lends money to someone to purchase its shares, the company's share capital, share premium account and capital redemption reserve[20] will not be in any way altered by that loan or by the subsequent purchase of the shares. Nor does the rule on financial assistance necessarily reduce the company's net asset position. If the borrower is able to repay the loan, the company is simply replacing one asset (cash) with another (loan) and possibly the latter will earn the company a higher rate of return[21].

2.12 There are two propositions that we need to consider before deciding whether to keep the financial assistance rules in respect of private companies in the statute. First, can we identify any problem that would not be effectively dealt with by other company law rules? Second, even if a problem or a gap is identified and the only way to deal with this gap is by the financial assistance rules, are we sure that the benefit is not outweighed by the cost of striking down innocuous transactions?

2.13 For the first question, it may be argued that the risks posed by unwise or unscrupulous financial assistance are, currently, sufficiently covered by other more targeted legal provisions, such as directors' fiduciary duties and the duty of care, the requirements for exercise of directors' powers for proper purposes and minority shareholder remedies[22].

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[19] Maisie Ooi, "The Financial Assistance Prohibition: Changing Legislative and Judicial Landscape", [2009] *Singapore Journal of Legal Studies* 135, 142.

[20] We proposed in Part 4 of the CB to adopt a mandatory system of no-par for all companies with a share capital, with a transition period of not less than 24 months. Without par, there will no longer be share premium and capital redemption reserve. See Explanatory Notes on Part 4 for details.

[21] See Paul L Davies, Gower and Davies' Principles of Modern Company Law (London: Sweet & Maxwell, 8th edn, 2008), page 342, at paragraphs 13 to 26.

[22] This view is shared by the UK Company Law Review Steering Group; see UK Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework* (March 2000), pages 232 to 234.

2.14 It should be noted that a number of improvements to be made to these provisions in the CB are being considered. These improvements include:

(a) codifying directors' duty of care, skill and diligence;

(b) enhancing corporate governance such as in the area of connected transactions involving directors and their associates; and

(c) enhancing the rules on shareholder remedies, including improving the operation of the unfair prejudice remedy and statutory derivative action[23].

Moreover, we intend to introduce a duty on directors to prevent insolvent trading under the legislative proposals for a corporate rescue procedure[24]. The insolvent trading provisions, if adopted, will create a substantial disincentive for directors to sanction financial assistance which reduces the company's assets in a way that endangers creditors. When these improvements are in place, there would be a more robust regulatory scheme to tackle the risks currently dealt with by the financial assistance rules.

2.15 For the second question, as the UK Company Law Review Steering Group has noted, it seems anomalous to target specifically one possible violation of directors' duties or oppression of minorities, particularly where to do so may well inhibit a range of transactions which do not harm third parties and which benefit the company[25]. Taking into account the developments mentioned in paragraphs 2.13 and 2.14 above, it follows that there is a strong argument for abolishing the financial assistance rules for private companies. Abolition of the restrictions on financial assistance would result in savings to private companies in time and costs that would be incurred in carrying out the "whitewash" procedure, without adversely affecting the protections for their shareholders and creditors.

2.16 The considerations for public companies (including both listed and unlisted public companies) may be somewhat different. When reviewing the CO in 2000, the SCCLR noted that the rationale of the financial assistance provisions was to prevent looting of a company by bidders in leveraged takeovers and that the primary concern was for minority shareholders who

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[23] See FSTB, "Chapter 2, Enhancing Corporate Governance", *Consultation Paper on Draft Companies Bill First Phase Consultation* (December 2009), particularly paragraphs 2.4 to 2.7 and 2.22 to 2.24.

[24] FSTB, "Chapter 6: Insolvent Trading", *Consultation Paper on Review of Corporate Rescue Procedure Legislative Proposals* (October 2009).

[25] See footnote 22, paragraph 7.24 at page 233.

remained in the company after a successful takeover[26]. As a safeguard for small investors, it seems doubtful whether we should go so far as abolishing the financial assistance rules in respect of public companies altogether. Moreover, the concern about the provisions being "a trap for the unwary" is less relevant to public companies as they should have the resources to obtain legal advice, where necessary.

2.17 There appears to be two possible options for public companies:

(a) maintaining the status quo, i.e. listed companies would continue to be prohibited from giving financial assistance except for certain exceptions as set out in sections 47C and 47D of the CO (largely equivalent to Subdivision 3 of Division 5 in Part 5 of the CB) while unlisted public companies may give financial assistance subject to a solvency test and a special resolution of the shareholders (section 47E of the CO); or

(b) adopting the streamlined approach using a solvency test as currently drafted in Division 5 in Part 5 of the draft CB for both listed and unlisted public companies.

We are inclined towards (b). Nevertheless, we would like to listen to public comments before taking a final view.

2.18 On the other hand, if it is considered that financial assistance restrictions are still a useful regulatory tool to protect the interests of creditors and minority shareholders in all public and private companies, comments on whether the draft clauses in Division 5 in Part 5 would achieve the purpose and whether they could be further streamlined are welcome.

Question 1

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

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

[26] SCCLR, *The 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 9.92. On the other hand, the SCCLR also noted in the Report the defects of the existing provisions: they are cumbersome, difficult to apply and result in unnecessary costs; they sometimes result in the non-completion of transactions which would be economically beneficial; and parties determined to circumvent the current prohibitions can succeed in so doing.

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

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

(iii) any other option (please elaborate),

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

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

CHAPTER 3

DIRECTORS' REMUNERATION REPORT

3.1 We would like to seek further views on whether the CB should require (a) all listed companies incorporated in Hong Kong, and (b) unlisted companies incorporated in Hong Kong where members holding not less than 5% of the total voting rights have so requested, to prepare separate directors' remuneration reports, before taking a final decision on the matter.

Background

3.2 At present, section 161 of the CO requires all companies to set out the aggregate amount of the emoluments and pensions of, and compensation paid in relation to loss of office to directors and past directors in the accounts of the company.

3.3 All listed companies in Hong Kong are required under the Listing Rules[27] to disclose in its financial statements, on a named basis, details of directors' and past directors' emoluments. Such details include the directors' fees for the financial year, their basic salaries as well as other allowances (e.g. housing allowances) and benefits in kind, contributions to pension schemes and bonuses paid for directors, etc.

3.4 In view of the increasing public concern over the remuneration of directors, the SCCLR has recommended during Phase II of the CGR that the level of transparency in respect of the disclosure of directors' remuneration packages should be enhanced. To this end, the SCCLR suggested that the CO should be amended to:

(a) require listed companies to disclose individual directors' remuneration packages by name in their annual accounts; and

(b) require unlisted public companies or private companies incorporated in Hong Kong to disclose full details of all elements of individual directors' remuneration packages by name in their annual accounts if members holding not less than 5% of the issued share capital so request.

[27] See paragraph 17.07 in Chapter 17 and paragraphs 24 and 28 of Appendix 16 of the Listing Rules (Main Board).

3.5 To take forward SCCLR's recommendations, the Joint Government/HKICPA Working Group[28] ("Working Group") proposed that a separate directors' remuneration report should be prepared by all listed companies and those unlisted companies whose members have so requested, subject to the thresholds in paragraph 3.4(b).

3.6 The Working Group further proposed that the requirements under the CB should be similar to the requirements in Schedule 7A to the UK Companies Act 1985. The requirements are substantially re-enacted in Schedule 8 to The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 ("UK Regulations"), relevant extract from the UK Regulations is at **Appendix 2**. The requirements under the UK Regulations are detailed and prescriptive in nature. In gist, the report covers various types of benefits given to individual directors by name, including the basic salary, fees, expenses allowances, benefits in kind, pension benefits and contributions, bonuses, compensation for loss of office, share options and long-term incentive schemes. The information in relation to the directors' benefits is subject to audit and the report should be approved by the board of directors and signed on behalf of the board by a director.

3.7 We consulted the public in 2007 on whether the Working Group's proposal should be adopted[29]. A majority of the respondents supported the proposal regarding the preparation of a separate directors' remuneration report while some of them highlighted the need to strike a balance between transparency and privacy. Views were, however, diverse on the details of disclosure and whether disclosure should be made by name of individual directors[30].

Considerations

3.8 In Part 9 of the draft CB, we have tentatively provided for a requirement for all listed companies incorporated in Hong Kong and unlisted companies incorporated in Hong Kong if the required number of members have so requested to prepare separate directors' remuneration reports[31]. The detailed requirements would be set out in regulations to be made by the FS

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[28] It was established in March 2002 to undertake a comprehensive review of the accounting and auditing provisions in Part IV of the CO, which, to a large extent, were not examined in the context of the SCCLR's report on the recommendations of a consultancy report of the review of the CO published in February 2000.

[29] See FSTB, *Consultation Paper on Accounting and Auditing Provisions* (March 2007), paragraphs 4.9 to 4.12 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

[30] Most respondents supported the proposal in principle. However, views on the details of disclosure were divided. Some respondents considered that all shareholders should have the right to require full disclosure of remuneration packages to directors while others suggested that the disclosure could be limited to remuneration bands rather than by name of each individual director.

[31] See **Clauses 9.34** and **9.35** in Part 9.

after the CB is enacted. Nevertheless, we have reflected on the desirability of such an approach in consultation with the SFC and HKEx. Our concerns are two-fold.

3.9 First, the CO should provide for a legal framework which is applicable to both listed and unlisted companies. Additional requirements on listed companies due to their nature should be set out in the Listing Rules, or if statutory backing is considered necessary, in the SFO[32]. Currently, all listed companies are already required to disclose in their financial statements detailed information concerning the remuneration of individual directors and past directors under the Listing Rules[33]. If regulations based on the UK Regulations are introduced under the CO, listed companies incorporated in Hong Kong would be subject to statutory and prescriptive rules while those incorporated outside Hong Kong would continue to be regulated by non-statutory Listing Rules which are more principle-based. Such a complex regulatory framework with two different sets of rules is difficult to justify, especially as the majority of listed companies are incorporated outside Hong Kong. To avoid confusion and to ensure a level-playing field, any improvements to the disclosure of the remuneration of directors of listed companies is better pursued through amendments to the Listing Rules and/or SFO.

3.10 Second, the requirements on directors' remuneration reports under the UK Regulations are designed primarily for listed companies and might be too onerous for unlisted companies. It would increase the compliance costs as most of the information in the directors' remuneration report has to be audited. While the mechanism for members holding not less than 5% of issued shares/voting rights to request a company to prepare such a report is intended to protect the interests of minority shareholders, it could be used as a means to impose an extra burden on the directors or management in case of shareholder disputes. The existing requirements under section 161 of the CO for accounts to include information on directors' emoluments, pensions and compensation for loss of office will be modified to include new disclosures[34]. Such requirements will be set out in regulations to be made under **Clause 9.27** of Part 9. As the vast majority of unlisted companies in Hong Kong are SMEs and most of them are closely held, the disclosures required under the new regulations should be sufficient.

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[32] This may involve amending the SFO to empower the SFC to make relevant rules.

[33] HKEx has been conducting a Financial Statements Review Programme, which is a continuous programme of review of a sample of 100 financial reports of listed issuers each year. In the latest report on the programme's findings issued in June 2009, HKEx did not identify any significant non-compliance with the Listing Rules in respect of directors' remuneration disclosures.

[34] The additional information required to be disclosed includes the amount of money or benefits received or receivable by directors under the long term incentive schemes and share options, or by third parties in respect of directors' services; and the nature and value of any benefit in kind, or damages or settlement sum for breach of contract, made to directors for loss of office.

3.11 Subject to the public's views, we are inclined not to introduce any requirement in the CB for listed or unlisted companies incorporated in Hong Kong to prepare separate directors' remuneration reports. Any improvements to the disclosure of the remuneration of directors of listed companies may be considered under the Listing Rules and/or the SFO. We would keep under review the need for introducing any statutory disclosure requirements for listed companies in the light of local and international market experience.

Question 2

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

CHAPTER 4

INVESTIGATIONS AND ENQUIRIES

4.1 In Part 19 of the CB, we propose to enhance the provisions relating to company investigations and enquiries currently set out in sections 142 to 152F of the CO and to explicitly provide a new power for the Registrar to obtain documents, records and information for the purposes of ascertaining, as a start, whether any conduct that would constitute an offence relating to false or misleading statements has taken place. This chapter provides background information on the proposals in Part 19 and invites comments on the proposals.

Powers exercised by the FS

Background

4.2 Currently, the CO provides the following:

(a) **investigation of a company's affairs:** the FS may appoint an inspector with extensive powers to conduct an investigation into the affairs of a company (sections 142 to 151). The appointment may be made under section 142 on members' application (in the case of a company having a share capital, by either not less than 100 members or members holding not less than one-tenth of the shares issued; in the case of a company not having a share capital, by not less than one-tenth in number of the members) or under section 143 in the following circumstances: (i) on the FS's own initiative where there is fraud or mismanagement involved, (ii) upon an order made by the court[35] or (iii) on application by a company which passed a special resolution to make the request; and

(b) **inspection of books and papers:** the FS or a person authorised by him may, in specified circumstances, require a company and any person who appears to be in possession of the company's books and papers to produce those documents and to provide an explanation of them (sections 152A to 152F). This power may provide a discreet and less costly way to assess whether an investigation is warranted upon receiving an application from members under section 142 of the CO. The FS may also invoke the power where there is "good reason" to do so.

[35] The appointment must be made under this scenario.

4.3 According to our records, the FS has in the past invoked section 142 or 143 of the CO to appoint inspectors to investigate the affairs of 38 companies. The last appointment was made in 1999. The power to inspect books and papers has never been invoked.

Need for the powers

4.4 Many of the previous investigations undertaken by inspectors involve listed companies or their related companies. Developments in the regulatory framework of listed companies in recent years have reduced the need for the FS to appoint inspectors under the CO to investigate into the affairs of listed companies. Since the coming into operation of the SFO in April 2003, the SFC has greater powers to investigate into market misconduct involving listed companies. The FRC was established in 2006 to conduct independent investigations of possible auditing and reporting irregularities in relation to listed companies. This may help explain the absence of any new investigation by inspectors appointed under the CO in recent years.

4.5 Nonetheless, we cannot rule out the possibility of FS using the investigation and enquiry powers[36] in future cases where there are sufficient grounds to do so, especially since the investigation and enquiry powers could cover all types of companies formed or operating in Hong Kong. The provisions should be retained in the CB as "reserve" or "last resort" powers as a supplement to the powers contained in specialised Ordinances, such as the SFO and the Banking Ordinance (Cap 155)) targeting certain types of companies.

Enhancing the provisions

4.6 The SFO and the FRCO both have provisions which empower the SFC and the FRC respectively to carry out investigations. We have made reference to these two pieces of legislation in modernising the provisions in the CB[37].

Strengthening investigatory powers of an inspector

4.7 We propose to enhance the investigatory powers of an inspector. For example, we propose to require a person under investigation to preserve records or documents and, by statutory declaration, to verify statements made to the inspector.

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[36] In Part 19 of the CB, the power to inspect books and papers under the CO is referred to as power to "enquire into company's affairs" (or "enquiry power" in short) to better described the nature of the power.

[37] There has been no major amendment to the relevant provisions in the CO since 1994.

Extending scope to cover companies incorporated elsewhere

4.8 We also propose to extend the categories of companies that may be subject to investigation to cover companies incorporated elsewhere that are doing business in Hong Kong.

4.9 As regards the appointment of inspectors on the application of members, we will also extend the right to cover registered non-Hong Kong companies, i.e. those companies registered under Part 16 of the CB.

Improving safeguards for confidentiality

4.10 In line with similar provisions provided for in SFO and FRCO, we consider it appropriate to provide better safeguards for confidentiality of information and protection of informers.

4.11 Details on the three proposals above can be found in the Explanatory Notes on Part 19 and the draft clauses in Divisions 1 to 3 and 5 in Part 19.

Threshold for application to FS for appointment of an inspector

4.12 Currently, the threshold for members of a company with share capital to apply to the FS for the appointment of an inspector under section 142 of the CO is:

(a) members holding not less than one-tenth of the shares issued; or

(b) not less than 100 members.

For a company without share capital, the threshold is one-tenth in number of the persons of the company's register of members.

4.13 The SCCLR had previously recommended that the number of members making a request under (b) above should be reduced from 100 to 50 while the other thresholds should remain unchanged. The current threshold of 100 members is already lower than similar thresholds in the UK and Singapore (both requiring at least 200 members). Nevertheless, the SCCLR's recommendation had taken into account the current shareholding structure and regime. Currently, a vast majority of the shares in listed companies are held in CCASS, and hence in the name of HKSCC Nominees Limited rather than in the name of the investor that actually holds the beneficial interest in the shares. Moreover, considerable processing time and cost is needed for the beneficial owner to withdraw the shares from

CCASS and register them in his/her own name[38]. We note that the SFC, HKEx and Federation of Share Registrars Limited have recently put forward a joint proposal for implementing a scripless securities market in Hong Kong which, if implemented, will facilitate investors to hold shares in their own names[39]. In view of this, we have retained the existing threshold of "not less than 100 members" in **Clause 19.3** of the draft Bill.

Question 3

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

Enquiries by Registrar

4.14 We will also explicitly provide for a new but limited power for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute certain offences under the CB, as a start, in relation to **Clauses 15.7(7)** (the equivalent of section 291AA(14) in the CO concerning giving false or misleading information in connection with an application for deregistration of a company) and **20.1(1)** (the equivalent of section 349 in the CO concerning making a statement that is misleading, false or deceptive in any material particular) has taken place.

4.15 The two offences, which relate to the provision of false information in documents delivered to the CR help safeguard the integrity of the Companies Register and the quality of information disclosed to the public.

4.16 The proposed power would enhance the CR's enforcement efforts and facilitate the handling of public complaints by improving the quality of the evidence needed for successful prosecution against breaches of the relevant obligations under the CB. As the focus would be on breaches related to filing and routine operational requirements (e.g. complaints against incorrect particulars in a notification of change of particulars of secretary and director, annual return, etc), such enforcement work falls strictly within CR's purview, and would not duplicate efforts of other regulatory bodies.

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[38] The issues involving CCASS are discussed in greater details in FSTB, *Consultation Paper on Draft Companies Bill – First Phase Consultation* (December 2009), paragraphs 6.13 and 6.14.

[39] SFC, HKEx and Federation of Share Registrars Limited, *Joint Consultation Paper on a Proposed Operational Model for Implementing a Scripless Securities Market in Hong Kong* (December 2009).

4.17 The details of the proposed new power can be found in the Explanatory Notes on Part 19 and the draft clauses in Divisions 1, 4 and 5 in Part 19.

Question 4

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

CHAPTER 5

NOTICE OF REFUSAL TO REGISTER A TRANSFER OF SHARES

5.1 Section 69(1) of the CO requires a company which refuses to register a transfer of shares or debentures to send a notice of such refusal to the transferor and transferee within 2 months of the lodgement of the transfer with the company. There is no requirement for the notice to be accompanied by the reasons for refusal to register the transfer. The existing provision for shares is essentially restated in **Clause 4.19** of the CB. Nevertheless, we would like to hear public views on whether we should introduce a new requirement for a company to give reasons explaining its refusal to register a transfer of shares.

Background

5.2 At common law, directors of private companies need not give reasons for their decision whether to accept or reject a transfer,[40] and their failure to give their reasons, either in the resolution embodying their decision or in evidence at the trial, will not be construed against them[41]. A dissatisfied transferor or transferee can attack the directors' decision only if he or she can show that they exercised their discretion for an improper purpose or for a reason outside the grounds for rejecting transfers which are specified in the articles[42]. Unless reasons are voluntarily given by the directors, it may be difficult to challenge the directors' decision.

5.3 The position is similar under the CO. Although the right of the transferee to apply to the court to have a transfer of shares registered is provided under section 69(1B), the burden of proving that directors have wrongfully disapproved a transfer would be equally difficult as directors are not required to provide grounds for their refusal.

5.4 The position of a transmittee of shares by operation of law is different. That person is entitled under section 69(1A) of the CO to call on the company to provide reasons for a refusal to register him or her as member. The company is required to register the transfer if it fails to furnish reasons within 28 days of the request.

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40 *Duke of Sutherland v British Dominion Land Settlement Corpn* [1926] Ch 746.

41 *Re Coalport China Co* [1895] 2 Ch 404; Robert R. Pennington, *Pennington's Company Law* (London: Butterworths, 7th edn, 1995), page 1002.

42 Robert R. Pennington, *Pennington's Company Law* (London: Butterworths, 7th edn, 1995), page 1002.

Position in the UK

5.5 The UKCA 2006 requires a company which refuses to register a transfer (whether of shares or debentures) to give the transferee notice of refusal *accompanied by reasons* as soon as practicable and in any event within two months of lodgement of the transfer (section 771(1)). The transferee has a right to request further information about the reasons for the refusal but such request has to be reasonable, and cannot include a request for copies of meetings of directors (section 771(2)).

Considerations

5.6 Where there is a discretion to refuse registration of a transfer of shares, it is for consideration whether directors who refuse to register a transfer should either be required to give reasons (in the manner of the UKCA 2006), or be required upon request to provide reasons (which is currently the position under the CO for transmissions by operation of law).

Pros and Cons

5.7 The company's constitution may give directors power in their absolute discretion, or in prescribed circumstances, to refuse to register a transfer of shares, but the discretion is a fiduciary one that must not be exercised fraudulently, capriciously or for a collateral purpose. It is however for the person alleging that the directors' decision is improper to prove it, and this is difficult to discharge if directors are not obligated and do not provide reasons for their refusal to register a transfer. The proposal to require directors to give reasons rectifies this problem, thereby providing for transparency. Giving the reasons may also be helpful to transferors and transferees, particularly when the reason was just because there were pre-emptive rights or the forms were not completed correctly.

5.8 However, there is a concern about the proposal in that it will impose a statutory obligation on directors to justify a refusal and would unduly restrict the directors' entrenched right to reject a transfer. This new requirement may encourage litigation, and directors may feel compelled to obtain legal advice before refusing a transfer on discretionary grounds thereby increasing costs. At the same time, it might open a floodgate to dissatisfied transferees, particularly in cases of family disputes. But weighed against this is the transferor's right to transfer the shares, and the transferee's right (as an incident of the transferee's property in the shares) against the company to be registered, which should only be restricted to the extent provided for in the company's constitution and by law, and not otherwise.

5.9 The requirement for directors to provide reasons does not mean that family companies can no longer control who can or cannot buy into the shares of the company. It will not interfere with a decision made legitimately, or substitute the court's decision for the directors', made in good faith, as to the interests of the company. The new requirement does not change the legal principles as to whether the directors' refusal to register a transfer is valid or not.

5.10 We would like to hear public views before deciding whether to introduce the requirement for a company to give reasons explaining its refusal to register a transfer of shares. In the case of debentures, ownership does not depend on registration and so the debt constituted or evidenced by the debenture is transferred in a manner similar to other choses in action[43]. For a legal transfer, this will be governed by section 9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23), subject to any restrictions in the terms of the trust deed or agreement. Hence we believe that it is not necessary to introduce the requirement for debentures[44].

Question 5

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

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

(i) in the manner of the UKCA 2006 (i.e. mandatory whenever there is a refusal); or

(ii) upon request, as in the case of transmissions by operation of law under section 69(1A) of the CO?

[43] Paul L Davies, *Gower and Davies' Principles of Modern Company Law* (London: Sweet & Maxwell, 8th edn, 2008), page 1147.

[44] For comparison, under section 69(1A) of the CO, a person to whom shares have been transmitted by operation of law is entitled to call on the company to provide reasons for a refusal to register him or her as member. This requirement does not apply to debentures and this position is preserved in the CB.

LIST OF QUESTIONS FOR CONSULTATION

Question 1

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

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

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

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

(iii) any other option (please elaborate),

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

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

Question 2

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

Question 3

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

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

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

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

(i) in the manner of the UKCA 2006 (i.e. mandatory whenever there is a refusal); or

(ii) upon request, as in the case of transmissions by operation of law under section 69(1A) of the CO?

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

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 Compulsory Share Acquisition in Takeover and Share Buy-Back		✓
14	Remedies for Protection of Companies' or Members' Interests	✓	
15	Dissolution by Striking Off or Deregistration	✓	

* The titles of some Parts have been revised since the first phase consultation. The titles of Parts are provisional and subject to change.

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

PART 4
DIRECTORS' REMUNERATION REPORT

Directors' remuneration report (quoted companies)

11.—(1) The remuneration report which the directors of a quoted company are required to prepare under section 420 of the 2006 Act (duty to prepare directors' remuneration report) must contain the information specified in Schedule 8 to these Regulations, and must comply with any requirement of that Schedule as to how information is to be set out in the report.

(2) In Schedule 8—

Part 1 is introductory,

Part 2 relates to information about remuneration committees, performance related remuneration, consideration of conditions elsewhere in company and group and liabilities in respect of directors' contracts,

Part 3 relates to detailed information about directors' remuneration (information included under Part 3 is required to be reported on by the auditor (see subsection (3)), and

Part 4 contains interpretative and supplementary provisions.

(3) For the purposes of section 497 in Part 16 of the 2006 Act (auditor's report on auditable part of directors' remuneration report), "the auditable part" of a directors' remuneration report is the part containing the information required by Part 3 of Schedule 8 to these Regulations.

PART 5
INTERPRETATION

Definition of "provisions"

12. Schedule 9 to these Regulations defines "provisions" for the purposes of these Regulations and for the purposes of—

(a) section 677(3)(a) (Companies Act accounts: relevant provisions for purposes of financial assistance) in Part 18 of the 2006 Act,

(b) section 712(2)(b)(i) (Companies Act accounts: relevant provisions to determine available profits for redemption or purchase by private company out of capital) in that Part, and

(c) sections 831(3)(a) (Companies Act accounts: net asset restriction on public company distributions), 832(4)(a) (Companies Act accounts: investment companies distributions) and 836(1)(b)(i) (Companies Act accounts: relevant provisions for distribution purposes) in Part 23 of that Act.

General interpretation

13. Schedule 10 to these Regulations contains general definitions for the purposes of these Regulations.

Gareth Thomas
Parliamentary Under Secretary of State for Trade and Consumer Affairs,
Department for Business, Enterprise and Regulatory Reform

19th February 2008

SCHEDULE 8

Regulation 11

QUOTED COMPANIES: DIRECTORS' REMUNERATION REPORT

PART 1
INTRODUCTORY

1.—(1) In the directors' remuneration report for a financial year ("the relevant financial year") there must be shown the information specified in Parts 2 and 3.

(2) Information required to be shown in the report for or in respect of a particular person must be shown in the report in a manner that links the information to that person identified by name.

PART 2
INFORMATION NOT SUBJECT TO AUDIT

Consideration by the directors of matters relating to directors' remuneration

2.—(1) If a committee of the company's directors has considered matters relating to the directors' remuneration for the relevant financial year, the directors' remuneration report must—

(a) name each director who was a member of the committee at any time when the committee was considering any such matter;

(b) name any person who provided to the committee advice, or services, that materially assisted the committee in their consideration of any such matter;

(c) in the case of any person named under paragraph (b), who is not a director of the company, state—

(i) the nature of any other services that that person has provided to the company during the relevant financial year; and

(ii) whether that person was appointed by the committee.

(2) In sub-paragraph (1)(b) "person" includes (in particular) any director of the company who does not fall within sub-paragraph (1)(a).

Statement of company's policy on directors' remuneration

3.—(1) The directors' remuneration report must contain a statement of the company's policy on directors' remuneration for the following financial year and for financial years subsequent to that.

(2) The policy statement must include—

(a) for each director, a detailed summary of any performance conditions to which any entitlement of the director—

(i) to share options, or

(ii) under a long term incentive scheme,

is subject;

(b) an explanation as to why any such performance conditions were chosen;

(c) a summary of the methods to be used in assessing whether any such performance conditions are met and an explanation as to why those methods were chosen;

(d) if any such performance condition involves any comparison with factors external to the company—

(i) a summary of the factors to be used in making each such comparison, and

(ii) if any of the factors relates to the performance of another company, of two or more other companies or of an index on which the securities of a company or companies are listed, the identity of that company, of each of those companies or of the index;

(e) a description of, and an explanation for, any significant amendment proposed to be made to the terms and conditions of any entitlement of a director to share options or under a long term incentive scheme; and

(f) if any entitlement of a director to share options, or under a long term incentive scheme, is not subject to performance conditions, an explanation as to why that is the case.

(3) The policy statement must, in respect of each director's terms and conditions relating to remuneration, explain the relative importance of those elements which are, and those which are not, related to performance.

(4) The policy statement must summarise, and explain, the company's policy on—

(a) the duration of contracts with directors, and

(b) notice periods, and termination payments, under such contracts.

(5) In sub-paragraphs (2) and (3), references to a director are to any person who serves as a director of the company at any time in the period beginning with the end of the relevant financial year and ending with the date on which the directors' remuneration report is laid before the company in general meeting.

Statement of consideration of conditions elsewhere in company and group

4. The directors' remuneration report must contain a statement of how pay and employment conditions of employees of the company and of other undertakings within the same group as the company were taken into account when determining directors' remuneration for the relevant financial year.

Performance graph

5.—(1) The directors' remuneration report must—

(a) contain a line graph that shows for each of—

(i) a holding of shares of that class of the company's equity share capital whose listing, or admission to dealing, has resulted in the company falling within the definition of "quoted company", and

(ii) a hypothetical holding of shares made up of shares of the same kinds and number as those by reference to which a broad equity market index is calculated,

a line drawn by joining up points plotted to represent, for each of the financial years in the relevant period, the total shareholder return on that holding; and

(b) state the name of the index selected for the purposes of the graph and set out the reasons for selecting that index.

(2) For the purposes of sub-paragraphs (1) and (4), "relevant period" means the five financial years of which the last is the relevant financial year.

(3) Where the relevant financial year—

(a) is the company's second, third or fourth financial year, sub-paragraph (2) has effect with the substitution of "two", "three" or "four" (as the case may be) for "five"; and

(b) is the company's first financial year, "relevant period", for the purposes of sub-paragraphs (1) and (4), means the relevant financial year.

(4) For the purposes of sub-paragraph (1), the "total shareholder return" for a relevant period on a holding of shares must be calculated using a fair method that—

(a) takes as its starting point the percentage change over the period in the market price of the holding;

(b) involves making—

(i) the assumptions specified in sub-paragraph (5) as to reinvestment of income, and

(ii) the assumption specified in sub-paragraph (7) as to the funding of liabilities, and

(c) makes provision for any replacement of shares in the holding by shares of a different description;

and the same method must be used for each of the holdings mentioned in sub-paragraph (1).

(5) The assumptions as to reinvestment of income are—

(a) that any benefit in the form of shares of the same kind as those in the holding is added to the holding at the time the benefit becomes receivable; and

(b) that any benefit in cash, and an amount equal to the value of any benefit not in cash and not falling within paragraph (a), is applied at the time the benefit becomes receivable in the purchase at their market price of shares of the same kind as those in the holding and that the shares purchased are added to the holding at that time.

(6) In sub-paragraph (5) "benefit" means any benefit (including, in particular, any dividend) receivable in respect of any shares in the holding by the holder from the company of whose share capital the shares form part.

(7) The assumption as to the funding of liabilities is that, where the holder has a liability to the company of whose capital the shares in the holding form part, shares are sold from the holding—

(a) immediately before the time by which the liability is due to be satisfied, and

(b) in such numbers that, at the time of the sale, the market price of the shares sold equals the amount of the liability in respect of the shares in the holding that are not being sold.

(8) In sub-paragraph (7) "liability" means a liability arising in respect of any shares in the holding or from the exercise of a right attached to any of those shares.

Service contracts

6.—(1) The directors' remuneration report must contain, in respect of the contract of service or contract for services of each person who has served as a director of the company at any time during the relevant financial year, the following information—

(a) the date of the contract, the unexpired term and the details of any notice periods;

(b) any provision for compensation payable upon early termination of the contract; and

(c) such details of other provisions in the contract as are necessary to enable members of the company to estimate the liability of the company in the event of early termination of the contract.

(2) The directors' remuneration report must contain an explanation for any significant award made to a person in the circumstances described in paragraph 15.

PART 3
INFORMATION SUBJECT TO AUDIT

Amount of each director's emoluments and compensation in the relevant financial year

7.—(1) The directors' remuneration report must for the relevant financial year show, for each person who has served as a director of the company at any time during that year, each of the following—

(a) the total amount of salary and fees paid to or receivable by the person in respect of qualifying services;

(b) the total amount of bonuses so paid or receivable;

(c) the total amount of sums paid by way of expenses allowance that are—

(i) chargeable to United Kingdom income tax (or would be if the person were an individual), and

(ii) paid to or receivable by the person in respect of qualifying services;

(d) the total amount of—

(i) any compensation for loss of office paid to or receivable by the person, and

(ii) any other payments paid to or receivable by the person in connection with the termination of qualifying services;

(e) the total estimated value of any benefits received by the person otherwise than in cash that—

(i) do not fall within any of paragraphs (a) to (d) or paragraphs 8 to 12,

(ii) are emoluments of the person, and

(iii) are received by the person in respect of qualifying services; and

(f) the amount that is the total of the sums mentioned in paragraphs (a) to (e).

(2) The directors' remuneration report must show, for each person who has served as a director of the company at any time during the relevant financial year, the amount that for the financial year preceding the relevant financial year is the total of the sums mentioned in paragraphs (a) to (e) of sub-paragraph (1).

(3) The directors' remuneration report must also state the nature of any element of a remuneration package which is not cash.

(4) The information required by sub-paragraphs (1) and (2) must be presented in tabular form.

Share options

8.—(1) The directors' remuneration report must contain, in respect of each person who has served as a director of the company at any time in the relevant financial year, the information specified in paragraph 9.

(2) Sub-paragraph (1) is subject to paragraph 10 (aggregation of information to avoid excessively lengthy reports).

(3) The information specified in sub-paragraphs (a) to (c) of paragraph 9 must be presented in tabular form in the report.

(4) In paragraph 9 "share option", in relation to a person, means a share option granted in respect of qualifying services of the person.

9. The information required by sub-paragraph (1) of paragraph 8 in respect of such a person as is mentioned in that sub-paragraph is—

(a) the number of shares that are subject to a share option—

(i) at the beginning of the relevant financial year or, if later, on the date of the appointment of the person as a director of the company, and

(ii) at the end of the relevant financial year or, if earlier, on the cessation of the person's appointment as a director of the company,

in each case differentiating between share options having different terms and conditions;

(b) information identifying those share options that have been awarded in the relevant financial year, those that have been exercised in that year, those that in that year have expired unexercised and those whose terms and conditions have been varied in that year;

(c) for each share option that is unexpired at any time in the relevant financial year—

(i) the price paid, if any, for its award,

(ii) the exercise price,

(iii) the date from which the option may be exercised, and

(iv) the date on which the option expires;

(d) a description of any variation made in the relevant financial year in the terms and conditions of a share option;

(e) a summary of any performance criteria upon which the award or exercise of a share option is conditional, including a description of any variation made in such performance criteria during the relevant financial year;

(f) for each share option that has been exercised during the relevant financial year, the market price of the shares, in relation to which it is exercised, at the time of exercise; and

(g) for each share option that is unexpired at the end of the relevant financial year—

(i) the market price at the end of that year, and

(ii) the highest and lowest market prices during that year,

of each share that is subject to the option.

10.—(1) If, in the opinion of the directors of the company, disclosure in accordance with paragraphs 8 and 9 would result in a disclosure of excessive length then, (subject to sub-paragraphs (2) and (3))—

(a) information disclosed for a person under paragraph 9(a) need not differentiate between share options having different terms and conditions;

(b) for the purposes of disclosure in respect of a person under paragraph 9(c)(i) and (ii) and (g), share options may be aggregated and (instead of disclosing prices for each share option) disclosure may be made of weighted average prices of aggregations of share options;

(c) for the purposes of disclosure in respect of a person under paragraph 9(c)(iii) and (iv), share options may be aggregated and (instead of disclosing dates for each share option) disclosure may be made of ranges of dates for aggregation of share options.

(2) Sub-paragraph (1)(b) and (c) does not permit the aggregation of—

(a) share options in respect of shares whose market price at the end of the relevant financial year is below the option exercise price, with

(b) share options in respect of shares whose market price at the end of the relevant financial year is equal to, or exceeds, the option exercise price.

(3) Sub-paragraph (1) does not apply (and accordingly, full disclosure must be made in accordance with paragraphs 8 and 9) in respect of share options that during the relevant financial year have been awarded or exercised or had their terms and conditions varied.

Long term incentive schemes

11.—(1) The directors' remuneration report must contain, in respect of each person who has served as a director of the company at any time in the relevant financial year, the information specified in paragraph 12.

(2) Sub-paragraph (1) does not require the report to contain share option details that are contained in the report in compliance with paragraphs 8 to 10.

(3) The information specified in paragraph 12 must be presented in tabular form in the report.

(4) For the purposes of paragraph 12—

(a) "scheme interest", in relation to a person, means an interest under a long term incentive scheme that is an interest in respect of which assets may become receivable under the scheme in respect of qualifying services of the person; and

(b) such an interest "vests" at the earliest time when—

(i) it has been ascertained that the qualifying conditions have been fulfilled, and

(ii) the nature and quantity of the assets receivable under the scheme in respect of the interest have been ascertained.

(5) In this Schedule "long term incentive scheme" means any agreement or arrangement under which money or other assets may become receivable by a person and which includes one or more qualifying

conditions with respect to service or performance that cannot be fulfilled within a single financial year, and for this purpose the following must be disregarded, namely—

(a) any bonus the amount of which falls to be determined by reference to service or performance within a single financial year;

(b) compensation in respect of loss of office, payments for breach of contract and other termination payments; and

(c) retirement benefits.

12.—(1) The information required by sub-paragraph (1) of paragraph 11 in respect of such a person as is mentioned in that sub-paragraph is—

(a) details of the scheme interests that the person has at the beginning of the relevant financial year or if later on the date of the appointment of the person as a director of the company;

(b) details of the scheme interests awarded to the person during the relevant financial year;

(c) details of the scheme interests that the person has at the end of the relevant financial year or if earlier on the cessation of the person's appointment as a director of the company;

(d) for each scheme interest within paragraphs (a) to (c)—

(i) the end of the period over which the qualifying conditions for that interest have to be fulfilled (or if there are different periods for different conditions, the end of whichever of those periods ends last); and

(ii) a description of any variation made in the terms and conditions of the scheme interests during the relevant financial year; and

(e) for each scheme interest that has vested in the relevant financial year—

(i) the relevant details (see sub-paragraph (3)) of any shares,

(ii) the amount of any money, and

(iii) the value of any other assets,

that have become receivable in respect of the interest.

(2) The details that sub-paragraph (1)(b) requires of a scheme interest awarded during the relevant financial year include, if shares may become receivable in respect of the interest, the following—

(a) the number of those shares;

(b) the market price of each of those shares when the scheme interest was awarded; and

(c) details of qualifying conditions that are conditions with respect to performance.

(3) In sub-paragraph (1)(e)(i) "the relevant details", in relation to any shares that have become receivable in respect of a scheme interest, means—

(a) the number of those shares;

(b) the date on which the scheme interest was awarded;

(c) the market price of each of those shares when the scheme interest was awarded;

(d) the market price of each of those shares when the scheme interest vested; and

(e) details of qualifying conditions that were conditions with respect to performance.

Pensions

13.—(1) The directors' remuneration report must, for each person who has served as a director of the company at any time during the relevant financial year, contain the information in respect of pensions that is specified in sub-paragraphs (2) and (3).

(2) Where the person has rights under a pension scheme that is a defined benefit scheme in relation to the person and any of those rights are rights to which he has become entitled in respect of qualifying services of his—

(a) details—

(i) of any changes during the relevant financial year in the person's accrued benefits under the scheme, and

(ii) of the person's accrued benefits under the scheme as at the end of that year;

(b) the transfer value, calculated in a manner consistent with "Retirement Benefit Schemes – Transfer Values (GN 11)" published by the Institute of Actuaries and the Faculty of Actuaries and dated 6th April 2001, of the person's accrued benefits under the scheme at the end of the relevant financial year;

(c) the transfer value of the person's accrued benefits under the scheme that in compliance with paragraph (b) was contained in the directors' remuneration report for the previous financial year or, if there was no such report or no such value was contained in that report, the transfer value, calculated in such a manner as is mentioned in paragraph (b), of the person's accrued benefits under the scheme at the beginning of the relevant financial year;

(d) the amount obtained by subtracting—

(i) the transfer value of the person's accrued benefits under the scheme that is required to be contained in the report by paragraph (c), from

(ii) the transfer value of those benefits that is required to be contained in the report by paragraph (b),

and then subtracting from the result of that calculation the amount of any contributions made to the scheme by the person in the relevant financial year.

(3) Where—

(a) the person has rights under a pension scheme that is a money purchase scheme in relation to the person, and

(b) any of those rights are rights to which he has become entitled in respect of qualifying services of his,

details of any contribution to the scheme in respect of the person that is paid or payable by the company for the relevant financial year or paid by the company in that year for another financial year.

Excess retirement benefits of directors and past directors

14.—(1) Subject to sub-paragraph (3), the directors' remuneration report must show in respect of each person who has served as a director of the company—

(a) at any time during the relevant financial year, or

(b) at any time before the beginning of that year,

the amount of so much of retirement benefits paid to or receivable by the person under pension schemes as is in excess of the retirement benefits to which he was entitled on the date on which the benefits first became payable or 31st March 1997, whichever is the later.

(2) In subsection (1) "retirement benefits" means retirement benefits to which the person became entitled in respect of qualifying services of his.

(3) Amounts paid or receivable under a pension scheme need not be included in an amount required to be shown under sub-paragraph (1) if—

(a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and

(b) amounts were paid to or receivable by all pensioner members of the scheme on the same basis;

and in this sub-paragraph "pensioner member", in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme.

(4) In this paragraph—

(a) references to retirement benefits include benefits otherwise than in cash; and

(b) in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit,

and the nature of any such benefit must also be shown in the report.

Compensation for past directors

15. The directors' remuneration report must contain details of any significant award made in the relevant financial year to any person who was not a director of the company at the time the award was made but had previously been a director of the company, including (in particular) compensation in respect of loss of office and pensions but excluding any sums which have already been shown in the report under paragraph 7(1)(d).

Sums paid to third parties in respect of a director's services

16.—(1) The directors' remuneration report must show, in respect of each person who served as a director of the company at any time during the relevant financial year, the aggregate amount of any consideration paid to or receivable by third parties for making available the services of the person—

(a) as a director of the company, or

(b) while director of the company—

(i) as director of any of its subsidiary undertakings, or

(ii) as director of any other undertaking of which he was (while director of the company) a director by virtue of the company's nomination (direct or indirect), or

(iii) otherwise in connection with the management of the affairs of the company or any such other undertaking.

(2) The reference to consideration includes benefits otherwise than in cash; and in relation to such consideration the reference to its amount is to the estimated money value of the benefit.

The nature of any such consideration must be shown in the report.

(3) The reference to third parties is to persons other than—

(a) the person himself or a person connected with him or a body corporate controlled by him, and

(b) the company or any such other undertaking as is mentioned in sub-paragraph (1)(b)(ii).

PART 4
INTERPRETATION AND SUPPLEMENTARY

17.—(1) In this Schedule—

"amount", in relation to a gain made on the exercise of a share option, means the difference between—

(a) the market price of the shares on the day on which the option was exercised; and

(b) the price actually paid for the shares;

"company contributions", in relation to a pension scheme and a person, means any payments (including insurance premiums) made, or treated as made, to the scheme in respect of the person by anyone other than the person;

"defined benefit scheme", in relation to a person, means a pension scheme which is not a money purchase scheme in relation to the person;

"emoluments" of a person—

(a) includes salary, fees and bonuses, sums paid by way of expenses allowance (so far as they are chargeable to United Kingdom income tax or would be if the person were an individual), but

(b) does not include any of the following, namely—

(i) the value of any share options granted to him or the amount of any gains made on the exercise of any such options;

(ii) any company contributions paid, or treated as paid, in respect of him under any pension scheme or any benefits to which he is entitled under any such scheme; or

(iii) any money or other assets paid to or received or receivable by him under any long term incentive scheme;

"long term incentive scheme" has the meaning given by paragraph 11(5);

"money purchase benefits", in relation to a person, means retirement benefits the rate or amount of which is calculated by reference to payments made, or treated as made, by the person or by any other person in respect of that person and which are not average salary benefits;

"money purchase scheme", in relation to a person, means a pension scheme under which all of the benefits that may become payable to or in respect of the person are money purchase benefits in relation to the person;

"pension scheme" means a retirement benefits scheme within the meaning given by section 611 of the Income and Corporation Taxes Act 1988;

"qualifying services", in relation to any person, means his services as a director of the company, and his services at any time while he is a director of the company—

(a) as a director of an undertaking that is a subsidiary undertaking of the company at that time;

(b) as a director of any other undertaking of which he is a director by virtue of the company's nomination (direct or indirect); or

(c) otherwise in connection with the management of the affairs of the company or any such subsidiary undertaking or any such other undertaking;

"retirement benefits" means relevant benefits within the meaning given by section 612(1) of the Income and Corporation Taxes Act 1988;

"shares" means shares (whether allotted or not) in the company, or any undertaking which is a group undertaking in relation to the company, and includes a share warrant as defined by section 779(1) of the 2006 Act;

"share option" means a right to acquire shares;

"value", in relation to shares received or receivable on any day by a person who is or has been a director of the company, means the market price of the shares on that day.

(2) In this Schedule "compensation in respect of loss of office" includes compensation received or receivable by a person for—

(a) loss of office as director of the company, or

(b) loss, while director of the company or on or in connection with his ceasing to be a director of it, of—

(i) any other office in connection with the management of the company's affairs, or

(ii) any office as director or otherwise in connection with the management of the affairs of any undertaking that, immediately before the loss, is a subsidiary undertaking of the company or an undertaking of which he is a director by virtue of the company's nomination (direct or indirect);

(c) compensation in consideration for, or in connection with, a person's retirement from office; and

(d) where such a retirement is occasioned by a breach of the person's contract with the company or with an undertaking that, immediately before the breach, is a subsidiary undertaking of the

company or an undertaking of which he is a director by virtue of the company's nomination (direct or indirect)—

(i) payments made by way of damages for the breach; or

(ii) payments made by way of settlement or compromise of any claim in respect of the breach.

(3) References in this Schedule to compensation include benefits otherwise than in cash; and in relation to such compensation references in this Schedule to its amounts are to the estimated money value of the benefit.

(4) References in this Schedule to a person being "connected" with a director, and to a director "controlling" a body corporate, are to be construed in accordance with sections 252 to 255 of the 2006 Act.

18.—(1) For the purposes of this Schedule emoluments paid or receivable or share options granted in respect of a person's accepting office as a director are to be treated as emoluments paid or receivable or share options granted in respect of his services as a director.

(2) Where a pension scheme provides for any benefits that may become payable to or in respect of a person to be whichever are the greater of—

(a) such benefits determined by or under the scheme as are money purchase benefits in relation to the person; and

(b) such retirement benefits determined by or under the scheme to be payable to or in respect of the person as are not money purchase benefits in relation to the person,

the company may assume for the purposes of this Schedule that those benefits will be money purchase benefits in relation to the person, or not, according to whichever appears more likely at the end of the relevant financial year.

(3) In determining for the purposes of this Schedule whether a pension scheme is a money purchase scheme in relation to a person or a defined benefit scheme in relation to a person, any death in service benefits provided for by the scheme are to be disregarded.

19.—(1) The following applies with respect to the amounts to be shown under this Schedule.

(2) The amount in each case includes all relevant sums paid by or receivable from—

(a) the company; and

(b) the company's subsidiary undertakings; and

(c) any other person,

except sums to be accounted for to the company or any of its subsidiary undertakings or any other undertaking of which any person has been a director while director of the company, by virtue of section 219 of the 2006 Act (payment in connection with share transfer: requirement of members' approval), to past or present members of the company or any of its subsidiaries or any class of those members.

(3) Reference to amounts paid to or receivable by a person include amounts paid to or receivable by a person connected with him or a body corporate controlled by him (but not so as to require an amount to be counted twice).

20.—(1) The amounts to be shown for any financial year under Part 3 of this Schedule are the sums receivable in respect of that year (whenever paid) or, in the case of sums not receivable in respect of a period, the sums paid during that year.

(2) But where—

(a) any sums are not shown in the directors' remuneration report for the relevant financial year on the ground that the person receiving them is liable to account for them as mentioned in paragraph 19 (2), but the liability is thereafter wholly or partly released or is not enforced within a period of 2 years; or

(b) any sums paid by way of expenses allowance are charged to United Kingdom income tax after the end of the relevant financial year or, in the case of any such sums paid otherwise than to an

individual, it does not become clear until the end of the relevant financial year that those sums would be charged to such tax were the person an individual,

those sums must, to the extent to which the liability is released or not enforced or they are charged as mentioned above (as the case may be), be shown in the first directors' remuneration report in which it is practicable to show them and must be distinguished from the amounts to be shown apart from this provision.

21. Where it is necessary to do so for the purpose of making any distinction required by the preceding paragraphs in an amount to be shown in compliance with this Part of this Schedule, the directors may apportion any payments between the matters in respect of which these have been paid or are receivable in such manner as they think appropriate.

22. The Schedule requires information to be given only so far as it is contained in the company's books and papers, available to members of the public or the company has the right to obtain it.

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. It has been included in the first phase consultation on the draft CB.

2. With this second phase consultation launched, some definitions have to be added to Part 1 while some others are revised to take into account the requirements of the draft provisions in this second phase consultation.

3. The major changes to Part 1 are:

I. Deleting the definitions of "constitution" and "memorandum"

4. Upon review, we consider that the definitions of "constitution" and "memorandum" are not necessary, and hence they are deleted. It should be noted that a condition of an existing company's memorandum of association is to be regarded as a provision of the company's articles (see **Clause 3.36**) (please refer to the Explanatory Notes on Part 3 for details).

5. Some of the provisions in the first phase consultation (i.e. those in Parts 2, 10 to 12 and 14 to 18) contain the term "constitution" and they will be changed to "articles" accordingly, except for those provisions where the term "constitution" is used in the general sense, like **Clauses 13.3**, **14.5** and **14.8(4)(c)**.

II. The use of "example" and "note" in the draft Bill

6. We are committed to plain language drafting and to making the law more accessible. The use, where appropriate, of read aids such as notes and examples is an aspect of this.

7. **Clause 1.2(4)** is added to explain that where the draft Bill includes an example of the operation of a provision (e.g. **Clauses 4.28(1)**, **5.7(1)** and **5.9(3)**), the example is not exhaustive and if the example is inconsistent with the provision, the provision prevails.

8. **Clause 1.2(5)** is added to explain that a note located in the text of the draft Bill (e.g. **Clauses 4.35(3)**, **5.19(1)** and **8.15(4)**) is provided for information only and has no legislative effect.

Other Changes

9. The following definitions are added to Part 1: "articles" with a note added to it; "financial year"; "listing rules"; "share warrant"; and "special notice".

10. The definition of "incorporation form" is deleted because it is considered unnecessary to have this definition in Part 1. The requirement to deliver an incorporation form is set out in **Clause 3.2(1)(b)(i)**.

11. **Clause 1.2(3)(a)(i)** now reads as "in paper form; or" instead of "in paper copy form; or" as the word "copy" is considered unnecessary, but there is no need to revise the Chinese text.

PART 3

COMPANY FORMATION AND RELATED MATTERS, AND RE-REGISTRATION OF COMPANY

Introduction

1. Part 3 deals with company formation and registration, re-registration of unlimited companies as companies limited by shares and related matters. The part contains provisions setting out the types of company[1] that may be formed, and their formation procedure. There is also an improved company name registration system which will be introduced ahead of the CO rewrite through the Companies (Amendment) Bill 2010. Part 3 also provides for new requirements for the articles of association ("AA") of a company following the proposed abolition of the memorandum of association ("MA"), and modifies the provisions governing the execution of documents.

   There are certain provisions that will apply only in the transition period between the enactment of the CB and the commencement of the no-par regime. Since these provisions will only be relevant during the transition period, they are not currently included in the draft CB but they will be finalised and included in the CB, when it is introduced in the LegCo.

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

  (a) Expediting the company name registration process and enhancing enforcement against "shadow companies"[2];

  (b) Abolishing the MA ;

[1] Under the CB, five types of companies can be formed, 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) guarantee companies that do not have share capital (see the Explanatory Notes on Part 1 of the draft CB contained in FSTB, *Consultation Paper on Draft Companies Bill - First Phase Consultation* (December 2009), pages 76 to 78.

[2] "Shadow companies" refer to those companies incorporated in Hong Kong with names which are very similar to existing and established trademarks or trade names of other companies and which pose themselves as representatives of the owners of such trademarks or trade names to produce counterfeit products in Mainland China bearing such trademarks or trade names.

(c) Making the keeping and the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad; and

(d) Reforming company re-registration provisions.

Significant Changes

(a) Expediting the company name registration process and enhancing enforcement against "shadow companies"

2. In February 2010, we introduced the Companies (Amendment) Bill 2010 into LegCo. One of the key proposals in the Bill is to expedite the company name registration process. A company name will be accepted for registration instantaneously if it satisfies certain requirements, including, among others, that it is not identical to another name on the register and does not contain certain specified words or expressions. A new criterion for registration has been added so that where a proposed name is the same as a name for which a direction to change name has been given, such name cannot be registered except with the consent of the Registrar. After incorporation, if a company's name is found to be objectionable, the Registrar will be empowered to direct the company in question to change its name within a period specified by the Registrar. The relevant provisions in the Companies (Amendment) Bill 2010 are restated in **Clauses 3.39(2)(c)**, **3.48** and **3.49** of the CB. The revised procedures will shorten the processing time for company incorporation from four working days to one day. This will put Hong Kong on a par with comparable jurisdictions such as the UK and Singapore.

3. To address concerns of the business community, especially trademark/trade name owners, we also propose in the Companies (Amendment) Bill 2010 to strengthen our company name registration system to enhance enforcement against possible abuses by "shadow companies" by empowering the Registrar to act pursuant to court orders to direct a "shadow company" to change its name. The provision is restated in **Clause 3.48(2)(a)** of the CB. The Registrar may substitute the company's name with its registration number if it fails to comply with the Registrar's direction to change name. The same power to substitute a company name will also be given to the

Registrar where a company fails to comply with a direction to change its name that is too similar to that of another company on the register; gives the impression that the company is connected with the Hong Kong Government or the Central People's Government; constitutes a criminal offence; or is contrary to the public interest. This provision is restated in **Clause 3.50** of the CB.

4. The Companies (Amendment) Bill 2010 is being scrutinised by LegCo. The relevant clauses in the CB may have to be amended subject to amendments made to the Companies (Amendment) Bill 2010, if any.

(b) Abolishing the MA

Background

5. Under the CO, the MA and the AA together comprise the constitution of a company. Broadly, the MA includes basic information about a company which the outside world needs to know, while the AA deal with the internal regulations of the company. The MA used to contain important information about the company, particularly its objects. However, the objects clause is now less significant, given the 1997[3] abolition of the doctrine of ultra vires in relation to corporate capacity, with all companies now having the capacity and the rights and powers of a natural person[4].

6. In 2008, the CR introduced streamlined incorporation procedures where persons wishing to incorporate a company are required to deliver to the Registrar a duly completed incorporation form together with copies of the MA and AA, if any. The incorporation form requires information including, among other things, the company name, address of the registered office, the type of company, particulars of the founder members, directors and secretaries, a statement of capital and initial shareholdings and a statement that all the requirements of the CO on the registration of the company have been complied with.

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[3] The Companies (Amendment) Ordinance 1997 (Ordinance No.3 of 1997).

[4] Since the 1997 amendments, objects clauses are optional except for the so-called "section 21 companies" which are found subject to section 21 of the CO. "Section 21 companies" are allowed to dispense with the word "Limited" in their names. Such companies are formed for promoting commerce, art, science, religion, charity or any other useful object, and are required to apply their profits, if any, or other income in promoting their objects. The similar provisions are reinstated in **Clause 3.42** of the draft CB.

7. We note that the information provided by the incorporation form and the AA contains virtually all the information required by the MA, with the exception of the objects clause and the authorised capital[5]. The need to retain the MA as a separate constitutional document is therefore diminished. In some common law jurisdictions such as Australia and New Zealand, companies have only a single constitutional document.

8. Under the CO, there are provisions in section 8 and section 25A respectively governing the alteration of object clauses in the MA and the alteration of the provisions contained in the MA which were originally intended to be contained in the AA (the "section 25A type of conditions"). Both provisions permit, in the case of private companies, applications by their members to the court to object to the alteration. With the abolition of the MA, provisions will be made in the CB to cater for the alteration of object clauses and of section 25A type of conditions as they would be contained in the AA and to provide for the members' right of objection.

Proposal

9. It is proposed that the MA of a company should be abolished altogether. **Clause 3.2** states that person(s) may form a company by delivering to the Registrar for registration an incorporation form in the specified form and a copy of the company's articles. **Clauses 3.3** to **3.8** and **3.14** to **3.24** set out the requirements of the incorporation form and the AA respectively, which should include information currently contained in the MA. In particular, the incorporation form will contain the name, address and type of company (**Clause 3.5(1)**), the particulars of the founder member(s) (**Clause 3.5(2)**), director(s) and officer(s) (**Clause 3.6**), information on the shares and share capital (**Clause 3.7**) and a statement of compliance (**Clause 3.8**). The AA will contain the company name (**Clause 3.20**), members' liabilities or contributions, (**Clauses 3.22** and **3.23**) and information on capital and initial shareholdings (**Clause 3.24**). As a result of the migration to no-par, the authorised capital requirement will be removed but **Clause 3.24(3)** provides that a company having a share capital may state in its articles the maximum number of shares that the company may issue. "Section 21 companies"[6] must also state the company's objects in the AA (**Clause 3.21**), while other companies have the option of doing so.

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5 See paragraph 9.
6 See footnote 4.

10. Upon the abolition of the MA, references to the MA in various provisions of the CO are removed or amended to mean the AA in the CB. In respect of companies which are formed before the CB comes into force, **Clause 3.36** states that conditions that are contained in a company's MA would be deemed to be regarded as provisions of the company's AA after the commencement of the new CO.

11. **Clause 3.17** empowers the FS to prescribe different model articles for different types of companies. These model articles replace Table A and the other tables in Schedule 1 of the current CO for companies incorporated after the commencement of the new CO.

12. **Clauses 3.27**, **3.34** and **3.35** will require companies to notify the Registrar of any alterations to the AA, including alterations by an order of the court or other Ordinance(s).

13. **Clause 3.28** will allow a company's alteration to its objects under its AA and **Clause 3.30(1)** will permit the right of members of a company to apply to the court to object to the resolutions for altering the conditions of the company's AA with respect to its objects.

14. **Clause 3.29** provides for the alteration of the CO section 25A type of conditions in an existing company's AA and **Clause 3.30(3)** preserves the right of members of an existing company to object to the resolutions for altering such conditions.

(c) Making the keeping and the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad

Background

15. Section 93(1)(b) of the CO stipulates that every company shall have a common seal with the company name engraved 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 share certificates and share warrants.

16. With the rapid increase in both volume and value of modern day business transactions and contracts, we consider it necessary to simplify the mode of execution of documents. In this respect, both the UK and Australia have given companies the choice of not keeping or using a common seal to execute documents and deeds.

17. Also in relation to the company's seal, section 35(1) of the CO provides that a company may have an official seal for use outside Hong Kong, provided that it is authorised by the AA of the company and that the objects of the company require or comprise the transaction of business outside Hong Kong. We note that there are no such requirements in common law jurisdictions such as the UK.

Proposal

18. It is proposed that the keeping and the use of a common seal should be optional. **Clause 3.63** states that a company may have a common seal. This gives flexibility to companies and does not prejudice those companies which may still wish to keep and use their common seals.

19. In connection with the change, **Clause 3.66** sets out the requirements for execution of documents by a company. In particular, **Clause 3.66(2)** allows a company to execute a document by having the document signed by a director (in the case of one-director company) or by two authorised signatories (in the case of a company having two or more directors). **Clause 3.66(4)** provides that a document signed in accordance with **Clause 3.66(2)** and expressed to be executed by the company has effect as if the document had been executed under the company's common seal.

20. As for the use of official seals outside Hong Kong, we propose to follow the relevant provisions in the UKCA 2006. **Clause 3.64** states that a company may have an official seal for use outside Hong Kong. The existing requirements concerning the objects of the company and authorisation by the AA have been abolished.

(d) Reforming company re-registration provisions

Background

21. Under the CO, there are only two statutory provisions which have the effect of bringing about a change in company type. Under section 19 of the CO, unlimited companies may be re-registered as limited companies by shares or by guarantee. Section 30 of the CO stipulates that, if a private company alters its AA in such a manner that it no longer fulfils the conditions of being a private company, it shall, as on the date of the alteration, cease to be a private company and must file with the Registrar documents and information as required in the Second Schedule to the CO.

22. We note that the format and the information required by the Second Schedule are outdated, unnecessarily detailed and complicated. There is a need to simplify the requirements. There is also scope for improving the provisions on changing an unlimited company to a limited company.

Proposal

23. **Clause 3.33** provides for alteration of the AA which affects the status of a private company. In particular, the requirement to file a prospectus or a statement in lieu of prospectus (i.e. the Second Schedule) under section 30 of the CO has been removed. However, the company must deliver to the Registrar within 15 days an annual financial statement for the financial year immediately preceding the financial year in which the alteration of the AA is made.

24. **Clause 3.69** provides for the matters in section 19(1) of the CO with the modification that an unlimited company may only re-register as a company limited by shares under the new CO. There must be a statement on the share capital structure, which after re-registration must conform to the requirements in the CB. **Clause 3.70** deals with how the application for re-registration should be made, and **Clause 3.71** provides for a fresh certificate of incorporation to be issued by the Registrar to the company after the re-registration.

Other Changes

(a) Providing statutory protection for persons dealing with a company

25. Under **Clause 3.55**, a company's exercise of powers will be limited by its AA after the elimination of the MA. To supplement the provision, we have made reference to sections 40 to 42 of the UKCA 2006, and propose to add **Clauses 3.56** to **3.58** with a view to providing statutory protection for persons dealing with a company in addition to the common law indoor management rule[7]. **Clause 3.56** is introduced to provide that in favour of a person dealing with a company in good faith, the power of the directors to bind the company will be deemed to be free of any limitation under the AA, any resolutions of the company or any agreement between the members of the company. Under **Clause 3.56**, a person dealing with a company is presumed, unless the contrary is proven, to have acted in good faith. **Clauses 3.57** and **3.58** set out the exception to **Clause 3.56**. **Clause 3.57** provides that transactions or act entered into by a company involving directors or their associates are voidable. **Clause 3.58** states that **Clause 3.56** does not apply to transaction or act of company permitted to be registered by name without "Limited", i.e. "section 21 companies".

(b) Allowing an attorney to execute not only deeds but also other documents on behalf of the company locally or outside Hong Kong

26. Under section 34 of the CO, a company may empower any person, to act generally or in respect of specified matters, as its attorney to execute deeds on its behalf outside Hong Kong. A deed signed by the attorney on behalf of the company and under his seal binds the company and has the same effect as if it were under the common seal. In view of the increasing volume of local and overseas business activities of Hong Kong companies, the current provision may be unduly restrictive.

27. It is proposed that the scope of the current section 34 of the CO be widened. **Clause 3.68** states that a company may authorise any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere. This clause is in line with section 47 of UKCA 2006.

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[7] Also known as "rule in *Turquand's* case". It ,refers to the common law rule that a third party dealing in good faith with a company is not bound to inquire whether any internal procedures contained in the company's constitution regulating the conferment of authority have been complied with and is entitled to presume that a person held out by the company has the necessary authority to act on behalf of the company, see *Royal British Bank v Turquand* (1856) 119 ER 886.

PART 4

SHARE CAPITAL

Introduction

1. **Share capital** means the money paid into the company (or legally promised as being available on call) by members for shares in the company. The current rules relating to share capital require companies having a share capital to have a **par value (or a nominal value)** ascribed to their shares (the requirement for par value). The rules also require that the capital so raised must be kept in the company, and used for the purposes of its business only, and must not be returned to shareholders except in restricted circumstances (the **capital maintenance rules**).

2. The complex provisions on "share capital" and "debentures" are currently set out in Part II (sections 37 to 79) of the CO. To make the law more user-friendly and readable, the provisions will be reorganised into three smaller parts in the CB. The core concepts about "share capital", its creation, transfer and alteration will be set out in Part 4. Those provisions relating to capital maintenance rules and debentures will be transferred to Part 5 and Part 7 respectively. The provisions on prospectuses in the CO (sections 37 to 44B, 48A in Part II and Part XII) will be dealt with in a separate review by the SFC and will be transferred to the SFO in due course.

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

  (a) Adopting a mandatory system of no-par for all companies with a share capital, with a transition period of 24 months;

  (b) Removing the power of companies to issue share warrants to bearer;

  (c) Extending the requirement of shareholders' consent for allotments of shares to the grants of rights to subscribe for, or to convert securities into, shares;

  (d) Clarifying certain concepts relating to class rights;

(e) Extending the statutory provisions for variation of class rights to cover companies without a share capital; and

(f) Requiring a company to deliver to the Companies Registry a return or notification including a statement of capital whenever there is a change to its capital structure.

Significant Changes

(a) Adopting a mandatory system of no-par for all companies with a share capital, with a transition period of not less than 24 months

Background

3. Par value (also known as nominal value) is the minimum price at which shares can generally be issued. Currently, companies incorporated in Hong Kong and having a share capital are required to have a par value ascribed to their shares[1]. There is no essential difference between a share of no par value and one having a par value. The par value does not serve the original purpose of protecting creditors and shareholders, and may, to some extent, even be misleading.

4. Retiring the concept of par would create an environment of greater clarity and simplicity, particularly in accounting treatment of share capital, that would be desirable for the business community generally. Jurisdictions that have adopted mandatory no-par shares include Australia, New Zealand and Singapore. During the public consultation conducted during June to September 2008, there was majority support for the proposal to adopt a mandatory system of no-par. We intend to give companies at least 24 months from the enactment of the CB to review their documents before the conversion is effected[2].

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1 Section 5(4) of the CO.

2 FSTB, *Consultation Conclusions on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (February 2009), paragraphs 5 to 10 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

Proposal

5. **Clause 4.2** effectively abolishes the concept of nominal value. From the "appointed day" (see **Clause 4.71**), a company's shares will have no nominal value. This will apply to all shares, including shares issued before the appointed day which is to be appointed by the FS by notice in the Gazette. The appointed day is intended to be at least 24 months after the enactment of the CB. This is to allow companies time to review and amend their documents where necessary.

6. **Clause 4.38** empowers a company, by resolution in general meeting, to alter its share capital in a number of ways set out in sub-clause (2). The clause is a modified version of existing section 53 of the CO. In addition to the alterations allowed under section 53, the new provision allows a company to capitalise its profits without issuing new shares and to allot and issue bonus shares without increasing share capital. This is one of the advantages of no-par shares.

7. Companies will continue to be able to effectively consolidate and subdivide shares. Whilst there is no nominal amount to be divided for no-par shares, a similar result to subdivision can be achieved by increasing the number of shares. The process of consolidating shares into a smaller number should be considerably simplified where there are no par values to contend with. The number of shares will just reduce with no visible effect on the share capital.

8. Without par, there will no longer be share premium and there will no longer be a need to distinguish between share capital and share premium, and consequently to account for them separately. **Clause 4.78** is a legislative deeming provision for the amalgamation of the existing share capital amount with the amount in the company's share premium account (and also capital redemption reserve) immediately before the migration to no-par share capital.

9. To avoid hardship to companies existing before the appointed day which would lose the permitted uses of share premium that they enjoyed prior to the migration to no-par, a transitional provision **Clause 4.79** is introduced 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. As for the position after the migration to no-par,

Clause 4.17 provides that on or after the appointed day, a company may apply its capital in writing off the preliminary expenses of the company, commission paid or any other expenses of any issue of shares.

10. **Subdivision 2 of Division 9 (Clauses 4.76** to **4.81)** contains transitional provisions relating to the move from nominal value shares to shares having no nominal value. The provisions are intended to provide legislative safeguards to ensure that contractual rights defined by reference to par value and related concepts will not be affected by the abolition of par. For example, **Clause 4.81** is a statutory deeming provision, which will save considerable work, expense and time for companies and reduce the possibility of disputes. Nonetheless, even with the transitional provisions, individual companies may still wish to review their particular situation to determine if they need to introduce more specific changes to their documents having regard to their own unique circumstances.

11. There will also be modifications to the provisions on merger and group reconstruction relief following the migration to a no-par regime as there will no longer be any share premium in a no-par environment[3]. **Clauses 4.62** to **4.66** modify sections 48C to 48E to apply the merger relief to any excess of the value of the equity shares acquired or cancelled over the subscribed capital of the acquired company attributable to the shares acquired or cancelled. Group reconstruction relief will apply to the excess of the value of the assets transferred over the net base value of the assets transferred[4].

12. The proposal to legislate for no-par will not affect companies incorporated off-shore as they will continue to be governed by the law of their place of incorporation. Where there are Hong Kong legislation or rules that apply to these companies, such as the SFO and Listing Rules, these can be amended to accommodate both par and no-par value shares to address the fact that the shares of some of these off-shore incorporated companies could still have par value.

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[3] Sections 48C to 48E of the CO provide relief from a company's obligation to transfer amounts to the share premium account where:

(i) shares are issued at a premium as consideration for the transfer or cancellation of another company's shares in the context of a merger; and

(ii) shares are issued at a premium as consideration for the transfer of assets in the context of a group reconstruction.

In the case of mergers, the relief extends to the whole of the premium. However, in the case of group reconstructions, it is limited to any excess over the base value of the assets transferred.

[4] The proposal was supported by the majority of respondents in the public consultation conducted in June to September 2008. See the Consultation Conclusions mentioned in footnote 2, paragraphs 14 to 17.

13. The proposal to remove the requirement for authorised capital which is also related to the migration to no-par is discussed in the Explanatory Notes on Part 3. There are certain provisions that will apply only in the 24-month transition period between the enactment of the CB and the commencement of the no-par regime. These provisions will be the equivalent provisions of the CO that refer to or are based on the concepts of nominal value, share premium, capital redemption reserves and authorised capital. For example, sections 49A(1)(b), 49A(2), 49A(4), 49G(1), 49H, 49I(4) and (5), 49Q(2)(b), 49R(2) and (3), 58(1A) and (3). Since these provisions will only be relevant during the transition period, they are not currently included in the draft CB but they will be finalised and included in the CB, when it is introduced in the LegCo.

(b) Removing the power of companies to issue share warrants to bearer

Background

14. Under section 73 of the CO, a company limited by shares is allowed to issue "share warrants to bearer" – i.e. a warrant stating that the bearer of the warrant is entitled to the shares specified in it. It is possible for legal title to shares to pass merely on the delivery of the warrant. Share warrants are undesirable from the perspective of anti-money laundering because of the lack of transparency in the recording of their ownership and the manner by which they are transferred.

Proposal

15. **Clause 4.7** repeals a company's power to issue "share warrants to bearer" but provides that such share warrants issued prior to the commencement of that clause would be grandfathered so that upon the surrender of such existing share warrants, the bearer's name will be registered in the company's register of members. The clause partially re-enacts section 97 of the CO, to provide for the surrender of share warrants. **Clause 4.72** provides that the records in the register of members in respect of existing share warrants would be preserved until the share warrants are surrendered.

(c) Extending the requirement of shareholders' consent for allotments of shares to the grants of rights to subscribe for, or to convert securities into, shares

Background

16. The allotment of shares is generally carried out by directors, but under section 57B of the CO, they are only entitled to do that with the prior approval of the company in general meeting. There are only two exceptions to this rule, namely: (i) a rights issue; and (ii) an allotment to the founder members (sections 57B(1) and (7)). The requirement of shareholder approval (save in the two circumstances set out above) is mandatory and notwithstanding any provision in the company's articles to the contrary.

17. However, section 57B only requires shareholder approval for the allotment of shares. The grant of an option to subscribe for shares or a right to convert any security into shares would not be within the scope of section 57B, but the subsequent exercise of the option or the right of conversion which would result in an allotment would require shareholders' approval.

18. It would not be prudent for a company to issue an option for unissued shares or a security convertible into new shares without the prior approval of its shareholders for the subsequent allotment, but strictly the CO does not require shareholders to give such prior approval. To enhance the protection of minority shareholders against dilution, it is proposed that the requirement of shareholder approval for allotments of shares be extended to the grants of rights to subscribe for, or to convert securities into, shares. If approval is given for the grant of an option, there would not be a need to obtain further approval of the allotment of shares pursuant to that option.

Proposal

19. **Clause 4.8** provides that the power of the directors of a company to allot shares, as well as to grant rights to subscribe for, or convert any security, into shares cannot be exercised except in accordance with **Clause 4.9**. Apart from the two original exceptions (i.e. rights issue and allotment to founder members), there is an additional exception that applies to an allotment of shares, or grant of rights, on a bonus issue of shares. **Clause 4.9** provides for a company to give approval for its directors to allot shares,

or grant rights to subscribe for, or convert any security, into shares. This is done by resolution of the company in general meeting, in advance of the allotment or grant of rights. Similar to section 57B(3), the approval would expire at the conclusion of the next AGM. As all companies are now allowed to dispense with AGMs subject to meeting certain conditions, **Clause 4.9(3)(b)** has also provided for the time when an approval will expire in case a company is not required to hold an AGM.

(d) Clarifying certain concepts relating to class rights

Background

20. Sections 63A and 64 of the CO set out the requirements for a variation of class rights of shareholders. The CO does not presently define the concept of class rights. There may be an issue as to whether class rights: (1) are rights attached to shares only[5]; (2) include rights conferred on individuals in a capacity other than as a member or shareholder of the company[6]; or (3) include rights that are not attached to any particular shares but are conferred on the beneficiary in the capacity as member or shareholder of the company[7].

Proposal

21. For companies with share capital, the provisions on class rights under **Subdivision 1 of Division 7** refer to "rights attached to shares in a class of shares" (e.g. **Clause 4.48**). **Clause 4.45** clarifies that references to the rights attached to a share in a class of shares are references to the rights of the holder of the share as a member of the company. The intention is that the second and third categories of rights referred to in the preceding paragraph are excluded from the concept of class rights under the CB. To provide further guidance on the meaning of a class of shares, **Clause 4.46** provides that shares are in a class if the rights attached to them are in all respects uniform. However, they are not regarded as different only because the shares do not carry the same rights to dividends in the first 12 months immediately after allotment.

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5 These are rights attached to particular shares which are not enjoyed by others, for example, 'dividends and rights to participate in surplus assets on a winding up'.

6 *Eley v Positive Government Security Life Assurance Co Ltd* (1875) 1 Ex D 20, is an instance of this. There the articles stipulated that Eley shall be the company's solicitor.

7 An example of this would be pre-emptive rights conferred upon a shareholder where these rights are not attached to any particular shares but conferred on the shareholder by name.

22. For a company without a share capital, **Clause 4.54** clarifies that references in the CB to the rights of members of a company are references to the rights of the members in their capacity as members of the company. **Clause 4.55** establishes when members of a company are in a class. Members are in a class if the rights of the members are in all respects uniform.

(e) Extending the statutory provisions for variation of class rights to cover companies without a share capital

Background

23. Sections 63A, 64 and 64A of the CO only provide for variation of class rights for companies with a share capital. The CO is silent on how members' rights may be varied in the case of companies without a share capital. It would seem that this would largely depend on whether provision has been made in the articles of association[8] for their variation but this is clearly less than satisfactory.

24. The same problem existed in the UK Companies Act 1985 but this was remedied in the UKCA 2006 which extends the statutory provisions on variation of class rights of companies with a share capital to companies without a share capital (section 631). The CB will likewise provide for the variation of class rights for companies without a share capital.

Proposal

25. **Subdivision 2 of Division 7 (Clauses 4.53** to **4.60)** provides for variation of class rights for companies without a share capital. The provisions mirror the corresponding provisions in **Subdivision 1 of Division 7 (Clauses 4.44** to **4.52)**, which applies to companies with a share capital. **Clause 4.56** sets out the procedural requirements for the variation of the rights of a class of members of a company that does not have a share capital. **Clause 4.57** requires a company that does not have a share capital to notify each class member if the rights of the class are varied (the corresponding provision for companies with a share capital (**Clause 4.49**) is a new requirement). **Clause 4.58** allows members amounting to at least 10% of members of the class to apply to the Court of First Instance to have a variation of the rights of the class disallowed. **Clause 4.60** requires a company that does not have

[8] Provisions contained in the memorandum of association of existing companies are deemed to be contained in the articles of association on and after the commencement of the CB.

a share capital to notify the CR of a variation of the rights of a class of members within one month after the variation takes effect.

(f) Requiring a company to deliver to the CR a return or notification including a statement of capital whenever there is a change to its capital structure

Background

26. A statement of capital is in essence a "snapshot" of a company's total subscribed capital at a particular point in time. We will require a company to deliver to the Registrar such a statement to be contained in a return or notification, whenever there is a change to its capital. For instance, in the context of an allotment of shares or a permitted alteration of share capital under **Clause 4.38**, a statement of capital will show the company's share capital information as at the time the company has so changed its share capital. This new requirement enhances the existing requirements for notification to the CR of changes of a company's share capital. This will ensure that the public register contains up-to-date information on a company's share capital structure. A similar requirement for a company to submit a "statement of capital" when the there is a change to its capital structure has been introduced under the UKCA 2006.

Proposal

27. **Clause 4.69** sets out the information to be contained in a statement of capital. Other provisions in the Part (such as **Clauses 4.10**, **4.39**, **4.41**, **4.43** and **4.52**) require a company to include a statement of capital in a return or notice delivered to the CR. A statement of capital must state the total number of issued shares in the company and the total amount paid and unpaid (if any) on them. Where the share capital is divided into classes, the statement must also contain particulars of the rights attached to shares of each class, the total number of issued shares of each class and the total amount paid and unpaid (if any) on issued shares of each class.

Other Changes

(a) Providing expressly that a company may redenominate its share capital from one currency into another

28. Whilst a company incorporated under the CO may issue foreign currency shares, it cannot easily convert its existing share capital into another currency. If a company wishes to redenominate its share capital into a different currency it is likely to find that an equivalent amount in the new currency would create shares expressed in awkward fractions of the new currency.

29. In order to create shares in the new denomination with whole numbers, the company would need to denominalise its shares as well, that is change the nominal value of each share. The process requires a cancellation of issued shares or buying back its existing shares (the shares it wants to redenominate) and an issue of new shares with a different denomination. These difficulties arise because there is no provision in the CO which deals specifically with the redenomination of issued share capital.

30. Under a no-par system, although there would not be a need to provide for the renominalisation of the shares, it would still be useful to have formal provisions in the CB on the denomination and redenomination of share capital.

31. **Clause 4.3** provides that a company's shares may be denominated in any currency. It further provides that shares of different classes in a company may be denominated in different currencies.

32. **Clause 4.40** empowers a company to convert its share capital, or any class of its share capital, from one currency to another currency. This power may be exercised on or after the appointed day for the introduction of shares having no nominal value. A redenomination does not affect any rights or obligations of members under the company's articles or any restrictions affecting members under the articles, and in particular does not affect any rights to dividends, voting rights or liability in respect of amounts unpaid on the shares.

(b) Removing the power of companies to convert shares into stock

33. "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 $10.00 each numbered 1 to 100, holds a $1,000.00 stock. The expression of a holding in terms of dollars or cents seems inappropriate to no-par value shares which are, in substance, no more than fractions of the company's net worth.

34. The use of "stock" is nowadays uncommon. Although, theoretically, there does not appear to be a reason why stocks cannot be redefined and expressed in number of shares or percentage of participation in a particular company or class of shares, there does not appear to be much practical purpose to this. It is therefore proposed that the concept of stock be abolished. A company which has previously converted shares into stock may reconvert the stock back into shares.

35. **Clause 4.6** repeals a company's power to convert shares into stock. **Clause 4.42** empowers a company that has converted paid up shares into stock (before the repeal of the power to do so) to reconvert the stock into shares. **Clause 4.43** requires a company that has reconverted its stock into shares under **Clause 4.42** to deliver a notice to the Registrar within one month. The notice must include a statement of capital.

(c) Clarifying requirements to register an allotment in the register of members

36. Although in the case of an allotment of shares, section 45 of the CO requires a company to deliver a return of the allotment to the Registrar for registration, there is no express requirement for a company allotting its shares to enter the information on the allotment and the details of the allottees in the register of its members within a specified period.

37. **Clause 4.11** of the CB will require an entry to be made in the register of members within 2 months after the date of the allotment of shares.

(d) Refusal of registration of shares transmitted by operation of law

38. **Clause 4.26** provides for a new requirement for a company to send a notice of refusal of registration to a person to whom shares are transmitted to the

person by operation of law and whose registration as a member has been refused. **Clause 4.27** provides that such person may apply to the Court of First Instance for an order to compel registration. These provisions mirror the corresponding provisions for transfer of shares in **Clauses 4.19** and **4.20**.

(e) Raising the threshold amount in replacement of lost share certificate and publicizing the notice in company's website

39. **Division 5** deals with the replacement of listed companies' lost share certificates. The Division re-enacts the substance of section 71A with a number of improvements.

40. **Clause 4.32** imposes publication requirements on the company before it may issue a replacement share certificate. Notice of intention must be published in the manner required by the law. In certain cases, a copy of the notice must also be served on the registered holder of the shares. The clause re-enacts the substance of section 71A(3) to (5) of the CO, except that the publication requirements are simplified. For cases where the value of shares is below $50,000 (instead of $20,000 in the current CO), the notice will be published in the listed company's website (in both Chinese and English) for one month (instead of in newspapers in the current CO). For cases where the value of shares is at or above $50,000, the notice will be published in the listed company's website (in both Chinese and English) for three months and once in the gazette within one month after the company has first published the notice on its own website (instead of publishing the notice in the gazette once in each of three consecutive months under the current CO).

41. The definition of "genuine purchaser"[9] in **Clause 4.30** clarifies that the person to whom the new certificate is issued is excluded from the term. The effect of the definition is to confirm that, under **Clause 4.35**, the Court may make an order under **Clause 12.99** (which gives the Court of First Instance power to make an order for rectification of the register of members) in favour of the original registered owner against the person to whom the new certificate was issued and against any person deriving title from him or her otherwise than as a genuine purchaser without notice.

[9] The phrase "genuine purchaser" is used in place of "bona fide purchaser" in Division 5 of Part 4.

PART 5

TRANSACTIONS IN RELATION TO SHARE CAPITAL

Introduction

1. Part 5 of the CB contains the provisions concerning "Capital Maintenance" (reduction of capital and purchase of own shares ("buy-backs")) and related rules (financial assistance). The capital maintenance doctrine was first developed in the mid-19th century in the UK. The premise of the doctrine is that creditors provide credit on the basis of an express or implied representation by the company that consideration received for shares (the share capital) shall be applied only for the purposes of the business and that it shall not be returned to the shareholders except in a winding up after all creditors have been paid.

2. In the public consultation conducted during June to September 2008, we asked whether changes should be introduced to the current rules. Having regard to the comments received[1], the CB will introduce reforms to streamline and rationalize those rules which are commonly considered as unduly complex, ill-targeted for their intended purpose or somewhat overtaken by their exceptions.

3. In Chapter 2 of this Consultation Paper, we seek comments on the option of abolishing the prohibition on financial assistance for private companies, as an alternative to the rules on financial assistance proposed in Divisions 2 and 5 of this Part.

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

  (a) Adopting a uniform solvency test based on cash-flow for different types of transactions under this Part;

  (b) Introducing an alternative court-free procedure for reduction of capital based on a solvency test;

[1] FSTB, *Consultation Conclusions on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (February 2009), paragraphs 30 to 51 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

(c) Allowing all companies to purchase their own shares out of capital, subject to a solvency test; and

(d) Allowing all types of companies (whether listed or unlisted) to provide financial assistance, subject to the satisfaction of the solvency test and certain specified procedures.

Significant Changes

(a) Adopting a uniform solvency test based on cash-flow for different types of transactions under this Part

Background

4. Under Part II of the CO a solvency test is provided for in respect of:

(i) buy-backs of its own shares out of capital by a private company; and

(ii) financial assistance by an unlisted company for the purpose of an acquisition of shares in the company or its holding company.

For (i), the solvency test has to be satisfied according to the requirements set out in section 49K(3), (4) and (5). For (ii), the solvency test has to be satisfied according to the requirements set out in section 47F(1)(d) and (2). Both of these solvency tests are based on cash flow alone. However, they are not exactly the same. The main differences are:

(i) the solvency test under section 47F(1)(d) seems to have an additional limb under section 47F(1)(d)(i) which provides for the situation where the company intends to commence winding up within 12 months of the date of the proposed financial assistance[2]; and

(ii) under section 49K(5), the solvency statement has to be accompanied by an auditor report[3].

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[2] It states that if it is intended to commence the winding up of the company within 12 months, that the company will be able to pay its debts in full within 12 months of the commencement of the winding up.

[3] The auditor report should state that:
- the auditor has inquired into the company's state of affairs
- the auditor is not aware of anything to indicate that the opinion expressed by the directors in the statement is unreasonable in all the circumstances.

5. As the solvency test will be applied to transactions involving a reduction of capital, buy-back or financial assistance, we consider that a uniform solvency test would result in consistency of the law. A uniform adoption of the approach of section 47(F)(1)(d) can give clarity and certainty on how the solvency test may apply in different scenarios.

6. As to the auditor's report, we take the view that the issues that need to be considered in determining whether the company would satisfy the solvency test involve forward-looking business judgments and so auditors would not be in a better position than the directors in ascertaining the company's solvency. Directors would be expected to have reasonable grounds in forming their opinion as to the company's solvency, and should be left to decide in any given case whether professional assistance is needed. Requiring an auditor's report in every case would add expense and delay for relatively little gain. We therefore do not propose to retain the requirement of attaching an auditor's report to the solvency statement.

Proposal

7. **Clause 5.2** provides that a uniform solvency test will be applicable to all three categories of transactions - reduction of capital, buy-backs and financial assistance. **Clause 5.3** sets out the content of the uniform solvency test, which in substance, re-enacts section 47F(1)(d). **Clause 5.4** provides for the making of a solvency statement. A solvency statement in relation to a transaction is a statement that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction. In forming his opinion, a director must inquire into the company's state of affairs and prospects and take into account contingent and prospective liabilities of the company. The solvency statement must be in the specified form and be signed by each director making it.

(b) Introducing an alternative court-free procedure for reduction of capital based on solvency test

Background

8. 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 (sections 58 to 63 of the CO). Shareholders must agree by

special resolution. In determining whether to approve the reduction, the court will consider various factors, including whether the reduction is equitable between shareholders and whether creditors' interests are safeguarded.

9. We will introduce a court-free procedure based on the solvency test, as an alternative procedure to the current rules. The new procedure should be faster and cheaper and can be utilised by all companies.

Proposal

10. **Subdivision 2 of Division 3** provides for a court-free procedure for reduction of capital, subject to compliance with the solvency test. The key features of the process include:

(a) all the directors signing a solvency statement in support of the proposed reduction of capital (**Clause 5.12**);

(b) the company obtaining members' approval by a special resolution **(Clauses 5.11** and **5.13**);

(c) the company publishing notices with relevant information in the Gazette and newspapers[4] and registering the solvency statement with the CR **(Clause 5.14)**;

(d) any creditor or non-approving member of the company may, within 5 weeks of the date on which the resolution is passed, apply to the court for cancellation of the resolution (**Clauses 5.16** to **5.18**). During this 5-week period, the company must make available the special resolution and solvency statement for the members' and creditors' inspection **(Clause 5.15)**; and

(e) the company must deliver after the 5-week period (but no later than 7 weeks) to the CR a return in specified form if there is no court application (**Clause 5.20**), or within 15 days[5] after the court makes the order confirming the special resolution or the proceedings are ended without determination by the court (**Clause 5.21**). The reduction takes effect when the return is registered by the CR.

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[4] Instead of publishing notices in newspapers, the company may give written notice to that effect to each of its creditors.

[5] Or such longer period as ordered by the court.

11. **Subdivision 2 of Division 3** is based on sections 49K to 49O, which set out the procedures for a private company to buy-back its own shares out of capital. There is a difference in that the CB provides that the reduction of capital will take effect when the return is registered by the CR under **Clause 5.20** or **5.21**.

(c) Allowing all companies to purchase their own shares out of capital, subject to a solvency test

Background

12. 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 currently provided as an exception available to private companies only. We will streamline the rules and allow all companies to fund buy-backs out of capital, subject to a solvency requirement. This procedure is included in the CB as an alternative to the existing rules on buy-backs out of profits or the proceeds of a fresh issue of shares.

Proposal

13. **Clause 5.52** provides that a company may redeem or purchase its own shares out of distributable profits, out of the proceeds of a fresh issue of shares or out of capital. However, a listed company will not be allowed to make a payment out of capital in respect of a purchase of its own shares on the stock exchange because it would be impractical for the listed company to follow all the procedures for payment out of capital each time before it purchases its own share in the market.

14. **Clauses 5.53** to **5.61** retains much of the requirements and procedures applicable to the buy-backs by a private company out of capital, and extends it to all companies. Largely the same requirements and procedures will be adopted for the new court-free procedure for reduction of capital in **Subdivision 2 of Division 3**, which are discussed in paragraph 10 above. The main difference is that the company is not required to deliver to the CR a return in specified form after the 5-week period. This is because under **Clause 5.66**, the company will be required to deliver a similar return, which is applicable to all types of purchase/redemption of shares (not just those

financed out of capital) within 14 days after the date on which the redeemed/purchased shares are delivered to the company. The purchase or redemption must be made no earlier than 5 weeks and no later than 7 weeks after the date the special resolution is passed, unless otherwise ordered by the court.

(d) Allowing all types of companies (whether listed or unlisted) to provide financial assistance, subject to the satisfaction of the solvency test and certain specified procedures

Background

15. Section 47A of the CO imposes broad prohibitions (subject to certain exceptions) on a company and its subsidiaries giving financial assistance for the purpose of acquiring shares in the company. In Chapter 2, we seek comments on the option of abolishing the prohibition on financial assistance for private companies.

16. Assuming that the prohibition on the giving of financial assistance for private companies are still considered necessary, we propose to streamline the financial assistance provisions in a manner similar to the NZCA.

Proposal

17. The CB retains the current definition of financial assistance in the CO (**Clause 5.70**). It also largely retains the current exceptions to the prohibition in section 47C of the CO (see also paragraph 21 below) and the special restrictions for listed companies in section 47D of the CO (**Clauses 5.73** to **5.78**). It then allows all types of company (whether listed or unlisted) to provide financial assistance, subject to the satisfaction of the solvency test[6] and one of the three procedures set out in **Subdivision 4 of Division 5**.

18. The first which is in **Clause 5.79** provides that a company may give financial assistance if the assistance, and all other financial assistance previously given and not repaid, is in aggregate less than 5% of the

[6] Unlike the solvency test for reduction of capital and redeem/purchase of own shares where all directors are required to make the solvency statement, the solvency statement for financial assistance is only required to be made by a majority of directors. This is the current position for the solvency test in financial assistance provisions in the CO and we believe having the majority of directors to make the statement should be sufficient as financial assistance is strictly not related to capital maintenance, and a lower threshold is justified.

shareholders' funds. The giving of the assistance must be supported by a solvency statement and a resolution of the directors in favour of giving the assistance. The assistance must be given not more than 12 months after the day on which the solvency statement is made. Within 15 days after giving the assistance, the company must notify its members the details of the assistance.

19. The second which is in **Clause 5.80** provides that a company may give financial assistance if it is approved by written resolution of all members of the company. The giving of the assistance must be supported by a solvency statement and a resolution of the directors in favour of giving the assistance. The assistance must be given not more than 12 months after the day on which the solvency statement is made.

20. The third which is in **Clause 5.81** provides that a company may give financial assistance if a notice is given to shareholders regarding the financial assistance. The giving of the assistance must be supported by a solvency statement and the board must resolve that giving the assistance is in the interests of the company. The company must send to each member a notice which contains all information necessary for the members to understand the nature of the assistance and the implications of giving it for the company. The assistance may only be given not less than 28 days after the day on which the notice is sent to the members and not more than 12 months after the day on which the solvency statement is made. **Clauses 5.82** to **5.84** provides that any member of the company or the company may, within the 28-day period, apply to the court to restrain the giving of the assistance.

Other Changes

(a) Making changes to the employee share scheme exception to giving financial assistance

21. The existing section 47C(4)(b) of the CO provides that the prohibition on financial assistance does not apply to employee share schemes. However, the financial assistance is restricted to the provision of money for the purchase or subscription of fully paid shares. We note that section 682(2)(b) of the UKCA 2006 adopts a more flexible approach than the current CO. **Clause 5.76**, which is largely based on the relevant UKCA 2006 provisions, allows all forms of financial assistance if the assistance is

given in good faith in the interest of the company for the purposes of an employee share scheme or the giving of the assistance is for the purposes of enabling or facilitating transactions to acquire the beneficial ownership of shares for the employees. A number of definitions are also added for the purpose of clarity, e.g. "employee share scheme".

(b) Standardising the definition of net assets in financial assistance

22. In section 47B(2) of the CO "net assets" is given "the same meaning as in section 157HA(15)". The definition in section 157HA(15) includes the concept of "provisions", which is itself defined in the Tenth Schedule of the CO. The Tenth Schedule will not be retained in the CB. There is another definition for "net assets" under section 47D(2) of the CO (which sets out a special restriction on financial assistance for listed companies). Since the two definitions are in substance the same, the definition set out in section 47D(2) is adopted in **Clause 5.70** for application in **Division 5 of Part 5**. The definition in section 47B(2) is not re-enacted.

PART 6

DISTRIBUTION OF PROFITS AND ASSETS

1. Part 6 deals with the distribution of profits and assets to members. The specific provisions on distributions are currently contained in sections 79A to 79P of Part IIA of the CO. Under the existing regime, "distribution" means every description of distribution of a company's asset to its members whether in cash or otherwise, with a number of exceptions (e.g. a reduction of share capital and distribution in a winding up). The usual form of distribution is "dividend".

2. If dividends can be paid despite the fact that the value of the net assets of the company is, or would become as a result of the payment, less than the value of the capital yardstick (i.e. the issued share capital plus share premium account and capital redemption reserve), then the purpose of the capital maintenance rules would be defeated. Part IIA lays down, for the protection of creditors, certain basic principles relating to the payment of dividends and the making of other distributions. The most important one is that a company may make a distribution only out of profits available for that purpose (section 79B(1)). A company's profits available for distribution are its accumulated, realised profits (so far as not previously distributed or capitalised) less its accumulated, realised losses (so far as not previously written off in a reduction or reorganisation of capital) (section 79B((2)). Thus realised losses may not be offset against unrealised profits. Section 79C imposes a further restriction for listed companies.

3. Whether or not a distribution may be made within the terms of the CO is determined by reference to a company's "relevant accounts". Where it is proposed to make a distribution during the company's first accounting reference period or before any accounts have been circulated, initial accounts must be prepared (section 79I). In all other cases, the relevant accounts are its last annual accounts that were circulated to members (section 79G) or interim accounts (section 79H), if the proposed distribution cannot be justified by reference to the last annual accounts.

4. The current rules on distribution have worked well and provide certainty. The CB does not propose any fundamental changes to the distribution provisions. This follows the consultation conclusions of the third topical consultation of not adopting a general solvency test in place of the capital maintenance doctrine[1].

5. Although the capital maintenance doctrine is largely retained, there are new exceptions based on a solvency test for reduction of capital, buy-backs and financial assistance. This wider use of the solvency test impacts on the current rules on distributions to a certain extent. For example, the exclusion of buy-backs out of capital from the definition of "distribution" (currently in CO s 79A(1)) would be wider under the CB (**Clause 6.1**) because of the wider circumstances where buy-backs can be made out of capital pursuant to the solvency test. Consequently, there could be more situations where "distributions" to shareholders under a buy-back are governed solely by the solvency test in Part 5 rather than the rules on distributions in Part 6.

6. There will also be technical amendments to change the terms used in Part 6 in accordance with the changes made in other Parts of the CB, e.g. the terms "profit and loss account" and "balance sheet" will be replaced by "financial statement" as in Part 9; the expression "purchase of a company's own shares" will be replaced by the term "buy-back" as in Part 5. References to "capital redemption reserve" and "share premium account" will be removed in parallel with the introduction of the no-par regime in Part 4. The existing section 79O of the CO would be removed as it is considered that there should not be exceptions for special classes of company (banking, insurance and shipping companies). The provisions will also be reorganised in a more logical and user-friendly way. Transitional provisions in this Part will be included in the finalised Bill.

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[1] FSTB, *Consultation Conclusions on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (February 2009), paragraphs 30 to 33.

PART 7

DEBENTURES

Introduction

1. The specific provisions on debentures are currently contained in sections 74A to 79 of the CO. They deal with a miscellany of matters, for example, the register of debenture holders, rights of inspection of the register and to copies of the register, trust deed and other documents, and meetings of debenture holders. A number of other provisions in the CO also apply to both debentures and shares (see paragraph 10 below).

2. To improve clarity, all substantive provisions on debentures are grouped into Part 7 of the CB. Adjustments are made mainly to align with the corresponding provisions for shares. We also introduce a new requirement for the allotment of debentures to be registered, in parallel with a similar new requirement for shares. Current sections 75A and 79 of the CO will not be re-enacted[1].

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

  (a) Aligning provisions for keeping of the register of debenture holders and branch register with the corresponding provisions for shares;

  (b) Introducing new requirements applicable to the allotment of debentures to align with similar requirements for shares; and

  (c) Allowing debenture holders to apply to the court to order a meeting to be held to give directions to the trustee for the protection of debenture holders.

[1] Section 79 will be reviewed in Phase II of the Rewrite.

Significant Changes

(a) Aligning provisions for keeping of the register of debenture holders and branch register with the corresponding provisions for shares

Background

3. Section 74A of the CO sets out the requirement for keeping the register of debenture holders, similar to section 95 governing the register of members in relation to their holding of shares in a company. Although the provision is largely the same as that for shares, there is a difference in that the register of debenture holders is required to state the occupation of the debenture holders (or otherwise provide a description), whilst it is not so required for the register of members. Sections 103 and 104 of the CO provide for the keeping of a branch register of members. However, there is no provision for duplicate and branch register for debenture holders. Since it is as likely for debt securities to be issued outside the issuer's home jurisdiction these days as it is for shares, it would be useful to also provide for branch and duplicate registers of debenture holders.

4. In addition, there are provisions in the CO which govern the place where the register of members of a company is to be kept (section 95), and the right to inspect and request a copy of the register of members (section 98). These provisions are essentially restated in Part 12 of the CB[2]. To ensure consistency, the provisions on registers of debenture holders and registers of members will be aligned.

Proposal

5. The clauses governing the register of debenture holders will generally mirror the corresponding clauses on the register of members. Such clauses include:

- **Clause 7.2** on the keeping of the register of debenture holders;

- **Clause 7.3** on the place where the register of debenture holders is kept;

[2] See FSTB, "Part 12: Company Administration and Procedure", *Companies Bill Consultation Draft (Parts 1, 2, 10-12 & 14-18)* (December 2009).

- **Clause 7.4** on the right to inspect and request a copy of the register of debenture holders[3]; and

- **Clauses 7.9** to **7.12** on the keeping of branch and duplicate registers of debenture holders.

(b) Introducing new requirements applicable to the allotment of debentures to align with similar requirements for shares

Background

6. Section 45 of the CO requires a company to deliver a return of the allotment of shares to the Registrar for registration. **Clause 4.11** of the CB will further require an entry to be made in the register of members within 2 months after the date of the allotment of shares[4]. Currently, there are no such requirements for the allotment of debentures. To help protect investors in debentures, requirements similar to those for the allotment of shares will be adopted.

Proposal

7. **Clause 7.13** provides that within one month after an allotment of debentures, a company must deliver to the Registrar for registration a return of the allotment. **Clause 7.14** provides that as soon as practicable and in any event within 2 months after an allotment of debentures, a company must register the allotment in the register of debenture holders.

(c) Allowing debenture holders to apply to the court to order a meeting to be held to give directions to the trustee for the protection of debenture holders

Background

8. Section 75A of the CO provides that certain provisions concerning meetings of debenture holders shall mirror those applicable to meetings of

[3] The right to a copy of the trust deed will be restricted to debenture holders and trustees only, which is the same as the UK, Australia and Singapore.

[4] See Explanatory Notes on Part 4 above.

shareholders[5], but only if the debentures, the trust deed or other document securing the debentures or stock provide for such meetings and to the extent that they are not inconsistent with the debenture documents concerned. In practice, it is difficult to see when the provisions are likely to be invoked. If the debenture documents do not provide for meetings, the provision will be of no assistance. Where the debenture documents do so provide, these documents (if professionally prepared) are likely to have their own provisions which will negate the application of the statutory provisions. It is considered that conferring a power on the court to order a meeting to give directions to the trustee for the protection of debenture holders appears to be more helpful to debenture holders[6].

Proposal

9. **Clause 7.28** provides for the right for debenture holders of a company who together hold 10% of the value of the debentures of the company to apply to the court to order a meeting and give directions to the trustee, subject to any provision in the trust deeds to exclude such right or require a higher percentage of debenture holders who may make the application to the court. The debentures to which this clause applies are limited to debentures forming part of a series issued by the company and ranking pari passu with the other debentures of that series and debenture stock.

Other Changes

Improving clarity by separating provisions applicable to debentures from those to shares

10. Currently, some of provisions applicable to both shares and debentures are scattered in different parts of the CO. Examples are:

- production of instrument of transfer for transfer of shares and debentures to be registered (section 66);
- notice of refusal to register transfer (section 69);

[5] The section only applies to a series of debentures ranking pari passu with the other debentures of that series or debenture stock. The provisions concern a requisition to convene an extraordinary general meeting (section 113 of the CO); the power of the court to order a meeting (section 114B); the appointment of proxies (section 114C); the right of a proxy to demand or join in the demand for a poll (section 114D(2)); and voting on a poll (section 114E).

[6] There are similar provisions in the ACA. See Part 2L.5 (section 283EC in particular) of the ACA.

- certification of transfers (section 69A);

- duties of company with respect to the issue of certificates on allotment and transfer and the court's power to order such issue (section 70); and

- a company's power to close register of members and register of debenture holders (section 99).

11. Such a layout is not user-friendly as a reader interested only in debentures has to comb through various provisions in different parts of the Ordinance to identify those provisions applicable to debentures. To improve clarity, all substantive requirements about debentures are now grouped under Part 7.

PART 8

REGISTRATION OF CHARGES

Introduction

1. Part 8 deals with registration of charges by both Hong Kong and registered non-Hong Kong companies. It sets out the types of charges which require registration and provides for the registration procedures involved and the consequences of non-compliance. It also contains provisions to regulate matters associated with registration, such as requiring companies to keep, and allow inspection of, copies of instruments of charges and registers of charges.

2. Part 8 basically retains the current registration regime under Part III of the CO (sections 80 to 91), with modifications made to improve the registration system, taking into account the comments received during the topical public consultation conducted in the second quarter of 2008 ("topical consultation")[1].

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

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

  (b) replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount is to become immediately payable where a charge is rendered void for non-compliance with the registration requirements;

  (c) in addition to the prescribed particulars of the charge, requiring the charge instrument to be registrable and available for public inspection;

[1] The *Consultation Conclusions on "Company Names, Directors' Duties, Corporate Directorship and Registration of Charges"* were issued in December 2008 and are available at www.fstb.gov.hk/fsb/co_rewrite.

(d) shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from 5 weeks to 21 days;

(e) replacing the issue by the Registrar of a certificate of due registration with the issue of an acknowledgement of receipt; and

(f) requiring written evidence of debt satisfaction/release of a charge to accompany a notification to the Registrar for registration of the debt satisfaction/release, thus rendering such documents to be available for public inspection.

Significant Changes

(a) Updating the list of registrable charges

Background

3. Under the current regime, only charges which fall within the categories as provided in section 80(2) of the CO are required to be registered. We suggest to make the following changes to the list:

(i) Charge on an aircraft or any share in an aircraft

The current list does not expressly include a charge on aircraft, though it may be argued that some charges on aircrafts are already made registrable as bills of sale under section 80(2)(c) of the CO. However, it is arguable that not all mortgages over aircrafts are necessarily registrable under section 80(2)(c)[2]. We will expressly provide that a charge on an aircraft or any share in an aircraft is registrable.

(ii) Instalments due, but not paid, on the issue price of the shares

Section 80(2)(g) of the CO provides for the registration of a charge on calls made but not paid. It has been argued that the registrability should also cover a charge on instalments due, but not paid, on the issue price of the shares although these instalments are not calls in the

[2] Some such mortgages could fall within one or more of the exclusions from the definition of 'bill of sale' and are therefore not registrable under section 80(2)(c).

strict sense. We therefore propose that express provision should be made to clarify that a charge on such instalments is registrable.

(iii) Charge for the purpose of securing any issue of debentures

We consider that section 80(2)(a) of the CO requiring the registration of a charge for the purpose of securing any issue of debentures duplicates some other heads of registrable charges and is therefore redundant. Typically, issues of debentures are usually supported by a floating charge or a fixed charge that is registrable by virtue of some other categories of registrable charges. Accordingly, section 80(2)(a) of the CO will not be retained in the CB.

(iv) Lien on subfreights

There is judicial authority to support the principle that a shipowner's contractual lien on subfreights is a charge on book debts[3] or a floating charge[4] which is registrable under section 80(2)(e) or section 80(2)(f) of the CO. On the other hand, it has also been said that a lien on subfreights is not a charge at all but merely a personal right to intercept freight before it is paid to the owner[5]. We take into account that since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration, requiring a lien to be registered is inconvenient from a commercial perspective. We will clarify that a shipowner's lien on subfreights does not fall within the category of a charge on book debts nor a floating charge on the company's property.

(v) Cash deposits

Although a charge over cash deposits could arguably be registrable as a charge on book debts under section 80(2)(e) of the CO, we will exclude such charges from this registrable head, the reason being that such charges are normally taken over credit balances with financial institutions, i.e. in the form of charge-backs with banks. Third party creditors would not be misled by the absence of registration since bank accounts are usually operated confidentially and it is reasonable to expect the depository bank to have a superior claim to the credit

3 *In re Welsh Irish Ferries Ltd* [1986] Ch 471.
4 *The Annangel Glory* [1988] 1 Lloyd's Rep 45.
5 Lord Millett in *Re Brumark Ltd: Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, at paragraph 41.

balance. Moreover, being in the nature of a charge-back, such charges would ordinarily have the effect of a set-off which, of itself, also does not require registration.

Proposal

4. **Clause 8.3(1)(h)** provides expressly that a charge on an aircraft or any share in an aircraft is registrable.

5. **Clause 8.3(1)(f)** expressly makes a charge on instalments due, but not paid, on the issue price of shares to be registrable.

6. **Clause 8.3(1)**, which contains the list of charges to be registrable under the CB, no longer specifically provides for the registration of a charge for the purpose of securing any issue of debentures.

7. **Clause 8.3(4)** states that a shipowner's lien on subfreights shall not be regarded as a charge on book debts or as a floating charge.

8. **Clause 8.3(3)(b)** stipulates that if a company deposits money with another person, a charge given by the company over its right to enforce repayment of the money is not regarded as a charge on book debts of the company.

(b) Replacing the automatic acceleration of repayment obligation

Background

9. Section 80(1) of the current CO states that where a charge becomes void for not being registered with the Registrar within the specified time limit, the money secured by it automatically becomes immediately payable. We note that this statutory acceleration of repayment may create problems for banks, as the acceleration arises automatically. We therefore propose to replace the "automatic" acceleration provision with a "discretionary" acceleration provision in the CB. The proposal received general support in the topical consultation.

Proposal

10. **Clause 8.6(6)** provides that when a charge becomes void should it be not registered with the Registrar within the specified time limit, the money secured by the charge becomes immediately payable at the option of the lender.

(c) In addition to the prescribed particulars of the charge, requiring the charge instrument to be registrable and available for public inspection

Background

11. The present law requires the charge instrument[6] (if any) together with the prescribed particulars of the charge in the specified form[7], to be submitted to the Registrar for registration. However, only the prescribed particulars are required to be registered and made available for public inspection[8] by the Registrar. The charge instrument itself, which is delivered for the purpose of enabling the Registrar to verify the contents of the prescribed particulars, does not appear on the Register for public search.

12. We note that it is desirable to make available to those who search the Register more detailed information as to the charges. We will therefore make both the charge instrument (if any) and the prescribed particulars of the charge registrable and available for public inspection. If the charge instrument is required to be registered, we believe that registration will give rise to constructive notice of all the terms in the charge instrument, including negative pledge clauses, on the part of those who may reasonably be expected to search the Register, such as banks, financiers and relevant professionals.

Proposal

13. The particulars of a charge required for registration under the CB are to be contained in a "statement of the particulars of a charge" which will be in specified form. The statement contains less details as compared with the

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6 "Charge instrument" means the instrument by which a charge is created or evidenced. In the case of a charge in a series of debentures where the debenture holders of that series are equally entitled to the benefit of the charge, the charge instrument means the debenture containing the charge or the instrument of charge to which the debenture refers.

7 The prescribed particulars are contained in Form M1.

8 Only those prescribed particulars as set out in section 83(1) of the CO are required to be entered in the Register and made available for public inspection.

prescribed particulars under the CO, since the charge instrument itself will be registered. **Clauses 8.4(1)**, **8.4(2)**, **8.5(1)**, **8.5(2)**, **8.7(2)**, **8.8(3)**, **8.9(2)** and **8.9(3)** require Hong Kong companies and registered non-Hong Kong companies to deliver to the Registrar for registration the statement of the particulars of the charge and the charge instrument (if any) under the circumstances stated in those provisions (i.e. where the company creates a registrable charge or acquires property subject to a registrable charge). Failure to deliver the statement of the particulars of the charge and the charge instrument (if any) within the specified registration period is an offence (**Clauses 8.6(2)**, **8.7(5)**, **8.8(6)** and **8.9(7)**). Where a registrable charge created by the company is not registered in time, the charge is void as against the liquidator and creditors, as is the case under CO section 80 (**Clause 8.6(4)**).

(d) Shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from 5 weeks to 21 days

Background

14. The CO currently requires a company to submit particulars of a charge and the charge instrument (if any) for registration within a period of five weeks[9]. It may therefore be possible that the particulars of a charge will only be visible on the Register after the expiration of the five-week period. We take the view that the period for the particulars of a charge to be invisible to outside parties should be minimized. As set out in the topical consultation conclusions, we will shorten the period for registration of the particulars of charge to 21 days, the same as in the UK.

Proposal

15. **Clauses 8.4(5)**, **8.5(6)**, **8.7(3)**, **8.8(4)** and **8.9(5)** require the statement of the particulars of a charge and the charge instrument (if any) to be lodged for registration within 21 days. In the case of an issue of debentures in a series, a statement of particulars of each issue of the debentures must be submitted for registration within 21 days **Clause 8.10(4)**, and where the charge or the debentures involves the payment of commission, allowance or discount, a statement of the particulars of the commission, allowance or discount must also be delivered for registration within 21 days (**Clause 8.11(6)**).

[9] For registration of a charge created by a company, the period of five weeks commences from the day after the day on which the charge is created. For registration of a charge existing on property acquired by a company, the period of five weeks commences from the day after the day on which the acquisition is completed.

(e) Replacing the issue of a certificate of due registration with the issue of an acknowledgement of receipt

Background

16. We consider that the procedure undertaken by the Registrar to verify the delivered particulars in the specified form against the charge instrument (if any) inevitably slows down the registration process. It should be the duty of the company, rather than the Registrar, to verify the particulars entered in the specified form. We recommend that the Registrar should be relieved from performing such a checking function in order to expedite the registration process. As a corollary to such a change, the Registrar should no longer be required to issue a certificate of due registration. A simple acknowledgement of receipt[10] of the documents submitted for registration will instead be issued. It is not to be treated as conclusive evidence that all the registration requirements have been complied with.

Proposal

17. **Clause 8.13(2)** stipulates that the Registrar must issue a receipt acknowledging the receipt of the filed document(s) by the Registrar on the date of receipt for registration.

(f) Requiring written evidence of debt satisfaction/release of a charge to accompany a notification to the Registrar for registration of the debt satisfaction/release

Background

18. The current law provides a means whereby a charge that is released or discharged can be shown as discharged on the Register. If the debt secured by a registered charge has been satisfied, an application in the specified form[11] may be made to the Registrar for entering on the Register a memorandum of satisfaction. A similar application may also be made where the property or undertaking subject to a registered charge has been released from the charge or has ceased to form part of the company's property or undertaking. The Registrar will, in such event, enter on the

[10] This document will not be called a "certificate", because at the time of issuing the document, the process that will have been undergone by the Registrar so far will in substance be an acknowledgement of receipt by the Registrar of the submitted document(s) for the purpose of registration on the date of receipt.

[11] Form M2.

Register a memorandum of release or cessation. Such applications should be accompanied by such evidence of discharge as the Registrar may require, which is usually the deed of release/discharge of a charge.

19. Presently, only the memoranda of satisfaction/release are open for public inspection. The evidence of discharge is neither registered nor available for public inspection. As we will make the charge instrument (if any) registrable, for consistency, we will also make the evidence of discharge registrable and open to public inspection as set out in the topical consultation conclusions.

Proposal

20. **Clause 8.14(4)** provides for the registration of the notification and the accompanying evidence of discharge[12].

Other Changes

(a) A certified copy of the charge instrument and written evidence of debt satisfaction/release of a charge to be delivered for registration

21. At present, the original of the charge instrument has to be delivered to the Registrar except where the charge is created by the company out of Hong Kong comprising property situate outside Hong Kong[13] or the charge is existing on property acquired by the company[14] in which case a copy would suffice.

22. Under the CB, only a certified copy of the charge instrument is required to be submitted to the Registrar for registration **(Clauses 8.4(1)**, **8.4(2)**, **8.5(1)**, **8.5(2)**, **8.7(2)**, **8.8(3)**, **8.9(2)** and **8.9(3)**. For the written evidence of debt satisfaction/release of a charge, **Clause 8.14(3)(c)** also only requires a certified copy to be lodged.

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[12] Under the current practice, the Registrar will only request for the production of the evidence of discharge if the application is made and signed by the company. Such practice will not be continued under the CB regime as the evidence of discharge should be registered and open for public inspection no matter who signs the application form.

[13] Section 80(3) of the CO.

[14] Section 82(1) of the CO.

(b) Extension of time for registration by the Court of First Instance (the "Court")

23. Under the current law, if the Court grants relief to extend the time for registration of a charge, section 86(2) of the CO provides that the grant of such relief will, if the Court so directs, not have the effect of relieving the company or its officer of criminal liabilities already incurred under section 81 of the CO.

24. The effect of section 86(2) of the CO, in its current wording, is unclear as to whether a grant of such relief by the court will, in the absence of any court direction, automatically relieve the company and the officers from criminal liability.

25. In order to remove this uncertainty, **Clause 8.15(5)** states that unless the Court directs otherwise, any liability already incurred for an offence under **Clauses 8.6(2)**, **8.7(5)**, **8.8(6)**, **8.9(7)**, **8.10(8)** or **8.12(1)** in relation to the registration of the charge or debenture is extinguished.

(c) Rectification of particulars in the registered charge instrument and evidence of discharge

26. Currently, section 86(1) of the CO allows the Court to rectify an omission or mis-statement of the registered particulars of a charge or in the memoranda of satisfaction/release. As the CB will make the charge instrument (if any) and evidence of discharge registrable and open to public inspection, the Court will also be empowered under the CB to rectify an omission or mis-statement of the particulars in the registered charge instrument and evidence of discharge (**Clauses 8.15(1)(b)(i)** and **8.15(1)(b)(iii)**). Such powers of rectification, however, will be subject to the common law rules and equitable principles as applied in relation to rectification of documents by the Court **Clause 8.15(4)**[15].

[15] Under the general law, the court may rectify a document in particular circumstances where the document failed to record the intention of the parties accurately. The remedy of rectification is available, not for the purpose of altering the terms of the agreement, but for that of correcting a document which does not reflect accurately the true agreement of the parties: *Agip SpA v Navigazione Alta Halia SpA* [1984] Lloyd's Rep 353 at 359.

(d) Drafting of provisions concerning registered non-Hong Kong companies

27. The current CO only has one provision (section 91) which applies the rest of Part III to registered non-Hong Kong companies. The drafting approach under the CB is different where there are now express provisions dealing with registered non-Hong Kong companies for the purpose of clarity. The change of drafting approach does not itself alter the substance of the charge registration and other requirements imposed on registered non-Hong Kong companies, other than those changes highlighted above.

(e) Transitional provisions

28. Upon implementation of the CB, certain types of charges which are currently not registrable under the CO will become registrable, and vice versa. A revised registration mechanism, concerning matters such as the documents required to be lodged for registration and the time allowed for registration of charges, will also come into play. Transitional provisions are not currently included in the draft CB but they will be finalised and included in the CB that will be introduced in LegCo.

PART 9

ACCOUNTS AND AUDIT

Introduction

1. Part 9 contains the accounting and auditing provisions in relation to the keeping of accounting records, the preparation and circulation of annual financial statements, directors' and auditor's reports and the appointment and rights of auditors. Apart from amending the existing accounting and auditing provisions in sections 121 to 141E of the CO, there are new provisions to lessen the compliance burden on private companies and small guarantee companies through reporting exemptions. The financial reports and disclosure requirements under Part 9 will be complemented by other standards and rules governing the contents of accounts and reports i.e. the financial reporting standards issued by the HKICPA and, in the case of listed companies, Listing Rules of HKEx.

2. Part 9 operates prospectively so that it applies in relation to a financial year, whether of an existing company or a company incorporated under the new Ordinance, that begins on or after the commencement of Part 9. A financial year of a company that begins before or straddles the commencement date of Part 9 will continue to be governed by the existing CO. We will provide for transitional and saving provisions for Part 9 after consideration of the public's views.

- The significant changes[1] to be introduced under this Part are highlighted below:

  (a) Clarifying the financial year of a company by providing for an accounting reference period and an accounting reference date, with reference to which financial statements and reports are to be prepared and laid before the company in general meeting or circulated to members of the company;

  (b) Relaxing the qualifying criteria for private companies to prepare simplified financial and directors' reports and allowing small guarantee companies and groups of private or guarantee

[1] Directors' remuneration reports provided in Subdivision 5 of Division 4 is not covered here in view of the proposal not to pursue this recommendation, see Chapter 3 of the Consultation Paper.

companies to take advantage of the simplified accounting and reporting requirements;

(c) Aligning the statutory accounting requirements with accounting standards and streamlining disclosure requirements that overlap with the accounting standards;

(d) Requiring companies to prepare a more comprehensive directors' report which includes an analytical and forward-looking business review whilst allowing companies qualified for simplified accounting to prepare a simplified directors' report;

(e) Enhancing auditor's right to information and strengthening enforcement by imposing criminal sanctions for breaches in relation to the provision of information to auditors;

(f) Improving transparency with regard to circumstances of cessation of office of auditor;

(g) Providing for the appointment and the deemed re-appointment of auditors and the term of office of an auditor; and

(h) Revamping the summary financial report provisions and extending their application to companies in general.

Significant Changes

(a) Clarifying the financial year of a company by providing for an accounting reference period and an accounting reference date, with reference to which financial statements and reports are to be prepared and laid before the company in general meeting or circulated to members of the company

Background

3. At present, the CO does not provide for a company's financial year and accounting reference period. Section 122 of the CO requires accounts to be made out every year and to be laid before the company at its AGM, and those accounts shall be made up to a date falling not more than a specified

number of months before the date of the AGM. Section 111 of the CO requires that not more than 15 months shall elapse between the date of one AGM and the next. It therefore indirectly requires accounts to be made up for a period of not more than 15 months, but there are no rules on shorter accounting periods. In addition, there is currently no provision to regulate the first accounting period, except that the first AGM has to be held within 18 months of incorporation.

Proposal

4. ***For a company incorporated on or after the commencement of the new Ordinance,*** **Clauses 9.12(2)**, **9.13(4)** and **(5)** provide that the first accounting reference period is a period of not more than 18 months from the date of the company's incorporation and ending with its "primary accounting reference date" as appointed by directors, or the last day of the month in which the anniversary of its incorporation falls[2].

5. ***For an existing company,*** **Clauses 9.12(1)**, **9.13(1)** and **(3)** state that the first accounting reference period begins on the date immediately following the "primary accounting reference date" which is any one of the following dates and ends on the first anniversary of that date:

   (a) for a company that, immediately before the commencement of Part 9, was required to hold an AGM under section 111(1) of the CO, either the date up to which the most recent accounts were made (in case the accounts have been laid before its AGM after the commencement of this Part and, in the case of a public or guarantee company, before a certain date to be appointed) or the last day of the month in which the first anniversary of its incorporation occurs; or

   (b) for a company that was not required to hold an AGM in accordance with section 111(1) of the CO, it is the date up to which the last accounts provided to a member under section 111(6)(*b*) of CO were made.

6. **Clause 9.12(3)** stipulates that the subsequent accounting reference periods of a company are successive periods of 12 months beginning immediately after the end of the previous accounting reference period and ending with

[2] For example, if a company is incorporated on 1 January 2013 and has not appointed any date as its accounting reference date, its first accounting reference period should start from 1 January 2013 and end on 31 January 2014 (i.e. the last day of the month within which the anniversary of its incorporation falls).

the company's accounting reference date unless the accounting reference period is shortened or extended.

7. **Clause 9.15** defines a company's accounting reference date to be the anniversary of its primary accounting reference date and **Clause 9.16** provides that it may be altered by a directors' resolution, subject to a number of conditions and exceptions.

8. **Clause 9.11** determines a company's financial year following section 390 of the UK CA 2006. In gist, a company's first financial year is the same as its first accounting reference period, except that the directors may alter the last day of the financial year by plus or minus seven days, so as to allow for some flexibility in fixing the financial year.

(b) Relaxing the qualifying criteria for private companies to prepare simplified financial and directors' reports and allowing small guarantee companies and groups of private or guarantee companies to take advantage of the simplified accounting and reporting requirements

Background

9. Section 141D of the CO provides that a private company (other than a company which is a member of a corporate group, a banking/ 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 and simplified directors' reports in respect of one financial year at a time. According to the SME Financial Reporting Framework (SME-FRF) issued by the HKICPA, a company incorporated under the CO qualifies for reporting under the SME-FRF if it satisfies the requirement under section 141D.

Proposal

10. We propose to relax the restrictive qualifying criteria to enable more private companies and small guarantee companies to prepare simplified financial and directors' reports[3] to save business and compliance costs[4]. We note the implementation of the Hong Kong Financial Reporting Standard for

[3] Further adjustments to the provisions may be required pending discussion with HKICPA on the applicable accounting and reporting standards.

[4] Companies qualified to prepare simplified financial reports are also exempted from the preparation of business review and certain disclosure requirements (see para. 28, 31 and footnote 8).

Private Entities as a reporting option for eligible private entities on 30 April 2010. We would welcome views of the accounting profession on the implications of the following proposals.

Private Companies

11. **Clauses 9.2(1)(a)**, **9.4(1)** and **(2)** provide that a private company (except for a banking/deposit-taking company, an insurance company, or a stock-broking company)[5], will automatically be qualified for simplified accounting, if it is a "small private company" that satisfies any two of the following conditions specified in **Clause 9.8(1)**:

- Total annual revenue of not more than HK$ 50 million.
- Total assets of not more than HK$ 50 million.
- No more than 50 employees.

12. **Clause 9.4(3)** and **(4)** further provide that if a company is not qualified under paragraph 11 and subsequently becomes qualified it will be able to prepare simplified reports if it has been qualified for two consecutive reporting periods[6]. Similarly, a company previously qualified for simplified reporting will be disqualified after it is no longer qualified for two consecutive reporting periods.

13. Private companies that do not qualify as a "small company" can also enjoy the benefit of simplified financial and directors' reports if members holding at least 75 % of the voting rights so resolves and no other member objects (**Clauses 9.2(1)(b)** and **9.3(1)**). The resolution will remain in force until it is objected to by any member.

14. By **Clauses 9.2(3)** and **9.6(1)**, a group of companies is qualified as a "small group" in a year if each company in the group is a small private company and the group satisfies any two out of the following conditions under **Clauses 9.8(6)**:

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[5] 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.

[6] An existing company that qualifies as an SME in its first financial year following the commencement of Part 9 or in the preceding financial year or a company incorporated under the new Ordinance that qualifies as an SME in its first financial year would qualify for reporting under the SME-FRF. There is no need to satisfy the two years' rule.

- Aggregate total annual revenue of not more than HK$50 million net.

- Aggregate total assets of not more than HK$50 million net.

- No more than 50 employees.

15. Under **Clauses 9.2(3)**, **9.3(2)** and **(3)**, if the above conditions cannot be met, an election for simplified reporting can still be made with the approval of members holding at least 75% of the voting rights (with no member objecting) in the holding company or in the non-small private companies, depending on the circumstances.

Companies Limited by Guarantee

16. Guarantee companies are often set up for non-profit making purposes, such as educational, charitable, religious or community-related purposes and are subject to certain tighter requirements than private companies, such as the requirement to file annual accounts with the Registrar. However, guarantee companies vary in size and it would be inappropriate to require those small guarantee companies to be subject to the Hong Kong Financial Reporting Standards (HKFRSs) that are primarily used for reporting by large or public companies.

17. 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 the small ones. We suggest using a total annual revenue of not more than HK$25 million as a bright line rule for guarantee companies. Under **Clauses 9.2(2)**, **9.5** and **9.8(3)**, a small guarantee company with a total annual revenue of HK$25 million or less, or under **Clauses 9.2(4)**, **9.7** and **9.8(8)** a holding company of a group of such companies with a total aggregate annual revenue of HK$25 million net or less, can take advantage of the simplified accounting and reporting requirements.

18. To sum up, the 7 types of companies that will be allowed to prepare simplified financial and directors' reports are:

(a) a small private company;

(b) other private company with the requisite members' approval;

(c) a small private company which is a holding company of a group of small companies;

(d) a private company which is a holding company of a group of one or more non-small private companies with the requisite members' approval;

(e) a small private company which is a holding company of a group of small companies with the requisite members' approval;

(f) a small guarantee company; and

(g) a guarantee company which is the holding company of a group of small guarantee companies.

(c) Aligning the statutory accounting requirements with accounting standards and streamlining disclosure requirements that overlap with the accounting standards

Background

19. At present, there are certain inconsistencies between the accounting requirements under the CO and the accounting standards, particularly in respect of the simplified accounting requirements in section 141D. Compared to the requirements under section 141D, the SME Financial Reporting Standard (SME-FRS) requires a more complete set of accounts and more disclosures. For example, pursuant to section 141D(1)(e), the auditor's report of a company which applies section 141D covers only the balance sheet but not the profit and loss account.

20. Another incongruity is that there is no obligation on a company applying section 141D to prepare accounts showing a "true and fair view". Yet section 141D(1)(e)(ii) requires the auditor's report of a company applying section 141D to state "whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view

of the state of the company's affairs…". The phrase "true and correct" may be inappropriate in certain circumstances[7].

21. The CO also provides for certain disclosure requirements as to the contents of the financial statements in the Tenth and Eleventh Schedules. These requirements essentially overlap with the disclosure requirements in HKFRSs and SME-FRS respectively. As accounting standards are constantly evolving, it is very difficult to keep the statutory requirements in the CO up-to-date. This can give rise to possible conflicts between the two.

Proposal

22. To align with the terminology used in the HKFRSs, the requirements under the CO to prepare annual "accounts" for companies and "group accounts" for holding companies will respectively be changed to the requirement to prepare a "financial statement" and "consolidated financial statement". The terms "balance sheet" and "profit and loss account" used in the CO will respectively be replaced by "statement of financial position" and "statement of comprehensive income".

23. To avoid any potential conflicts between the Tenth Schedule and HKFRSs and between the Eleventh Schedule and SME-FRS, the Tenth and Eleventh Schedules will be repealed, with only a small number of public interest disclosure requirements not covered by the HKFRSs or SME-FRS being retained in the form of a **Schedule**[8].

24. To align with the SME-FRS, companies that are qualified to prepare simplified financial and directors' reports will be required to prepare a full set of financial statements dealing with the financial position and financial performance of the company. Holding companies of a corporate group that prepares simplified financial and directors' reports are similarly required to prepare consolidated financial statements dealing with the financial position and financial performance of the company and its subsidiary undertakings as a whole. The auditor's report will be expanded to cover the financial statements and consolidated financial statements of such companies.

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[7] For example, as the amount of depreciation shown in the accounts is an estimate, the use of the word "correct" to describe the amount is inappropriate.

[8] Such disclosures include auditor's remuneration (which applies to companies other than those that fall within the reporting exemption), 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.

25. Under **Clause 9.25**, the requirement for financial statements to show the "true and fair view" will also apply to companies that are qualified to prepare simplified financial reports so that there will be a common requirement for all companies incorporated in Hong Kong to prepare financial statements that give a true and fair view of the financial position and financial performance of the company, or of the company and its subsidiary undertakings as a whole.

26. The HKFRSs and SME-FRS will be given indirect statutory recognition as **Clause 9.25(4)** requires a financial statement to comply with the applicable accounting standards which are issued by a body to be prescribed by regulation (i.e. HKICPA). **Paragraph 4 of the Schedule** further requires a statement to be made in the financial statement as to whether it has been prepared in accordance with the applicable accounting standards, and to give the particulars of, and the reasons for, any material departure from those standards.

(d) Requiring companies to prepare a more comprehensive directors' report which includes an analytical and forward-looking business review while allowing companies qualified for simplified accounting to prepare a simplified directors' report

Background

27. Section 129D of the CO sets out the detailed information required in a directors' report. A copy of the report must be sent to every member and debenture holder of the company together with a copy of the accounts and the auditor's report. To enhance transparency, we propose that all public companies and "large" private and guarantee companies (i.e. other than those qualified to apply the simplified accounting and reporting requirements, see paragraph 18 above) should be required to prepare more analytical and forward-looking information.

Proposal

28. **Clauses 9.29** and **9.31** provide that companies (except for those qualified to apply the simplified accounting and reporting requirements) are required to prepare, as part of the directors' report, a business review which is more analytical and forward-looking than the information currently required. The proposed business review is similar to the business review which all

companies (except small companies) in the UK have to include in their directors' reports under section 417 in the UKCA 2006. Specifically, the business review should include:

(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 development 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, including:

(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.

29. The requirement to include in the business review information relating to environmental and employee matters is in line with international trends to promote corporate social responsibility[9].

30. **Clause 9.29(1)** requires the disclosure of other matters prescribed in regulations to be made by the FS. We envisage that the information will include:

[9] Reference can also be made to paragraph 52(vi) and (viii) of Appendix 16 to the Listing Rules (Main Board) which sets out the recommended additional disclosures to be made in the management discussion and analysis prepared by listed companies.

(a) the directors' interests in the company, its subsidiary undertakings, its holding company or a subsidiary undertaking of the company's holding company,

(b) directors' permitted indemnity provisions

(c) donations by the company and its subsidiary undertakings,

(d) the shares issued and equity-linked agreements entered into by the company,

(e) the management contracts entered into by the company,

(f) the amount (if any) that the directors recommend should be paid by way of dividend, and

(g) if any director has resigned or given notice declining to stand for re-election during the financial year on the ground of his disagreement with the management of the company, a summary of his reasons for disagreement with the management of the company, if he has given such reasons to the company.

31. Companies which are qualified to apply the simplified accounting and reporting requirements will be exempted from disclosure of information about company donations, recommended dividends and the resigning director's reasons for disagreement with the management of the company.

32. The requirement to prepare a business review will not impose a significant burden on private companies as only a small number of "large" private companies where the members have not opted for the simplified accounts and simplified directors' report would be subject to that requirement.

(e) Enhancing auditor's right to information and strengthening enforcement by imposing criminal sanctions for breaches in relation to the provision of information to auditors

Background

33. To ensure that an auditor will be in a position to perform his oversight functions in an effective manner, it is important for him to have access to the relevant information regarding the state of affairs of the company. 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[10]. A new provision should be drafted along the lines of sections 499 and 500 in the UKCA 2006. It should allow auditors to require a wider range of persons to provide them with information, explanations or assistance as they think necessary for the performance of their duties as auditors.

34. To ensure effective and continuous oversight, there should be proper transitional arrangements in the event of any changes in the auditor of a company. In practice, sudden or frequent changes in auditors often lead to market speculation. Thus, while noting that there are legitimate reasons for changes in auditors, such as disagreement on fees, the existing provisions regarding the rights as well as the duties of the outgoing and incoming auditors should be enhanced. At present, an outgoing auditor needs to seek the company's permission to discuss the affairs of the company with the incoming auditor because of the principle of confidentiality. The lack of consent may prevent the dissemination of relevant "work-related information" to the incoming auditor.

Proposal

35. **Clause 9.56** provides that auditors will be empowered to require a wider range of persons, including the employees of the company and the officers and employees of its Hong Kong subsidiary undertakings, and any person holding or accountable for any of the company's or the subsidiary undertakings' accounting records, to provide them with information, explanations or assistance as they think necessary for the performance of their duties as auditors. The range of persons also covers the officers,

[10] 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" (namely, directors, managers and secretary) of the company, but not company employees, to provide information.

employees or auditor of a subsidiary undertaking which is not a company incorporated in Hong Kong.

36. To tighten enforcement, **Clause 9.57** provides for offences caused by a failure to comply with the obligations under **Clause 9.56** by the company or the responsible person of the company concerned.

37. **Clause 9.58** provides that an outgoing auditor does not contravene any duty just because he gives "work-related information" to an incoming auditor. "Work-related information" means information of which the person became aware in the capacity as such auditor. (**Clause 9.58(3)**)

(f) Improving transparency with regard to circumstances of cessation of office of auditor

Background

38. Under sections 132(3) and 140B of the CO, an auditor who is proposed to be removed or not to be re-appointed and a resigning auditor has the respective right to make written representations or a statement (collectively "cessation statement") to the company with regard to his cessation of office and request for circulation of such written representations or statement to members of the company. The auditor is entitled to attend, to be heard and to receive all notices of the relevant meetings of the company in respect of his cessation of office. The written representations and statement need not be sent to members of the company if the court is satisfied, on the application of the company or a person who claims to be aggrieved, that the outgoing auditor's rights are being used to secure needless publicity for defamatory matter.

39. Under section 140A(1) and (2) of the CO, a resigning auditor is required to make a statement in the notice of resignation as to whether there are any circumstances in relation to his resignation that he considers should be brought to the notice of the members or creditors of the company, and if so, a statement of any such circumstance ("statement of circumstances"). Auditors who have ceased office owing to other reasons, e.g. removal or not being re-appointed as auditor after expiration of his term of office, are not required to make such a statement.

Proposal

40. To improve transparency and corporate governance, an outgoing auditor's right to make and request for circulation of a cessation statement and the mandatory requirement to make a statement of circumstances will be expanded.

Cessation statement

(a) The right to make a cessation statement will apply where an auditor resigns or where a resolution removing an auditor from office or having the effect of appointing another person as auditor instead of the retiring auditor is proposed to be passed (**Clauses 9.66** and **9.67**).

Statement of circumstances

(b) Under **Clauses 9.68** and **9.69**, the mandatory requirement to make and circulate the statement of circumstances will cover not only resigning auditors but will also be extended to an auditor who has been removed and a retiring auditor who has not been re-appointed so that such auditors are also required to provide a statement of circumstances, or if there are no such circumstances, a statement to that effect.

In either case, the company will be required to circulate the statement to members of the company unless the company, or a person who claims to be aggrieved, applies to the court for an order not to publicize the statement.

41. Under **Clause 9.54**, auditors will be provided with qualified privilege for statements made in the course of their duties as auditors. A cessation statement and a statement of circumstances made by an auditor in respect of his ceasing to hold office as auditor will be covered by such privilege. Accordingly, an auditor will not, in the absence of malice on his part, be liable to any action for defamation in respect of any statement made by him in the course of his duties as auditor and in respect of his ceasing to hold office as auditor.

(g) Providing for the appointment and the deemed re-appointment of auditors and the term of office of an auditor

Background

42. One aspect affected by the dispensation of the AGM is the appointment and term of office of an auditor. Section 131(1) of the CO provides that every company shall at each AGM appoint an auditor to hold office from the conclusion of that meeting until the conclusion of the next AGM. We need to provide for these matters where the AGM is dispensed with under **Clause 12.75(2)**[11].

Proposal

43. We propose to follow the approach in sections 485, 487 and 488 of the UKCA 2006 to make provisions for an "appointment period" and the deemed re-appointment of auditors. It will also be made clear that an auditor deemed to be appointed does not take office until the retiring auditor ceases to hold office.

Appointment of another person as auditor in place of the retiring auditor

44. If a company is not required to hold an AGM:

(a) **Clause 9.40(4)** provides that an auditor must be appointed before the end of the "appointment period" which is defined in **Clause 9.36** as the period of 28 days beginning with:

- the last date on which copies of the company's financial statements and reports for the previous financial year must be sent to its members under **Clause 9.74(3)** or **12.75(1)(b)** as the case may be, or

- if earlier, the date on which copies of such financial statements and reports are sent out under such clauses.

(b) The retiring auditor ceases to hold office at the end of that period unless re-appointed or deemed to be re-appointed and the new auditor

[11] See Part 12 in FSTB, *Companies Bill Consultation Draft – Parts 1, 2, 10 - 12 & 14 – 18* (December 2009).

will not take office until the retiring auditor ceases to hold office (**Clause 9.46**).

(c) **Clauses 9.40**, **9.44** and **9.45** set out the procedure for appointing an auditor in place of the retiring auditor.

Deemed re-appointment of current auditor where no appointment of auditor has been made

45. If no auditor is appointed by the end of the appointment period, **Clause 9.47** provides that the current auditor is deemed to be re-appointed on the same terms at that time. However, the deemed re-appointment can be prevented by any of the circumstances mentioned in **Clause 9.47(2)**, including where the auditor gives written notice to the company to decline the re-appointment.

(h) Revamping the summary financial report provisions and extending their application to companies in general

Background

46. Under sections 141CA to 141CH of the CO, a listed company may send a summary financial report to its members and debenture holders in place of the accounts, together with directors' and auditor's reports required to be sent under section 129G of the CO (" the reporting documents") provided that it has obtained the agreement of those persons.

47. Sections 141CA to 141CH, and the Companies (Summary Financial Reports of Listed Companies) Regulation came into effect on 4 January 2002 but very few listed companies have offered the alternative of providing summary financial reports to members partly due to cost considerations and partly because the company has to obtain the members' consent by complying with complex rules for sending notification to and receiving a response from the members. Currently, there is no exemption for listed companies incorporated in Hong Kong not to send out the reporting documents or summary financial reports. However, in some jurisdictions those documents need not be sent if the members so request[12].

[12] See section 316(1)(a) of the ACA 2001 and section 203A(3) of the SCA and regulation 3(1)(f)(iii) of the Singaporean Companies (Summary Financial Statement) Regulations.

Proposal

48. Against this background, we will make the summary financial reports provisions more user-friendly so as to encourage the publication of summary financial reports and help save operating costs. The key proposals are summarised as follows:

(a) Under **Clause 9.86**, companies (except for those that prepare simplified accounts) are given a choice of sending a copy of the summary financial report instead of a copy of the reporting documents to their members. This will avoid the complex rules which require a company to ask its members in advance before it can send them a copy of the summary financial report. Members receiving summary financial reports may, under **Clause 9.90**, request a copy of the reporting documents from the company.

(b) Under **Clause 9.87**, the company can at any time ascertain the wishes of its members through a "notification" which allows the members to elect to receive a copy of the reporting documents, or a copy of the summary financial report in hard copy form, or electronic form, or by making it available on a website; or not to receive any copies of the documents.

(c) The technical requirements as to the form and contents of summary financial reports will be prescribed in regulations to be made by the FS.

Other Changes

(a) Requiring directors to make a declaration whether in their opinion the financial statements give a true and fair view of the financial position and financial performance of the company

49. Section 129B of the CO requires every balance sheet of a company to be approved and signed on behalf of the board of directors. With reference to similar provisions in Australia and Singapore[13], we propose to repeal section 129B and replace it by a directors' declaration in respect of the financial statements of the company so as to remind the directors of their

[13] See section 201(15) of the SCA and section 295(4) and (5) of the ACA 2001.

obligation to prepare financial statements that give a true and fair view of the financial position and financial performance of the company.

50. **Clause 9.28** provides that a financial statement laid before a company in general meeting, or otherwise sent to a member, circulated, published or issued, must be accompanied by a declaration that states whether, in the directors' opinion, the financial statement or consolidated financial statement, gives a true and fair view of the company or the group's financial position and financial performance as required by **Clause 9.25**.

(b) Providing new offences relating to contents of auditor's report

51. At present, there is no offence in the CO relating to intentional or reckless omissions in the auditor's statement concerning problems in the accounts or audit. Some comparable jurisdictions such as the UK have introduced new offences relating to such omissions[14]. We propose that similar provisions should also be introduced to enhance the integrity of auditor's reports.

52. **Clause 9.52(1)**, modelled on section 507(2)(a) and (b) of the UKCA 2006, provides the offence where an auditor knowingly or recklessly causes an auditor's report to omit a statement required by:

(a) **Clause 9.51(2)(b)** (statement that the company's financial statement does not agree with accounting records), or

(b) **Clause 9.51(3)** (statement that necessary information and explanation not obtained).

53. **Clause 9.52(2)** defines the persons liable to be caught by **Clause 9.52(1)** as:

(a) the auditor, if he is an individual, and his employees and agents;

(b) the members, employees and agents of an audit firm; and

(c) the officers, members, employees or agents of an auditor which is a body corporate.

[14] See section 507 of the UKCA 2006. The section also provides for an offence of "commission", where a person knowingly or recklessly causes an auditor's report to include anything that is misleading, false or deceptive. This will be taken care of by widening the scope of the offence of false statements in Clause 20.1. See Explanatory Notes on Part 20, paragraphs 2 to 6.

PART 13

ARRANGEMENTS, AMALGAMATION, AND COMPULSORY SHARE ACQUISITION IN TAKEOVER AND SHARE BUY-BACK

Introduction

1. Part 13 basically restates the provisions with some proposed amendments concerning schemes of arrangement with creditors or members, reorganisations of share capital of a company, and reconstructions or amalgamations of a company with other companies. The relevant provisions are currently found in sections 166, 166A, 167, 168, 168B and the Ninth and Thirteenth Schedules[1] of the CO.

2. Based on the recommendation of the SCCLR and the feedback from the public consultation conducted in June to September 2008, we will introduce a court free statutory amalgamation procedure whereby wholly-owned intra-group companies would be allowed to amalgamate and continue as one of the amalgamating companies without the need for any court sanction.

3. On the review of the "headcount" test under section 166(2) of the CO which was included in the First Phase Consultation Paper issued in December 2009, we are studying the feedback obtained during the consultation and will amend the relevant provisions in the CB, if necessary.

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

Schemes of Arrangements, Takeovers and Share Buy-backs

(a) Extending the application of the provisions for facilitating reconstructions and amalgamations of companies currently under section 167 of the CO to cover companies liable to be wound up under the CO, which would include both Hong Kong and non-Hong Kong companies;

[1] The Ninth Schedule deals with provisions relating to acquisition of minority shares after successful takeover offer. The Thirteen Schedule covers provisions relating to acquisition of minority shares after successful buy out under a share buy-back.

(b) Revising the definitions of "property" and "liabilities" currently under section 167(4) of the CO to include rights and duties respectively of a personal character or incapable under the general law of being assigned or performed vicariously;

(c) Clarifying the meaning of a "takeover offer", "shares already held by the offeror" and "shares to which the offer relates";

(d) Introducing new provisions to allow an offeror in a takeover offer or share buy-back offer who is unable to achieve the necessary squeeze out threshold because of untraceable shareholders related to the offer, to apply to court for an authorization to give squeeze out notices;

(e) Introducing new provisions to allow a revised offer to be treated as the original offer so long as certain specified conditions are met;

Court-free Statutory Amalgamation Procedure

(f) Introducing a new court-free statutory amalgamation procedure for wholly-owned intra-group companies.

Significant Changes

Schemes of Arrangements, Takeovers and Share Buy-backs

(a) Extending the scope of section 167 of the CO to cover companies liable to be wound up under the CO

Background

4. Section 167 of the CO, which provides for the sanctioning of a scheme of compromise or arrangement by the court initiated under section 166, does not apply to a company other than one formed and registered under the CO or the preceding Companies Ordinances. This is contrary to the provision of section 166(5) and 166A where the expression "company" means any company liable to be wound up under the CO which in effect includes a non-Hong Kong company.

Proposal

5. **Clauses 13.3** to **13.10** restate the provisions under sections 166, 166A and 167 of the CO. **Clause 13.3(1)** defines a company for the purpose of these clauses as a company liable to be wound up under the Companies (Winding-up Provisions) Ordinance (Cap 32)[2] thereby removing the difference in the categories of companies currently covered under section 166, 166A and 167 of the CO.

(b) Revising the definition of "property" and "liabilities" currently under section 167(4) of the CO

Background

6. The expression "property" is defined in section 167(4) of the CO as including "property, rights and powers of every description", and the expression "liabilities" as including "duties". Based on the court's views in decided cases, a transfer order made under section 167 to facilitate reconstructions and amalgamations of companies is unable to operate to transfer a contract of personal service. As a result, contracts of employment are not transferable under the section.

7. We propose to follow the ACA where "property" and "liabilities" are defined to include rights and duties respectively of a personal character or incapable under the general law of being assigned or performed vicariously (i.e. in substitution for another person). This will enable personal rights and duties, which could not have been transferred or assigned unless with the consent of the parties concerned, to be transferred or assigned once a transfer order is made.

Proposal

8. **Clause 13.9** restates section 167 of the CO. **Clause 13.9(8)** redefines "property" as including:

(a) rights and powers of a personal character and incapable of being assigned or performed vicariously under the law; and

[2] Provisional title of Cap 32 after it is consequently amended by the new Companies Ordinance. It is subject to change.

(b) rights and powers of any other description.

and "liabilities" as including:

(a) duties of a personal character and incapable of being assigned or performed vicariously under the law; and

(b) duties of any other description.

(c) Clarifying the meaning of "takeover offer", "shares already held by the offeror" and "shares to which the offer relates" in a takeover

Background

9. Section 168 of the CO, together with the Ninth Schedule, deal with the compulsory acquisition of shares following a takeover. Section 168 applies, inter alia, where a company makes an offer to acquire all the shares not already held by it in another company on terms which are the same in relation to all the shares to which the offer relates. There are no clear definitions of what would constitute "shares already held by an offeror" and "shares to which the offer relates". For the sake of clarity, we consider that these terms should be clearly defined.

Proposal

10. **Clause 13.22(1)** defines what constitutes a takeover offer. First, it must be an offer to acquire all the shares (or shares of any class) in the company except those that, at the date of the offer, are held by the offeror. Secondly, in relation to all the shares to which the offer relates (or all the shares of the class to which the offer relates), the terms of the offer must be the same.

11. **Clause 13.22(3)** defines "shares that are held by an offeror" as including shares that the offeror has contracted, unconditionally or conditionally to acquire, but excluding shares that are subject to a contract which is:

(a) intended to secure that the holder of the shares will accept the offer when it is made; and
(b) entered into for no consideration by deed, for consideration of negligible value, or for consideration consisting of a promise by the offeror to make the offer.

12. **Clauses 13.22** and **13.24** clarify that shares to which a takeover offer relates may include:

(a) shares that are allotted after the date of the offer but before a date specified in the offer (**Clause 13.22(6)**);

(b) shares which the offeror acquires or contracted to acquire other than by virtue of acceptances of the offer during the offer period unless the acquisition consideration exceeds the consideration specified in the terms of the offer (**Clause 13.24(2)**); and

(c) shares which a nominee or an associate of the offeror has contracted to acquire after a takeover offer is made but before the end of the offer period, unless the acquisition consideration exceeds the consideration specified in the offer (**Clause 13.24(4)**).

13. **Clauses 13.40(1)**, **13.40(3)** and **13.42** contain similar provisions in relation to compulsory acquisition powers following a share buy-back offer.

(d) Introducing new provisions to allow an offeror in a takeover offer or share buy-back offer who was unable to achieve the necessary squeeze out threshold because of untraceable shareholders related to the offer to apply to court for an authorisation to give squeeze out notices

Background

14. Under the CO, there is no mechanism for an offeror to apply for a court order authorising the giving of squeeze out notices for those takeover or buy-back offers which failed to achieve the applicable threshold for giving of such notices because of untraceable shareholders related to the offer. Such a mechanism has been included in the UK Companies Act since 1987 and is considered practical and useful.

Proposal

15. **Clauses 13.26(3)** to **(7)** introduce the mechanism mentioned in paragraph 14 above which will apply if the offeror has been unable to trace the relevant shareholders after reasonable enquiry. The consideration offered must be fair and reasonable and the court may not make an order unless it considers that it is just and equitable to do so having regard, in particular, to the

number of shareholders who have been traced but have not accepted the offer.

16. **Clauses 13.45(4)** to **(8)** provide a similar mechanism in the case of a share buy-back offer.

(e) Introducing new provisions to allow a revised offer to be treated as the original offer so long as certain specified conditions are met

Background

17. At present, the CO does not have any provision on revised offers to provide for unexpected changes of circumstances after the making of an offer. As a result, an offeror who wishes to revise his offer will have to make a new takeover or share buy-back offer and address the acceptances received under the old offer. Both the UKCA 2006 and the SCA have provisions for a revised offer to be treated as the original offer as long as certain specified conditions are met. The ACA has specific provisions for variation of offers.

Proposal

18. **Clause 13.25** provides that a revision of the terms of a takeover offer is not regarded as the making of a fresh offer if:

(a) the terms of the offer provide for the revision and the acceptances on the previous terms to be regarded as acceptances on the revised terms; and

(b) the revision is made in accordance with that provision.

19. **Clause 13.43** contains a similar provision in the case of a share buy-back offer.

Court-free Statutory Amalgamation Procedure

(f) Introducing a new court-free statutory amalgamation procedure for wholly-owned companies which are within the same group

Background

20. At present, companies intending to amalgamate have to resort to the procedures under sections 166 to 167 of the CO which require court sanction. In practice, sections 166 to 167 of the CO are rarely used. Apart from the complex procedure involved and high compliance costs, the court's restrictive approach in applying the provisions may also be a disincentive. Other comparable jurisdictions such as Singapore and New Zealand have provided a court-free regime in their company law.

21. In June 2008, we consulted the public whether a court-free amalgamation process along the lines of the Singaporean model with minor modifications should be introduced in Hong Kong[3]. While a majority of the respondents supported the introduction of a court-free procedure, some respondents raised a pertinent concern regarding the protection of the interests of minority shareholders and creditors. To minimise the risk that the new procedure may be abused, we consider it prudent to confine it only to amalgamations of wholly-owned intra-group companies where minority shareholders' interests would normally not be an issue[4]. The proposed procedure is modelled on the "short form amalgamation" procedure under sections 215D to 215J of the SCA and sections 222 to 226 of the NZCA.

Proposal

22. **Clauses 13.11** to **13.19** provide for a court-free statutory amalgamation procedure for wholly-owned intra-group companies limited by shares to amalgamate and continue as one of the amalgamating companies. The amalgamation may either be vertical (i.e. between the holding company and one or more of its wholly-owned subsidiaries) or horizontal (i.e. between two or more subsidiaries of the same holding company) (**Clauses 13.13(1)** and **13.14(1)**).

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3 See FSTB, *Consultation Paper on Share Capital, the Capital Maintenance Require, Statutory Amalgamation Procedure*, Chapter 4 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

4 See FSTB, *Consultation Conclusions on Share Capital, the Capital Maintenance Require, Statutory Amalgamation Procedure* (February 2009), paragraphs 55 to 56 (available at http://www.fstb.gov.hk/fsb/co_rewrite).

23. The details of the procedure are:

- **<u>Amalgamation Proposal</u>**

  Clauses 13.13(2) and **13.14(2)** set out the terms and conditions of the amalgamation. No formal amalgamation proposal is required.

- **<u>Directors's approval and solvency statements</u>**

  Clauses 13.13(2) and **13.14(2)** provide that the board of each amalgamating company must make a statement to confirm that the assets of the amalgamating company is not subject to any charge of a floating nature[5] and to verify the solvency of the amalgamating company as well as the amalgamated company. Details of the solvency statement are set out in **Clause 13.12**.

  Clause 13.16(1) — every director who votes in favor of the making of the solvency statement must sign a certificate confirming that in his opinion, the amalgamating company and/or the amalgamated company satisfy the required solvency conditions.

- **<u>Shareholders' approval</u>**

  Clauses 13.13(1), **(3)** and **(4)** and **13.14(1)**, **(3)** require that the amalgamation proposal be approved by the shareholders of each amalgamating company by special resolution.

- **<u>Notice of amalgamation</u>**

  Clause 13.15(2) stipulates that the directors of each amalgamating company must give written notice of the proposed amalgamation to every secured creditor of the amalgamating company and to publish a newspaper notice of the proposal.

- **<u>Registration of amalgamation</u>**

  Clause 13.17 requires that the amalgamation proposal, the directors' solvency statement, the certificate regarding the solvency statement, etc must be registered with the Registrar. As soon as practicable after the registration of the required documents, the Registrar shall issue a certificate of amalgamation.

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[5] Please see the last bullet point below.

- **Effect of amalgamation**

  Clauses 13.18(1) and **(2)** state that the amalgamation shall take effect on the date shown in the certificate of amalgamation. Upon the amalgamation taking effect, each amalgamating company ceases to exist as an entity separate from the amalgamated company (**Clause 13.18(3)**). The amalgamated company succeeds to all the property rights and privileges and all the liabilities and obligations of each amalgamating company.

  Clause 13.18(4) further sets out that on or after the effective date of an amalgamation, any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company. Any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company.

- **Creditors' and shareholders' right to seek court relief**

  Clause 13.19 provides that before the effective date of the amalgamation proposal, on application by a member or creditor of an amalgamating company, the court may disallow or modify the amalgamation proposal or give any directions, if it is satisfied that giving effect to the amalgamation proposal would unfairly prejudice a member or a creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation. This is to protect the interests of the minority shareholders and creditors in the course of the amalgamation process.

- **Exclusion of companies with floating charges**

  As the effect of amalgamation is that the amalgamated company takes the benefits and is subject to the liabilities of the amalgamating companies, this poses a problem when 2 or more of the amalgamating companies have floating charges subsisting over their respective assets in favour of different security holders. There will be a question of priorities between the competing security holders over the assets of the amalgamated company, which may result in unfairness between the security holders.

The problem will not be solved by providing that any floating charges will be deemed crystallized immediately before the coming into effect of the amalgamation proposal, as the question of the order of priority between crystallized former floating charges over the same assets still persists. Further, upon crystallization, the company will no longer be able to deal with the assets in the ordinary course of business without the consent of the chargee and this may have the effect of paralyzing the business of the company.

As the purpose of the proposal is to introduce a simple and less costly procedure for amalgamation, we therefore propose to exclude companies with floating charges from the proposal in order to keep the procedure simple and easy to implement.

PART 19

INVESTIGATIONS AND ENQUIRIES

Introduction

1. Part 19 deals with investigations and enquiries into a company's affairs. Currently, the CO provides the following:

   (a) investigation of a company's affairs: the FS may appoint an inspector with extensive powers to conduct an investigation into the affairs of a company (sections 142 to 151); and

   (b) inspection of books and papers: the FS or a person authorised by him may, in specified circumstances, require a company and any person who appears to be in possession of the company's books and papers to produce those documents and to provide explanation of them (sections 152A to 152F).

   The CO also provides that a company may appoint an inspector to investigate its own affairs (section 152).

2. Part 19 reorganises, with some modifications, the existing provisions in sections 142 to 152F of the CO. The relevant provisions are clarified or modernised, making reference to the more updated provisions on investigations in the SFO and the FRCO. The power to inspect books and papers is rephrased as power to "enquire into company's affairs" to better described the nature of the power. The Part also provides a new power for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute an offence under **Clause 15.7(7)** (concerning giving false or misleading information in connection with an application for deregistration of a company[1]) or **20.1(1)** (concerning making a statement that is misleading, false or deceptive in any material particular[2]) has taken place.

3. Background information on the needs for the powers is provided in Chapter 4 of the consultation paper.

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1 The equivalent of section 291AA(14) in the CO.

2 The equivalent of 349 in the CO.

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

  (a) Enhancing the investigatory powers of an inspector, for example, requiring a person under investigation to preserve records or documents and to verify statements by statutory declaration;

  (b) Extending the categories of companies that may be subject to investigation;

  (c) Providing better safeguards for confidentiality of information and protection of informers; and

  (d) Providing for a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the CB has taken place.

Significant Changes

(a) Enhancing the investigatory powers of an inspector

Background

4. The provisions in sections 142 to 151 of the CO deal with investigations of a company's affairs by independent inspectors appointed by the FS. The FS may appoint an inspector on application by members (section 142) or a company by special resolution, upon an order made by the Court[3] or on his own initiative where there is fraud or mismanagement involved (section 143). Inspectors appointed under these sections are vested with extensive investigative powers, including the power to:

   (a) require production of books or documents;

   (b) require attendance and examination of persons on oath;

   (c) require reasonable assistance to be given;

[3] The appointment must be made under this scenario.

(d) apply to the Court to punish a person who failed to comply with a requirement made by an inspector as if the person had been guilty of contempt of the Court; and

(e) apply for a search warrant.

At the end of the investigation, an inspector is required to make a final report to the FS.

5. The SFO and the FRCO both contain provisions which empower the SFC and the FRC respectively to carry out investigations. We have made reference to these two pieces of legislation in the enhancement of the powers of an inspector.

Proposal

6. **Clause 19.9(1)(b)** gives the inspector a new power to require a person to preserve records or documents before production to the inspector.

7. **Clause 19.11(2)** gives the inspector a new power to require a person to verify by statutory declaration any answer or explanation given to the inspector. **Clause 19.11(3)** provides another new power in that if a person does not give any answer for the reason that the information is not within the person's knowledge or possession, the inspector may require the person to verify that reason and fact by statutory declaration.

8. **Clause 19.26** introduces criminal sanctions for non-compliance with a request made by an inspector. Under the CO, criminal sanctions are imposed for non-compliance with a request made by the FS or an authorised person for the inspection of books and papers, but there is no such sanction for non-compliance with a request made by an inspector. This clause therefore addresses the anomaly.

9. **Clause 19.27** introduces express provisions allowing the Court to not only punish a person who failed to comply with an inspector's requirement as if he had been guilty of contempt of the Court but also to order the person to comply with the requirement made by the inspector.

(b) Extending the categories of companies that may be subject to investigation

Background

10. Currently under the CO, companies which may be subject to investigations by an inspector are:

(a) companies formed and registered in Hong Kong;

(b) companies which have, or had a place of business in Hong Kong even though the company is incorporated elsewhere[4]. This provision does not apply to those investigations on the application of a company's members (section 142); and

(c) bodies corporate which are related to the company being investigated (e.g. its subsidiary or holding company or body corporate substantially under the control of the same person as the company being investigated).

11. Inspection of books and papers under section 152A may cover both companies formed and registered in Hong Kong and companies incorporated elsewhere which are carrying on or have carried on business in Hong Kong.

12. Nowadays, companies incorporated elsewhere may conduct business activities in Hong Kong (for example over the Internet) although they are not registered or have a place of business here. For investigations in general, a broader scope covering all companies incorporated elsewhere that are doing business in Hong Kong is therefore preferred. As regards the appointment of inspectors on the application of members, there is also room to extend the right to members of registered non-Hong Kong companies, i.e. those registered under Part 16 of the CB.

Proposal

13. **Clause 19.2** provides for the definition of "company". In relation to appointment of inspectors on the application of members of a company

[4] The investigatory powers are subject to such adaptations and modifications as may be specified by Regulations to be made by the FS under section 146A. So far, no regulations have been made.

under **Clause 19.3(2)**, an application may be made by members of registered non-Hong Kong companies, in addition to companies incorporated in Hong Kong. Appointment of inspectors under other scenarios in **Clause 19.4** may cover companies incorporated outside Hong Kong but doing business in Hong Kong (whether or not having a place of business in Hong Kong or registered in Hong Kong) and any other companies within a group comprising such companies, wherever incorporated.

(c) Providing better safeguards for confidentiality of information and protection of informers

Background

14. Currently, section 152C of the CO provides for security of information or documents relating to a company which have been obtained by section 152A (inspection of books and papers) or section 152B (documents seized by search warrant). There is however no confidentiality or statutory "gateway" provision concerning the information obtained by an inspector.

15. There is also no provision dealing with the protection of an informer's identity in the CO. Such provisions (such as section 52 of the FRCO) would encourage persons to volunteer information to facilitate investigations.

Proposal

16. **Clauses 19.43**, **19.44** and **19.45** enhances the confidentiality of matters or information obtained pursuant to an investigation of a company's affairs or enquiry into company's affairs. It defines expressly how such information may be disclosed to other regulatory authorities, through the introduction of a statutory regime along the lines of section 378 of the SFO, section 51 of the FRCO and section 120 of the Banking Ordinance.

17. **Clause 19.47** introduces provisions to give protection (by granting immunity from liability for disclosure) to persons who volunteered information to facilitate an investigation of a company's affairs or enquiry into company's affairs. **Clause 19.48** gives additional protection by keeping the identity of an informer anonymous in civil, criminal or tribunal

proceedings. These clauses are also applicable to the new power for the Registrar to obtain documents, records and information.

(d) Providing for a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the CB has taken place.

Background

18. Currently, investigation of a company's affairs and inspection of books and papers are initiated by the FS and not by the Registrar. We will provide for a new but limited power for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute an offence under **Clause 15.7(7)** or **20.1(1)** has taken place.

19. These offences, which relate to the provision of false information in documents delivered to the CR, help to safeguard the integrity of the Companies Register and the quality of information disclosed to the public. The proposed power would help CR's enforcement efforts and facilitate the handling of public complaints by improving the quality of the evidence needed for successful prosecution against breaches of the relevant obligations under the CB.

Proposal

20. **Clause 19.36** gives the Registrar the new power to require production of records or documents, to make copies of the records or documents and to require information or explanations in respect of the records or documents. The clause also sets out safeguards in exercising the power. **Clause 19.37** states that the Registrar may delegate to any public officer the power.

21. **Clause 19.38** provides for the criminal sanctions for non-compliance with the Registrar's requirement.

Other Changes

Minor improvements of the law

22. **Clause 19.1** updates the definitions of "books", "document", "information" and "record" to cover electronic or other types of records (this definition is

also applicable to the new power for the Registrar to obtain documents, records and information).

23. **Clauses 19.3(4)** and **19.4(3)** provide expressly that the FS would be guided by the public interest in appointing an inspector to investigate a company's affairs. This reflects the existing position where the FS will only appoint an inspector if significant or great public interest is involved.

24. **Clause 19.4(2)** restates the existing section 143(1)(c) of the CO on the circumstances where the FS may appoint an inspector, except that section 143(1)(c)(iii) (i.e. a company's members have not been given all the information with respect to its affairs that they might reasonably expect) is not restated as there are other provisions, such as **Clause 19.3** (appointment of inspectors by application of members) and **Clause 14.22** (court may order inspection of records), which are concerned with this type of situation.

25. **Clauses 19.6** to **19.8** provide expressly that the FS may give direction to an inspector, define the terms of the appointment of an inspector, limit or expand the scope of an investigation, suspend an investigation at his discretion, or terminate an investigation.

26. **Clauses 19.14** to **19.17** introduce express provisions on the resignation of an inspector, the revocation of an inspector's appointment by the FS, the replacement of an inspector and the handing over of documents and information that an inspector has obtained or generated during the course of an investigation.

27. **Clauses 19.22** and **19.23** gives the FS greater discretion to prevent premature access to a copy of the report filed with the Court and to decide whether to provide a copy of the report to the company or its shareholders.

28. **Clause 19.25** provides that the findings of fact by an inspector stated in his/her report should be regarded as evidence of that fact in civil proceedings (as compared with "evidence of the opinion" under the CO[5]).

29. **Clauses 19.28** and **19.35** provide for an express obligation for an inspector or the FS or a person authorised by him (for enquiry into company's affairs) to inform or remind a person required to provide answers or explanations (to

[5] Except for disqualification order under section 168J of the CO where the findings are already currently regarded as evidence of fact.

the inspector) or information or explanations (to the FS or a person authorised by him) in respect of the record or document obtained of the limitations concerning the use in criminal proceedings against the person of self-incriminating evidence. **Clause 19.39** provides for the equivalent obligation in exercising the new Registrar's power to obtain information or explanation in respect of the record or document obtained.

30. **Clause 19.29** clarifies the provisions relating to the recovery of expenses of an investigation from other parties. Specifically, **Clause 19.29(8)** provides that expenses recoverable should include general staff costs and overhead expenses of the Government and the cost of insurance for the inspector.

31. **Clause 19.40** improves the existing provisions in the CO regarding search warrants by incorporating relevant features of the SFO and the FRCO, including: a search warrant application may be made to the Magistrate before or after a formal request for the document has been made; the duration of a search warrant is shortened from 1 month to 7 days; receipt should be issued for any record or document removed; and a search warrant could be issued to a specified person or a police officer (i.e. not just to a police officer).

PART 20

MISCELLANEOUS

Introduction

1. Part 20 contains a number of miscellaneous provisions which may be classified into the following three categories generally:

   (a) miscellaneous offences, namely the offences for false statements and for improper use of the words "Limited", "Corporation" or "Incorporated", based on sections 349 and 350 of the CO respectively;

   (b) miscellaneous provisions relating to investigation or enforcement measures, including provisions based on sections 306, 351A, 351B and 352 of the CO, and a new power for the Registrar to compound certain offences under the CB; and

   (c) other miscellaneous provisions which are based on sections 354, 355, 357, 358 and 359A of the CO.

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

  (a) Widening the scope of the offence for false statements;

  (b) Empowering the Registrar to compound certain offences; and

  (c) Widening the categories of companies that the court may require security for costs in actions.

Significant Changes

(a) Widening the scope of the offence for false statement

Background

2. Section 349 of the CO creates a criminal offence of wilfully making a statement to the Registrar which is false in any material particular and

which the offender knows to be false. The offence arises in the context of false statements made in any return, certificate, balance sheet or other document which is required by, or for the purposes of, any provision of the CO. The requisite mental element of the offence requires proof of knowledge and wilful intent.

3. We consider that the ambit of the offence in section 349 could be too narrow as it might not cover, for example, the making of a misleading statement. In addition, the requirement to prove a "wilful" intent would leave out cases where false statements are delivered to the Registrar recklessly.

4. In other comparable common law jurisdictions, there are similar offences but their scope is much wider. In Australia and Singapore, it is an offence to make a false statement or to make a misleading statement. It is also an offence to authorise the making of a statement that is false or misleading, or to omit or authorise the omission of any matter or thing without which the document would be misleading[1]. In the UK, the offence covers any statement that is misleading, false, or deceptive in a material particular[2].

5. Moreover, the requisite mental element is different in Australia and the UK. The proof of "wilful" intent is not required in Australia in prosecuting the offence. In the UK, the offence covers acts committed "knowingly or recklessly".

Proposal

6. **Clause 20.1** now provides for the matters currently covered by section 349 of the CO subject to the modifications that the offence is extended to cover "a statement that is misleading, false or deceptive in any material particular" and that the mental element covers acts committed "knowingly or recklessly".

(b) Empowering the Registrar to compound certain offences

Background

7. Other than prosecution for non-compliance, the CR has implemented a range of administrative measures to encourage due compliance with the

[1] Section 1308 of the ACA; section 401 of the SCA.
[2] Section 1112 of the UKCA 2006.

filing obligations under the CO. These include the publication of various information pamphlets, posters and external circulars to provide general guidelines on compliance. While information pamphlets are distributed to company promoters on incorporating or registration of companies, posters on compliance are placed in the public areas of the Registry. In addition, companies may also subscribe to an Annual Return e-Alert Service to receive email notifications on the filing of annual returns.

8. To further expand the repertoire of measures to encourage due compliance with the CO filing obligations and to optimise the use of scarce judicial resources, we propose to give the Registrar a new power to compound, at her discretion, certain offences under the CB[3].

Proposal

9. **Clause 20.5(1)** provides that the Registrar may, if she has reason to believe that a person has committed an offence specified in a schedule to be created in the CB, give the person a notice that contains the following:

(1) the allegation that the person has committed the offence and the particulars of the offence;

(2) the conditions upon which no proceedings will be instituted against the person in respect of the offence, including the amount of compounding fee to be paid and the period within which the conditions have to be complied with; and

(3) any other information that the Registrar thinks fit.

10. **Clause 20.5(2)** provides that the notice may be given only before the proceedings on the offence commences.

11. **Clause 20.5(3)** empowers the Registrar, by a further written notice, to extend the period within which the conditions as specified in the notice issued have to be complied with. It also specifies that such power of extension may be exercisable during, or after the end of, that period.

[3] If a regulator is empowered to compound an offence, he may offer a person in default by giving a notice to him an opportunity to rectify the default by paying an amount to the regulator as a compounding fee and, where appropriate, remedying the breach constituting the offence within a specified period. If that person accepts and complies with the terms of the notice, no prosecution will be initiated against him for that offence.

12. **Clause 20.5(4)** provides that the notice may not be withdrawn during the period specified in the notice or the extended period.

13. The proposal distinguishes between an offence constituted by a failure to do an act and an offence not constituted by a failure to do an act.

14. For the former category, **Clause 20.5(5)** provides that if, within the period specified in the notice or within the extended period, the person pays the Registrar the compounding fee specified in the notice and rectifies the act in default, no proceedings will be instituted against the person in respect of that offence. However, if within the period specified in the notice or within the extended period, the person has not paid the Registrar the compounding fee specified in the notice or has not rectified the act in default, proceedings may be instituted against the person in respect of that offence.

15. For the latter category, **Clause 20.5(6)** provides that if, within the period specified in the notice or within the extended period, the person pays the Registrar the compounding fee specified in the notice, no proceedings will be instituted against the person in respect of that offence. However, if within the period specified in the notice or within the extended period, the person has not paid the Registrar the compounding fee specified in the notice, proceedings may be instituted against the person in respect of that offence.

16. **Clause 20.5(7)** makes it clear that the payment of the compounding fee specified in the notice is not to be taken as an admission by the person of any liability for the offence alleged in the notice to have been committed by that person.

17. This proposal is targeted generally at offences which are (a) related to non-compliance with filing obligations and with obligations for affixing or publishing a company's name; (b) punishable only by a fine; and (c) triable summarily only. The compoundable offences will be set out in a Schedule to the CB[4] which may be amended by the FS by notice published in the Gazette, subject to negative vetting by the LegCo.

[4] The Schedules of the CB are not included in the Consultation Draft.

(c) Widening the categories of companies that the court may require security for costs in actions

Background

18. Section 357 of the CO only applies to a limited company which is formed and registered under the CO or an existing limited company, i.e. one formed and registered under an earlier CO. Therefore, a plaintiff which is an unlimited company or a company incorporated outside Hong Kong would not be caught by the section.

19. In a number of Hong Kong cases involving applications for security for costs against companies incorporated outside Hong Kong[5], the court recommended the amendment of section 357 of the CO to remove the anomaly that a company incorporated outside Hong Kong but having its central management and control in Hong Kong is immune from any security for costs as it is neither ordinarily resident out of the jurisdiction under Order 23 rule 1(1)(a) of the Rules of the High Court nor a company caught by section 357 of the CO. We agree that it is appropriate to widen the categories of companies that the court may require security for costs in actions.

Proposal

20. We consider that section 357 of the CO should be extended to all types of companies incorporated outside Hong Kong, irrespective of whether the company is a limited or unlimited company. It is reasonable and just to order a foreign plaintiff to give security for costs in view of the difficulties that a defendant may encounter in enforcing a judgment against a foreign party. This also covers the loophole under Order 23 rule 1(1)(a) in the situation where the plaintiff is a company incorporated outside Hong Kong but having its central management and control in Hong Kong.

21. However, we have reservations on the extension of section 357 to unlimited companies incorporated in Hong Kong. It is an established common law principle that the insolvency or poverty of a plaintiff is no ground for requiring him to give security for costs. The only exception is in the case of a limited company under section 357 of the CO. It may be argued that

[5] *Insurance Co of the State of Pennsylvania v Grand Union Insurance Co Ltd* [1988] 2 HKLR 541; *Charter View Holdings (BVI) Ltd v Corona Investments Ltd & Another* [1988] 1 HKLRD 469; *Akai Holdings Ltd v Ernst & Young* [2008] 5 HKLRD 133.

the policy behind section 357 of the CO is to impose a price for the privilege of limited liability and therefore the provisions were not extended to unlimited companies. As the liability of the shareholders of an unlimited company is without limitation, a costs order against an unlimited company may ultimately require payment from the shareholders.

22. **Clause 20.9** provides for the matters currently in section 357 of the CO subject to the modifications that any court having jurisdiction in the matter may require a plaintiff to give security for costs if the plaintiff is (a) a limited company incorporated in Hong Kong; or (b) a company incorporated outside Hong Kong.

Other Changes

(a) Clarifying the power of the Registrar to require a defaulting company or officer to make good the default

23. Currently section 306 of the CO provides that where a company having made default in complying with any requirement of the CO, the Registrar may issue a compliance notice to the company or the officer concerned to comply with that requirement. If the company or the officer concerned fails to make good the default within 14 days after the service of notice, the Registrar or any member or creditor of the company may apply to the Court of First Instance for an order to compel a company or its officers to make good the default within the time specified by the court. Where a company or its officers fail to comply with the court order, the defaulting company or officer may be punished for contempt of court.

24. Section 306 is intended to facilitate enforcement of filing of information with the Registrar. However, the phrase "default in complying with any requirement of this Ordinance" used in that section may be perceived literally as covering all requirements in the CO.

25. **Clause 20.4** clarifies that the default being referred to is a default in complying with any requirement under the Ordinance to (a) deliver a document to the Registrar or (b) give notice to the Registrar of any matter.

(b) Clarifying that the time limitation provision under section 351A of the CO only applies to summary offences and to prosecution made at the level of Magistrates' Courts

26. **Clause 20.6** provides for the matters currently under section 351A of the CO with clarifications that:

(a) the time limitation as provided therein does not apply to an indictable offence and an offence triable either on indictment or summarily; and

(b) the limitation only applies to prosecution made in the Magistrates' Courts.

(c) Extending the power given under section 352 of the CO to the District Court to direct the application of any fine imposed

27. **Clause 20.7** provides for the matters currently under section 352 of the CO. Modification has been made to extend the power to the District Court to direct any fine imposed under the CB for paying the costs of proceedings or rewarding the informant etc.

(d) Empowering the FS to make regulations

28. As the FS is empowered to prescribe certain matters in the CB, **Clause 20.14** provides that the FS is empowered to make regulations in respect of any matter required or permitted to be prescribed by him under the CB.

CO Rewrite
重寫《公司條例》

Companies Bill

Consultation Draft

Parts 1, 3-9, 13 & 19-20

May 2010

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 (Second Phase Consultation) issued in May 2010 (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[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;

Note: Please also see section 3.36. A condition of an existing company's memorandum of association is to be regarded as a provision of the company's articles.

"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

[1] This is the Consultation Draft of the revised Part 1 with some added and revised definitions. The changes are highlighted in the Explanatory Note on Part 1.

(*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;

"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;

"financial year" (財政年度) – see section 9.11;

"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 3.2(1)(*a*); or

(*b*) in relation to an existing company, means a person who subscribed to or signed on the company's memorandum of association;

"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;

"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;

"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;

"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 –

(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;

"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*];

"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;

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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.

"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;

"share warrant" (股份權證) means a warrant –

(*a*) stating that the bearer is entitled to the shares specified in the warrant; and

(*b*) enabling the shares to be transferred by delivery of the warrant;

"special notice" (特別通知) – see section 12.34;

"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 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.

(4) Where this Ordinance includes an example of the operation of a provision –

(*a*) the example is not exhaustive; and

(*b*) if the example is inconsistent with the provision, the provision prevails.

(5) A note located in the text of this Ordinance is provided for information only and has no legislative effect.

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 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 section 9.18 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;

"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 articles 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 articles to the amount that the members undertake, by those articles, 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 3

COMPANY FORMATION AND RELATED MATTERS, AND RE-REGISTRATION OF COMPANY

Division 1 – Company Formation

Subdivision 1 – General Requirements for Formation

3.1 Types of companies

Only the following companies may be formed under this Ordinance –

(*a*) a public company limited by shares;

(*b*) a private company limited by shares;

(*c*) a public unlimited company having a share capital;

(*d*) a private unlimited company having a share capital;

(*e*) a company limited by guarantee not having a share capital.

3.2 Formation of company

(1) Any one or more persons may form a company by –

(*a*) signing the articles of the company intended to be formed; and

(*b*) delivering to the Registrar for registration –

(i) an incorporation form in the specified form; and

(ii) a copy of the articles.

(2) A copy of articles delivered under subsection (1)(*b*)(ii) must be accompanied by a statement by the founder member or, if there are 2 or more founder members, by any one of those members, confirming that –

(*a*) the articles have been signed for the purposes of subsection (1)(*a*) by every person proposing to become a member of the company on the company's formation; and

(*b*) the contents of the copy are the same as those of the articles.

(3) A company may only be formed for a lawful purpose.

3.3 Content of incorporation form

(1) An incorporation form must –

(*a*) in relation to the company intended to be formed, contain the particulars and statements specified in section 3.5(1);

(*b*) in relation to each founder member of the company, contain the particulars specified in section 3.5(2);

(*c*) in relation to each person who is to be a director of the company on the company's formation, contain –

(i) the particulars specified in section 3.6(1); and

(ii) the statement specified in section 3.6(2);

(*d*) in relation to each person who is to be the secretary, or one of the joint secretaries, of the company on that formation, contain the particulars specified in section 3.6(3); and

(*e*) contain the statement of compliance specified in section 3.8(1).

(2) If the company intended to be formed is a company limited by shares or an unlimited company, the incorporation form must also contain the statement specified in section 3.7.

3.4 Signing of incorporation form

An incorporation form must be signed by the founder member named in the form or, if 2 or more founder members are so named, by any one of those members.

3.5 Particulars and statements of company and founder member to be contained in incorporation form

(1) The particulars and statements specified for the purposes of section 3.3(1)(*a*) are –

(*a*) the proposed name of the company;

(*b*) the proposed address of the company's registered office in Hong Kong;

(*c*) a statement as to whether the company is to be a company limited by shares or by guarantee, or an unlimited company;

(*d*) if the company is to be a company limited by shares or an unlimited company, a statement as to whether it is to be a private or public company; and

(*e*) if the company is to be a company limited by guarantee, the number of members with which it proposes to register.

(2) The particulars specified for the purposes of section 3.3(1)(*b*) are the name and address of the founder member.

3.6 Particulars and statement of proposed officers to be contained in incorporation form

(1) The particulars specified for the purposes of section 3.3(1)(*c*)(i) are –

(*a*) if the person 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 person does not have an identity card, the number and issuing country of any passport held by the person; or

(*b*) if the person is a body corporate, the corporate name and the address of its registered or principal office.

(2) The statement specified for the purposes of section 3.3(1)(*c*)(ii) is –

(*a*) if the person is the signatory to the incorporation form, a statement by the person –

(i) that the person has consented to be a director of the company; and

(ii) if the person is a natural person, that he or she has attained the age of 18 years; or

(*b*) if the person is not the signatory to the incorporation form –

(i) a statement by the person that the person has consented to be a director of the company and, if the person is a natural person, that he or she has attained the age of 18 years; or

(ii) a statement by the signatory that the person has consented to be a director of the company and, if the person is a natural person, that the person has attained the age of 18 years.

(3) The particulars specified for the purposes of section 3.3(1)(*d*) is –

(*a*) if the person is a natural person and is not a person covered by paragraph (*c*) –

(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 person does not have an identity card, the number and issuing country of any passport held by the person;

(*b*) if the person is a body corporate and is not a person covered by paragraph (*c*), the corporate name and the address of its registered or principal office; or

(*c*) if the person is a partner of a firm all partners of which are to be the joint secretaries of the company, the firm's name and the address of the firm's principal office.

(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;

"signatory" (簽署人), in relation to an incorporation form, means the founder member who signs the form for the purposes of section 3.4;

"surname" (姓氏), for a person usually known by a title different from the person's surname, means that title.

(5) For the purposes of subsection (3)(*a*)(ii), a correspondence address must be a place in Hong Kong and must not be a post office box number.

(6) 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.

3.7 Statement of capital and initial shareholdings to be contained in incorporation form

(1) The statement specified for the purposes of section 3.3(2) is a statement that –

(*a*) states the total number of shares that the company proposes to issue on the company's formation;

(*b*) states the amount of share capital that the company proposes to issue to its founder members on that formation;

(*c*) states the amount to be paid up and the amount to remain unpaid on the total number of shares that the company proposes to issue on that formation;

(*d*) if the share capital is to be divided into different classes of shares on that formation, also states the classes and, for each class –

(i) the total number of shares in that class that the company proposes to issue on that formation;

(ii) the amount of share capital in that class that the company proposes to issue to its founder members on that formation; and

(iii) the amount to be paid up and the amount to remain unpaid on the total number of shares in that class that the company proposes to issue on that formation; and

(*e*) in respect of each founder member, states the number of shares and the amount of share capital that the company proposes to issue to the member on that formation.

(2) If the shares proposed to be issued to a founder member on the formation belong to 2 or more classes, the information required under subsection (1)(*e*) must be stated in respect of each class.

3.8 Statement of compliance to be contained in incorporation form

(1) The statement specified for the purposes of section 3.3(1)(*e*) is a statement that –

(*a*) all the requirements of this Ordinance in respect of registration of the company intended to be formed have been complied with; and

(*b*) the information, statements and particulars contained in the incorporation form are accurate and consistent with those in the company's articles.

(2) The Registrar may accept the statement of compliance as sufficient evidence that all the requirements of this Ordinance in respect of registration of the company have been complied with.

3.9 Financial Secretary may amend sections 3.5, 3.6 and 3.7

The Financial Secretary may, by order published in the Gazette, amend sections 3.5, 3.6 and 3.7.

3.10 Delivery of written consent of director

(1) Each consent given for the purposes of section 3.6(2)(*b*)(ii) in relation to a company intended to be formed must be delivered to the Registrar in the specified form not later than 14 days after the date of incorporation of the company.

(2) If subsection (1) is contravened, the company, every responsible person of the company, and the founder member who signs the incorporation form for the purposes of section 3.4, 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.

(3) In any proceedings against a founder member for an offence under this section, it is a defence to establish that the founder member took all reasonable steps to secure compliance with subsection (1).

Subdivision 2 – Incorporation of Company

3.11 Issue of certificate of incorporation on registration

(1) On registering an incorporation form and a copy of articles delivered under section 3.2(1)(*b*), the Registrar must issue a certificate of incorporation certifying that the company –

(*a*) is incorporated under this Ordinance; and

(*b*) is a limited company or an unlimited company (as the case may be).

(2) A certificate of incorporation must be signed by the Registrar.

3.12 Conclusiveness of certificate of incorporation

A certificate of incorporation is conclusive evidence that –

(*a*) all the requirements of this Ordinance in respect of registration of the company have been complied with; and

(*b*) the company is registered under this Ordinance.

3.13 Effect of incorporation

(1) On and after the date of incorporation stated in the certificate of incorporation, the founder members, and any other persons who may from time to time become the company's members, are a body corporate with the name stated in the certificate.

(2) On and after the date of incorporation, the body corporate is capable of exercising all the functions of an incorporated company, and has perpetual succession.

(3) On and after the date of incorporation, the founder members, and any other persons who may from time to time become the company's members, are liable to contribute to the assets of the company in the event of the company being wound up as is mentioned in the Companies (Winding Up Provisions) Ordinance (Cap. 32).[1]

Division 2 – Company Articles

Subdivision 1 – General

3.14 Articles prescribing regulations for company

A company must have articles prescribing regulations for the company.

3.15 Language of articles

A company's articles must be printed in English or Chinese.

3.16 Form of articles

A company's articles must be divided into paragraphs and the paragraphs must be numbered consecutively.

Subdivision 2 – Model Articles

3.17 Financial Secretary may prescribe model articles

(1) The Financial Secretary may, by notice published in the Gazette, prescribe model articles for companies.

(2) For the purposes of subsection (1), the Financial Secretary may prescribe different model articles for different types of companies.

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[1] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

(3) Any amendment of model articles under this section does not affect a company incorporated before the amendment takes effect.

3.18 Adoption of model articles

A company may adopt as its articles any or all of the provisions of the model articles prescribed for the type of company to which it belongs.

3.19 Application of model articles to limited company

(1) On the incorporation of a limited company, the model articles that are prescribed for the type of company to which the company belongs and that are for the time being in force, so far as applicable, form part of the company's articles in the same manner, and to the same extent, as if those model articles had been registered as the company's articles.

(2) Subsection (1) applies if the company's articles do not prescribe any regulations for the company.

(3) If the company's articles prescribe any regulations for the company, subsection (1) applies in so far as the articles do not exclude or modify the model articles.

Subdivision 3 – Content and Effect of Articles

3.20 Company name

A company's articles must state the name of the company.

3.21 Company objects

(1) If a licence is granted under section 3.42(2) to an association intended to be formed as a limited company or under section 3.42(4) to a limited company, then during the period when the licence is in force, the articles of the company must state the objects of the company.

(2) The articles of any other company may state the objects of the company.

(3) Subsections (1) and (2) do not affect any requirement relating to the articles of a company specified in any other Ordinance.

3.22 Members' liabilities

(1) The articles of a limited company must state that the liability of its members is limited.

(2) The articles of an unlimited company must state that the liability of its members is unlimited.

3.23 Liabilities or contributions of members of limited company

(1) The articles of a company limited by shares must state that the liability of its members is limited to any amount unpaid on the shares held by the members.

(2) The articles of a company limited by guarantee must state that each person who is a member of the company undertakes that if the company is wound up while the person is a member of the company, 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, charges and expenses of winding up the company; and

(*c*) for the adjustment, among the contributories, of their rights.

3.24 Capital and initial shareholdings

(1) The articles of a company having a share capital must –

(*a*) state the information required under section 3.7 to be contained in the company's incorporation form; and

(*b*) if the share capital of the company is divided into different classes of shares, also state for each class the particulars specified in subsection (2).

(2) The particulars are –

(*a*) particulars of any voting rights attached to shares in the class, including rights that arise only in certain circumstances;

(*b*) particulars of any rights attached to shares in the class, as respects dividends, to participate in a distribution;

(*c*) particulars of any rights attached to shares in the class, as respects capital, to participate in a distribution (including on a winding up); and

(*d*) whether or not shares in the class are redeemable shares.

(3) The articles of a company having a share capital may state the maximum number of shares that the company may issue.

(4) In this section –

"redeemable shares" (可贖回股份) has the meaning given by section 5.1(1).

3.25 Effect of articles

(1) Subject to this Ordinance, the articles of a company, once registered under this Ordinance or a former Companies Ordinance –

(*a*) have effect as a contract under seal –

(i) between the company and each member; and

(ii) between a member and each other member; and

(*b*) are regarded as containing covenants on the part of the company and of each member to observe all the provisions of the articles.

(2) Without limiting subsection (1), the articles are enforceable –

(*a*) by the company against each member;

(*b*) by a member against the company; and

(*c*) by a member against each other member.

(3) Money payable by a member to the company under the articles –

(*a*) is a debt due from the member to the company; and

(*b*) is of the nature of a specialty debt.

Subdivision 4 – Alteration of Articles

3.26 Company may alter articles

(1) Subject to this Ordinance, a company may alter its articles.

(2) A company must not alter in its articles any statement mentioned in section 3.22 or 3.23(1).

(3) Subject to section 4.48, a company having a share capital must not make any alteration to its articles that is inconsistent with any rights attached to shares in a class of shares in the company.

(4) Subject to section 4.56, a company not having a share capital must not make any alteration to its articles that is inconsistent with any rights of a class of members of the company.

(5) A company limited by guarantee must not alter in its articles the information in section 3.23(2) other than to increase the specified amount.

3.27 Alteration by special resolution or ordinary resolution

(1) Subject to this Ordinance, this section applies if a company alters its articles.

(2) Subject to subsection (3) and any other provisions of this Ordinance, a company may only alter its articles by special resolution.

(3) An alteration in articles to the maximum number of shares that the company may issue may be made by ordinary resolution.

(4) Subject to this Ordinance, an alteration made in accordance with this section is as valid as if the alteration were originally contained in the articles.

(5) Within 15 days after the date on which an alteration takes effect, the company must deliver to the Registrar for registration –

(*a*) a notice of the alteration in the specified form; and

(*b*) a copy of the articles as altered and certified by an officer of the company as correct.

(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 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

3.28 Alteration of company objects

(1) This section applies to an alteration of the objects of a company as stated in the company's articles.

(2) The company may, by special resolution of which notice has been given to all the members of the company (including members who are not entitled to such notice under the company's articles), alter the objects by –

(*a*) abandoning or restricting any of the objects; or

(*b*) adopting any new object that could lawfully have been contained –

(i) in the case of a company formed and registered under this Ordinance, in the company's articles as at the time of the registration of the articles; or

(ii) in the case of an existing company, in the company's memorandum of association as at the time of the registration of the memorandum of association.

(3) If a private company passes such a resolution, a notice of the resolution must also be given to all holders of the relevant debentures of the company, and the notice must be the same as the notice mentioned in subsection (2).

(4) For the purposes of subsection (3), if there is no provision regulating the giving of notice to the holders of the relevant debentures, the

provisions of the company's articles regulating the giving of notice to members are to apply.

(5) If a private company passes a special resolution altering its objects, an application to cancel the alteration may be made to the Court of First Instance in accordance with section 3.30, and if such an application is made, the alteration does not have effect except in so far as it is confirmed by the Court.

(6) After passing a special resolution altering its objects –

(*a*) in the case of a private company, if no application is made under subsection (5), the company must within 15 days after the end of the period for making such an application, deliver to the Registrar for registration the documents specified in subsection (7);

(*b*) in the case of a private company, if an application is made under subsection (5), the company must –

(i) immediately give notice of that fact to the Registrar; and

(ii) within 15 days after the date of any Court order cancelling or confirming the alteration or, if an extension of time is granted under subsection (8), within the extended period, deliver to the Registrar for registration an office copy of the order and, in the case of an order confirming the alteration, also the documents specified in subsection (7); or

(*c*) in the case of a company other than a private company, the company must within 15 days after the date of passing the resolution, deliver to the Registrar for registration the documents specified in subsection (7).

(7) The documents are –

(*a*) a notice of the alteration in the specified form; and

(*b*) a copy of the company's articles as altered and certified by an officer of the company as correct.

(8) The Court of First Instance may at any time by order extend the period for delivering any documents under subsection (6)(*b*).

(9) If a company contravenes subsection (6), 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.

(10) In this section –

"relevant debentures" (有關債權證) means any debentures, secured by a floating charge, that were issued or first issued before 15 February 1963 or that form part of the same series as any debentures so issued.

3.29 Alteration of certain articles by existing company

(1) Subject to subsection (2), this section applies to an alteration of any provision of the articles of an existing company if the provision –

(*a*) was, immediately before the commencement of this Part, contained in the company's memorandum of association (whether registered before, on or after 31 August 1984); and

(*b*) could lawfully have been contained in the company's articles instead of in the memorandum of association as at the time of the registration of the memorandum of association.

(2) If any provision of the articles of an existing company was, immediately before the commencement of this Part, contained in the company's memorandum of association (whether registered before, on or after 31 August 1984), and it provides for or prohibits the alteration of any provision mentioned in subsection (1), then this section does not apply.

(3) An existing company may by special resolution alter any provision mentioned in subsection (1).

(4) If a private company passes such a resolution, an application to cancel the alteration may be made to the Court of First Instance in accordance with section 3.30, and if such an application is made, the alteration does not have effect except in so far as it is confirmed by the Court.

(5) After passing a special resolution under subsection (3) –

(*a*) in the case of a private company, if no application is made under subsection (4), the company must within 15 days after the end of the period for making such an application, deliver to the Registrar for registration the documents specified in subsection (6);

(*b*) in the case of a private company, if an application is made under subsection (4), the company must –

(i) immediately give notice of that fact to the Registrar; and

(ii) within 15 days after the date of any Court order cancelling or confirming the alteration or, if an extension of time is granted under subsection (7), within the extended period, deliver to the Registrar for registration an office copy of the order and, in the case of an order confirming the alteration, also the documents specified in subsection (6); or

(*c*) in the case of a company other than a private company, the company must within 15 days after the date of passing the resolution, deliver to the Registrar for registration the documents specified in subsection (6).

(6) The documents are –

(*a*) a notice of the alteration in the specified form; and

(*b*) a copy of the company's articles as altered and certified by an officer of the company as correct.

(7) The Court of First Instance may at any time by order extend the period for delivery any documents under subsection (5)(*b*).

(8) 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 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(9) This section does not authorize any variation or abrogation of the special rights of any class of members.

3.30 Application to Court to cancel alteration

(1) An application under section 3.28(5) to cancel an alteration of the objects of a company may be made –

(*a*) by the holders of not less than 5% in aggregate of the number of the issued shares in the company or any class of the company's issued share capital or, if the company is not limited by shares, by not less than 5% of the company's members; or

(*b*) by the holders of not less than 5% in value of the company's debentures that are mentioned in section 3.28(10).

(2) An application under section 3.28(5) may be made on behalf of the persons mentioned in subsection (1)(*a*) or (*b*) by any one or more of them as the persons may appoint in writing for the purpose.

(3) An application under section 3.29(4) to cancel an alteration of a provision of the articles of an existing company may be made by the holders of not less than 5% in aggregate of the number of the issued shares in the company or any class of the company's issued share capital or, if the company is not limited by shares, by not less than 5% of the company's members.

(4) An application under section 3.29(4) may be made on behalf of the persons mentioned in subsection (3) by any one or more of them as the persons may appoint in writing for the purpose.

(5) An application under section 3.28(5) or 3.29(4) may only be made within 28 days after the date of passing the relevant special resolution.

(6) On an application under section 3.28(5) or 3.29(4), the Court of First Instance –

(*a*) may cancel or confirm the alteration either wholly or in part, on any terms and conditions that it thinks fit to impose; and

(*b*) may adjourn the proceedings so that an arrangement may be made to its satisfaction for the purchase of the interests of dissentient members, and may give any directions and make any order that it thinks expedient for facilitating or carrying into effect any such arrangement.

3.31 Certain alterations not binding on members

(1) Despite any provision in a company's articles, a person who is a member of the company is not bound by any alteration of the articles that takes effect after the date on which the person became a member, if and so far as the alteration –

(*a*) requires the person to take or subscribe for more shares than the number of shares held by the person on the date on which the alteration takes effect;

(*b*) in any way increases the person's liability as at that date to contribute to the company's share capital; or

(*c*) in any way increases the person's liability as at that date to pay money to the company.

(2) Subsection (1) does not apply if the person agrees in writing before, on or after the alteration takes effect, to be bound by the alteration.

3.32 Company must incorporate alteration into articles

(1) If an alteration is made to a company's articles, the company must incorporate the alteration in every copy of the articles issued on or after the date on which the alteration takes effect.

(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.

3.33 Alteration affecting status of private company

(1) If a private company alters its articles in such a manner that the articles no longer comply with section 1.10(1)(*b*), the company ceases to be a private company on the date on which the alteration takes effect.

(2) In addition to the documents required under section 3.27(5), the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration a copy of the company's annual financial statement that is –

(*a*) prepared in accordance with section 9.24;

(*b*) prepared for the financial year immediately preceding the financial year in which the alteration takes effect; and

(*c*) certified by an officer of the company to be true.

(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 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

3.34 Notice to Registrar of alteration by Court order

(1) If any provision of a company's articles or the effect of any such provision is altered by an order of the Court of First Instance, the company must,

within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration a notice of the alteration in the specified form.

(2) A notice of alteration must be accompanied by –

(*a*) an office copy of the order; and

(*b*) a copy of the articles as altered by the order.

(3) Subsection (2)(*a*) does not apply if the company is required to deliver an office copy of the order to the Registrar under another provision of this Ordinance.

(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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

3.35 Notice to Registrar of alteration by Ordinance

(1) If any provision of a company's articles or the effect of any such provision is altered by any other Ordinance, the company must, within 15 days after the date on which the alteration takes effect, deliver to the Registrar for registration a notice of the alteration in the specified form.

(2) A notice of alteration must be accompanied by a copy of the articles as altered by that other Ordinance.

(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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

Subdivision 5 – Miscellaneous

3.36 Conditions of memorandum of association of existing company regarded as provisions of articles

(1) A condition that immediately before the commencement of this Part was contained in the memorandum of association of an existing company and was in force is, for all purposes, regarded as a provision of the company's articles.

(2) A reference in any Ordinance in force immediately before the commencement of this Part, or in any other document made before the commencement of this Part, to a condition of the memorandum of association of an existing company is a reference to a provision of the company's articles.

3.37 Articles of company limited by guarantee

(1) This section applies to a company limited by guarantee registered under a former Companies Ordinance on or after 1 January 1912 that does not have a share capital.

(2) A provision in the company's articles, or in any resolution of the company, purporting to give a person a right to participate in the company's divisible profits otherwise than as a member is void.

(3) For the purposes of a provision of this Ordinance relating to the articles of a company limited by guarantee, a provision in the company's articles, or in any resolution of the company, purporting to divide the company's undertaking into shares or interests is regarded as a provision for a share capital.

3.38 Saving for Table A in former Companies Ordinance

This Ordinance does not affect –

(*a*) Table A in the First Schedule to the Companies Ordinance 1865 (1 of 1865), either as originally contained in that Schedule or as altered under that Ordinance, so far as it

applies to any company existing at the commencement of this Part;

(*b*) Table A in the First Schedule to the Companies Ordinance 1911 (58 of 1911), either as originally contained in that Schedule or as altered under section 119 of that Ordinance, so far as it applies to any company existing at the commencement of this Part; and

(*c*) Table A in the First Schedule to the predecessor Ordinance, either as originally contained in that Schedule or as altered under that Ordinance, so far as it applies to any company existing at the commencement of this Part.

Division 3 – Company Name

Subdivision 1 – Restriction on Company Name

3.39 Company must not be registered by certain names

(1) A company must not be registered by –

(*a*) a name that is the same as a name appearing in the index of names kept under section 22C of the predecessor Ordinance or in the Index of Company Names;

(*b*) a name that is the same as a name of a body corporate incorporated or established under an Ordinance;

(*c*) a name the use of which by the company would, in the Registrar's opinion, constitute a criminal offence; or

(*d*) a name that, in the Registrar's opinion, is offensive or otherwise contrary to the public interest.

(2) Except with the Registrar's prior approval, a company must not be registered by –

(*a*) a name that, in the Registrar's opinion, would be likely to give the impression that the company is connected in any way with –

(i) the Central People's Government;

(ii) the Government; or

(iii) any department or agency of the Central People's Government or the Government;

(*b*) a name that contains any word or expression for the time being specified in an order under section 3.40; or

(*c*) a name that is the same as a name for which a direction has been given under –

(i) section 3.48 or 3.49; or

(ii) section 22 or 22A of the predecessor Ordinance on or after the commencement of the Companies (Amendment) Ordinance 2010 (of 2010).

3.40 Financial Secretary may specify word or expression for section 3.39(2)(*b*)

(1) The Financial Secretary may, by order published in the Gazette, specify any word or expression for the purposes of section 3.39(2)(*b*).

(2) An order under this section may contain any transitional or savings provision the Financial Secretary thinks fit to include, and may specify different words or expressions for different cases or classes of cases.

Subdivision 2 – Limited Company Name with "Limited" as Last Word etc.

3.41 Limited company must not be registered without "Limited" as last word of name etc.

A limited company must not be registered by –

(*a*) if the company has an English name only, a name without "Limited" as the last word of the name;

(*b*) if the company has a Chinese name only, a name without "有限公司" as the last 4 characters of the name; or

(*c*) if the company has both an English name and a Chinese name –

(i) an English name without "Limited" as the last word of the name; and

(ii) a Chinese name without "有限公司" as the last 4 characters of the name.

3.42 Registrar's licence to dispense with "Limited" etc.

(1) The Registrar may exercise the power under subsection (2) in respect of an association intended to be formed as a limited company, if it is proved to the Registrar's satisfaction that –

(*a*) the company is to be formed for promoting commerce, art, science, religion, charity or any other useful objects;

(*b*) the association intends to apply the company's profits or other income in promoting its objects; and

(*c*) the association intends to prohibit the payment of dividends to the company's members.

(2) The Registrar may, by licence, permit the association to be registered as a limited company by –

(*a*) if the company has an English name only, a name without "Limited" as the last word of the name;

(*b*) if the company has a Chinese name only, a name without "有限公司" as the last 4 characters of the name; or

(*c*) if the company has both an English name and a Chinese name –

(i) an English name without "Limited" as the last word of the name; and

(ii) a Chinese name without "有限公司" as the last 4 characters of the name.

(3) The Registrar may exercise the power under subsection (4) in respect of a limited company, if it is proved to the Registrar's satisfaction that –

(*a*) the objects of the company are restricted to –

(i) promoting commerce, art, science, religion or charity or any other useful objects; and

(ii) objects incidental or conducive to the objects mentioned in subparagraph (i);

(*b*) the company is required by its articles to apply its profits or other income in promoting its objects; and

(*c*) the company is prohibited by its articles to pay dividends to its members.

(4) The Registrar may, by licence, permit the limited company to –

(*a*) if the company has an English name only, change the name to delete from it the word "Limited";

(*b*) if the company has a Chinese name only, change the name to delete from it the characters "有限公司"; or

(*c*) if the company has both an English name and a Chinese name –

(i) change the English name to delete from it the word "Limited"; and

(ii) change the Chinese name to delete from it the characters "有限公司".

(5) A change of company name under a licence mentioned in subsection (4) may only be made by special resolution, and section 3.47(2), (3), (4), (5) and (6) applies to such a change as it applies to a change of company name under section 3.47.

(6) To avoid doubt, a company registered by a name under a licence granted under this section –

(*a*) has the privileges of a limited company; and

(*b*) subject to section 3.44(1), has the obligations of a limited company.

3.43 Terms and conditions of licence

(1) A licence under section 3.42 may be granted on any terms and conditions the Registrar thinks fit to impose.

(2) The terms and conditions –

(*a*) are binding on the company; and

(*b*) are to be incorporated in the articles of the company if the Registrar so directs.

3.44 Effect of licence

(1) The company to which a licence under section 3.42 relates is exempt from –

(*a*) section 3.41;

(*b*) regulations made under section 12.127(3) in relation to the publication of a company name; and

(*c*) section 12.130 in relation to the delivery of lists of members to the Registrar.

(2) While a licence under section 3.42 remains in force, the company must not alter its articles except under a direction given under this section or section 3.43(2)(*b*) or with the Registrar's written prior approval.

(3) On granting an approval under subsection (2), the Registrar may vary the licence by making it subject to any terms and conditions he or she thinks fit to impose, in addition to or in place of the terms or conditions that the licence was subject to immediately before the variation.

(4) The terms and conditions imposed under subsection (3) –

(*a*) are binding on the company; and

(*b*) are to be incorporated in the articles of the company if the Registrar so directs.

3.45 Revocation of licence

(1) The Registrar may at any time revoke a licence granted under section 3.42 on being satisfied that –

(*a*) the company has failed to comply with the terms or conditions to which the licence is subject; or

(*b*) any one or more of the requirements specified in section 3.42(1) or (3) (as the case may be) are no longer met .

(2) Before revoking a licence, the Registrar must –

(*a*) notify in writing the company of the Registrar's intention to revoke the licence; and

(*b*) give the company an opportunity to be heard.

(3) If a licence is revoked, the Registrar must give the company a notice in writing of the revocation.

(4) On the revocation of a licence, the company ceases to be entitled to the exemptions mentioned in section 3.44(1).

(5) Within the period specified in the notice of revocation, the company must change its name by special resolution to –

(*a*) if the company has an English name only, add "Limited" as the last word of the name;

(*b*) if the company has a Chinese name only, add "有限公司" as the last 4 characters of the name; and

(*c*) if the company has both an English name and a Chinese name –

(i) add "Limited" as the last word of the English name; and

(ii) add "有限公司" as the last 4 characters of the Chinese name.

(6) Section 3.47(2), (3), (4), (5) and (6) applies to a change of company name under subsection (5) as it applies to a change of company name under section 3.47.

(7) If the company fails to comply with subsection (5), the Registrar must in the Register –

(*a*) if the company has an English name only, add "Limited" as the last word of the name;

(*b*) if the company has a Chinese name only, add "有限公司" as the last 4 characters of the name; and

(*c*) if the company has both an English name and a Chinese name –

(i) add "Limited" as the last word of the English name; and

(ii) add "有限公司" as the last 4 characters of the Chinese name.

3.46 Application of sections 3.43, 3.44 and 3.45 to pre-existing licence etc.

(1) Without limiting section 23 of the Interpretation and General Clauses Ordinance (Cap. 1), sections 3.43, 3.44 and 3.45 apply in relation to a company to which a pre-existing licence relates as if the licence had been granted under section 3.42.

(2) In this section –

"pre-existing licence" (已有的特許證) means a licence that –

(*a*) was granted under section 21 of the predecessor Ordinance;

(*b*) permits the registration of a limited company by –

(i) an English name without the word "Limited" in it;

(ii) a Chinese name without the expression "有限公司" in it; or

(iii) an English name without the word “Limited” in it and a Chinese name without the expression “有限公司” in it; and

(*c*) was in force immediately before the commencement of this Part.

Subdivision 3 – Change of Company Name

3.47 Company may change name by special resolution

(1) A company may change a company name by special resolution.

(2) Within 15 days after the date of passing the special resolution, the company must deliver to the Registrar for registration a notice in the specified form of the change of company name.

(3) After receipt of a notice under subsection (2), the Registrar must, unless the new name is a name by which the company must not be registered under section 3.39 –

(*a*) enter the new name of the company in the Register in place of the former name; and

(*b*) issue to the company a certificate of change of name.

(4) The change of the name has effect on and after the date on which the certificate of change of name is issued.

(5) 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.

(6) 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.

3.48 Registrar may direct company to change same or similar name etc.

(1) The Registrar may by notice in writing direct a company to change, within the period specified in the notice, a name by which the company is registered under this Ordinance or the predecessor Ordinance if –

(*a*) the name is, as at the time of the registration, the same as or in the Registrar's opinion too like a name that appeared or should have appeared in the index of names kept under section 22C of the predecessor Ordinance or in the Index of Company Names;

(*b*) the name is, as at the time of the registration, the same as or in the Registrar's opinion too like a name of a body corporate incorporated or established under an Ordinance;

(*c*) it appears to the Registrar that misleading information has been given for the company's registration by the name;

(*d*) it appears to the Registrar that any undertaking or assurance given for its registration by the name has not been fulfilled; or

(*e*) the Registrar is of the opinion that the name is a name by which, as at the time of the registration, the company should not have been registered because of section 3.39(2)(*a*) or (*b*).

(2) The Registrar may by notice in writing direct a company to change, within the period specified in the notice, a name by which the company is registered under this Ordinance or any former Companies Ordinance if, after the company is registered by the name –

(*a*) a court makes an order restraining the company from using the name or any part of the name; and

(*b*) the Registrar receives from a person in whose favour the order is made an office copy of the order and a notice in the specified form.

(3) A direction may only be given –

(*a*) in the case of subsection (1)(*a*) or (*b*), within 12 months after the date of registration by the name;

(*b*) in the case of subsection (1)(*c*) or (*d*), within 5 years after the date of registration by the name; and

(*c*) in the case of subsection (1)(*e*), within 3 months after the date of registration by the name.

(4) The Registrar may, before the end of the period specified in a notice given under subsection (1) or (2), by notice in writing extend the period.

(5) If a company fails to comply with a direction within the period specified in the notice or extended under subsection (4), 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.

3.49 Registrar may direct company to change misleading or offensive name etc.

(1) The Registrar may by notice in writing direct a company to change a name by which the company is registered under this Ordinance or any former Companies Ordinance if the Registrar is of the opinion that the name –

(*a*) gives so misleading an indication of the nature of the company's activities as to be likely to cause harm to the public; or

(*b*) is a name by which, as at the time of the registration, the company should not have been registered because of section 3.39(1)(*c*) or (*d*).

(2) The company must comply with a direction –

(*a*) within the period of 6 weeks after the date of the direction or, if the period is extended under subsection (5), within the extended period; or

(*b*) if a period is specified under subsection (4) for the direction, within the period.

(3) A company may, within 3 weeks after the date of a direction, apply to the Court of First Instance to set aside the direction, and the Court may set aside or confirm the direction.

(4) If the Court of First Instance confirms the direction, the Court must specify the period within which the company must comply with the direction.

(5) The Registrar may, before the end of a period of 6 weeks after the date of the direction, by notice in writing extend the period.

(6) 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 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

3.50 Registrar may replace company name in case of failure to comply with direction

(1) This section applies if –

(*a*) the Registrar directs a company to change a name under section 3.48(1) or (2) or 3.49(1) or, on or after the commencement of the Companies (Amendment) Ordinance 2010 (of 2010) under section 22 or 22A of the predecessor Ordinance; and

(*b*) the company fails to comply with the direction –

(i) in the case of a direction under section 3.48(1) or (2), within the period specified in the notice or, if the period is extended under 3.48(4), within the extended period;

(ii) in the case of a direction under section 3.49(1), within the relevant period specified in section 3.49(2);

(iii) in the case of a direction under section 22(2), (3A), (3B) or (4) of the predecessor Ordinance, within the period specified by the Registrar or, if the period is extended under section 22(5) of that Ordinance, within the extended period; or

(iv) in the case of a direction under section 22A(1) or (1A) of the predecessor Ordinance, within the period specified in section 22A(2) of that Ordinance or, if a period is specified by the court under section 22A(3) of that Ordinance for the direction, within the period specified by the court.

(2) Without limiting section 3.48(5) or 3.49(6), or section 22(6) or 22A(4) of the predecessor Ordinance (as the case may be), the Registrar may replace the name with –

(*a*) 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;

(*b*) in the case of a Chinese name, a new name that consists of the 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; or

(*c*) in the case of a name consisting of both an English name and a Chinese name –

(i) a new English 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; and

(ii) a new Chinese name that consists of the 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.

(3) On replacing the name with a new name, the Registrar must enter the new name in the Register in place of the replaced name.

(4) The replacement of the name has effect on and after the date on which the new name is entered in the Register.

(5) Within 30 days after the date of entering the new name in the Register, the Registrar must –

(*a*) notify the company in writing of –

(i) the fact that a name of the company has been replaced with the new name; and

(ii) the date on which the replacement takes effect; and

(*b*) publish a notice of that fact and that date in the Gazette.

(6) A replacement 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 replaced name may be commenced or continued by or against it by its new name.

Subdivision 4 – Supplementary Provision

3.51 Determining whether name is same as or similar to another name

(1) This section applies in determining –

(*a*) whether a name is the same as another name for the purposes of section 3.39(1)(*a*) or (*b*) or (2)(*c*) or 3.48(1)(*a*) or (*b*); or

(*b*) whether a name is too like another name for the purposes of section 3.48(1)(*a*) or (*b*).

(2) If the definite article is the first word of the name, the definite article must be disregarded.

(3) If any of the words, expressions or characters specified in subsection (4), or an abbreviation of any of them, appears at the end of the name, the word, expression, character or abbreviation must be disregarded.

(4) The words, expressions or characters are –

(*a*) "company";

(*b*) "and company";

(*c*) "company limited";

(*d*) "and company limited";

(*e*) "limited";

(*f*) "unlimited";

(*g*) "public limited company";

(*h*) "公司";

(*i*) "有限公司";

(*j*) "無限公司";

(*k*) "公眾有限公司".

(5) The following must be disregarded –

(*a*) the type or case of letters;

(*b*) the spaces between letters;

(*c*) the accent marks;

(*d*) the punctuation marks.

(6) The following expressions are regarded as the same –

(*a*) "and" and "&";

(*b*) "Hong Kong", "Hongkong" and "HK";

(*c*) "Far East" and "FE".

(7) A Chinese character is regarded as the same as another Chinese character if the Registrar is satisfied, having regard to the usage of the 2 characters in Hong Kong, that the 2 characters can reasonably be used interchangeably.

Division 4 – Membership

3.52 Members of company

(1) A founder member of a company is regarded as having agreed to become a member of the company.

(2) On the registration of a company, a founder member of the company must be entered, as a member, in the company's register of members.

(3) Any other person who agrees to become a member of a company and whose name is entered, as a member, in the company's register of members is a member of the company.

3.53 Members of holding company

(1) Subject to this section –

(*a*) a body corporate cannot be a member of a company of which the body corporate is a subsidiary; and

(*b*) any allotment or transfer of shares in a company to a body corporate that is a subsidiary of the company is void.

(2) Subsection (1) does not apply if –

(*a*) the body corporate is a member of the company as a personal representative; or

(*b*) the body corporate is a member of the company as a trustee, and the holding company or any of its subsidiaries is not beneficially interested under the trust.

(3) For the purposes of subsection (2)(*b*), a company or subsidiary is not beneficially interested under a trust if it is interested under the trust only by way of security for the purpose of a transaction entered into by it in the ordinary course of a business (including the lending of money).

(4) Subsection (1) does not prevent a body corporate that was, on 31 August 1984, already a member of a holding company of the body corporate from continuing to be such a member.

(5) Subsection (1) does not prevent a company that on the date it becomes a subsidiary of another company is a member of that other company, from continuing to be such a member.

(6) Subsection (1) does not prevent a body corporate from becoming a member of a holding company of the body corporate, or prevent an allotment to a body corporate of shares in a holding company of the body corporate, by virtue of the exercise by the body corporate of any rights of conversion –

(*a*) attached to any shares in the holding company held by the body corporate on 31 August 1984; or

(*b*) under any debentures of the holding company held by the body corporate on 31 August 1984.

(7) If a body corporate is a member of a holding company of the body corporate, subsection (1) does not prevent the body corporate from accepting or holding further shares in the holding company if those shares are allotted to the body corporate as fully paid up as a consequence of a capitalization of reserves or profits by the holding company.

(8) If a company makes an offer of shares to its members, the company may –

(*a*) sell, on behalf of any of its subsidiaries, any such shares that the subsidiary could, but for this section, have taken by virtue of shares in the company that are already held by the subsidiary; and

(*b*) pay to the subsidiary the proceeds of the sale.

(9) Even though a body corporate is a member of a holding company of the body corporate, it has no right to vote at –

(*a*) meetings of the holding company; or

(*b*) meetings of any class of members of the holding company.

(10) Subsection (9) does not apply if the body corporate is such a member in the circumstances described in subsection (2).

(11) In this section, a reference to a body corporate includes a nominee for the body corporate.

(12) In this section, a reference to shares, in relation to a holding company that is a company limited by guarantee or an unlimited company, includes the interest of the company's members, whatever the form of the interest and whether or not the company has a share capital.

Division 5 – Capacity and Powers of Company

3.54 Company's capacity etc.

(1) A company has the capacity, rights, powers and privileges of a natural person of full age.

(2) Without limiting subsection (1), a company –

(*a*) may do any act that it is permitted or required to do by its articles or any Ordinance or rule of law; and

(*b*) has power to acquire, hold and dispose of land.

(3) In this section –

"land" (土地) includes any estate or interest in land, buildings, messuages and tenements of any nature or kind.

3.55 Company's exercise of powers limited by articles

(1) If the objects of a company are stated in its articles, the company must not do any act that it is not authorized to do by its articles.

(2) If any power of a company is expressly modified or excluded by its articles, the company must not exercise the power contrary to that modification or exclusion.

(3) A member of a company may bring proceedings to restrain the company from doing any act in contravention of subsection (1) or (2).

(4) Proceedings must not be brought under subsection (3) in respect of any act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(5) An act by a company (including a transfer of property to or by the company) is not invalid only because the company does the act in contravention of subsection (1) or (2).

3.56 Transaction or act binds company despite limitation in articles etc.

(1) Subject to section 3.58, in favour of a person dealing with a company in good faith, the power of the company's directors to bind the company, or authorize others to do so, is regarded as free of any limitation under any relevant document of the company.

(2) For the purposes of subsection (1) –

(*a*) a person deals with a company if the person is a party to any transaction or any other act to which the company is a party;

(*b*) a person dealing with a company is presumed, unless the contrary is proved, to have acted in good faith;

(*c*) a person dealing with a company is not regarded as acting in bad faith by reason only of the person's knowing that an act is beyond the directors' powers under any relevant document of the company.

(*d*) a person dealing with a company is not required to inquire as to the limitations on the power of the company's directors to bind the company or authorize others to do so.

(3) This section does not affect any right of a member of the company to bring proceedings to restrain the doing of an act that is beyond the directors' powers.

(4) Proceedings must not be brought under subsection (3) in respect of any act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(5) This section does not affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.

(6) In this section –

"relevant document" (有關文件), in relation to a company, means –

(*a*) the company's articles;

(*b*) any resolutions of the company or of any class of members of the company; or

(*c*) any agreements between the members, or members of any class of members, of the company.

3.57 Transaction or act involving directors or their associates is voidable

(1) This section applies if –

(*a*) a company enters into a transaction; and

(*b*) the transaction binds the company because the power of the directors to bind the company, or authorize others to do so, is regarded under section 3.56 as free of any limitation under –

(i) the company's articles;

(ii) any resolutions of the company or of any class of members of the company; or

(iii) any agreements between the members, or members of any class of members, of the company.

(2) The transaction is voidable at the instance of the company if the parties to the transaction include –

(*a*) a director of the company or of a holding company of the company; or

(*b*) an entity connected with such a director.

(3) The transaction ceases to be voidable if –

(*a*) restitution of any money or other asset that was the subject matter of the transaction is no longer possible;

(*b*) the company is indemnified for any loss or damage resulting from the transaction;

(*c*) a person who is not a party to the transaction has acquired rights in good faith and for value, and without actual notice of the directors' exceeding their powers, and those rights would be affected by the avoidance of the transaction; or

(*d*) the transaction is affirmed by the company.

(4) Whether or not the transaction is avoided under subsection (2), any party to the transaction falling within subsection (2)(*a*) or (*b*) is liable, and any director of the company who has authorized the transaction is liable, to –

(*a*) account to the company for any gain that the party or director has directly or indirectly made from the transaction; and

(*b*) indemnify the company against any loss or damage resulting from the transaction.

(5) A person who is not a director of the company is not liable under subsection (4) if the person shows that, at the time of the transaction, the person did not know that the directors were exceeding their powers.

(6) Subject to subsection (7), this section does not affect the rights of any party to the transaction not falling within subsection (2)(*a*) or (*b*).

(7) The Court of First Instance may, on application by the company or a party covered by subsection (6), affirm, sever or set aside the transaction on any terms it thinks just.

(8) This section does not exclude the operation of any other Ordinance or rule of law by which the transaction may be called in question or any liability to the company may arise.

(9) In this section –

"transaction" (交易) includes any act.

(10) In subsection (2)(*b*), the reference to an entity connected with a director has the same meaning as in Part 11 (see section 11.2).

3.58 Section 3.56 not to apply to certain cases

(1) Section 3.56 does not apply to any act of an exempted company except in favour of a person who –

(*a*) does not know at the time of the act that the company is an exempted company; or

(*b*) gives full consideration for the act and does not know –

(i) that the act is not permitted by any relevant document of the company; or

(ii) that the act is beyond the powers of the directors.

(2) If an exempted company purports to transfer or grant an interest in property, the fact that –

(*a*) the act was not permitted by any relevant document of the company; or

(*b*) the directors exceeded any limitation on their powers under any relevant document of the company,

does not affect the title of a person who subsequently acquires the property or any interest in it for full consideration without actual notice of any of the circumstances set out in paragraph (*a*) or (*b*).

(3) In any civil proceedings arising out of subsection (1) or (2), the burden of proving that –

(*a*) a person knew that the company was an exempted company;

(*b*) a person knew that the act was not permitted by any relevant document of the company; or

(*c*) a person knew that the act was beyond the powers of the directors,

lies on the person who asserts that fact.

(4) In this section –

"exempted company" (獲豁免公司) means the company to which a licence under section 3.42 relates;

"relevant document" (有關文件), in relation to a company, means –

(*a*) the company's articles;

(*b*) any resolutions of the company or of any class of members of the company; or

(*c*) any agreements between the members, or members of any class of members, of the company.

3.59 No constructive notice of matters disclosed in articles etc. kept by Registrar

A person is not regarded as having notice of any matter merely because the matter is disclosed in –

(*a*) the articles of a company kept by the Registrar; or

(*b*) a return or resolution kept by the Registrar.

Division 6 – Contracts of Company

3.60 Contracts made by or on behalf of company

(1) This section applies to –

(*a*) a contract that would be required by law to be in writing and under seal if made between natural persons;

(*b*) a contract that would be required by law to be in writing, and to be signed by the parties to the contract, if made between natural persons; and

(*c*) a contract that, though made by parol only and not reduced into writing, would by law be valid if made between natural persons.

(2) A contract specified in subsection (1)(*a*) may be made by a company –

(*a*) in writing under the company's common seal (if any); or

(*b*) in writing executed in accordance with section 3.66(2) and expressed (in whatever words) to be executed by the company.

(3) A contract specified in subsection (1)(*b*) may be made on behalf of a company in writing signed by any person acting with the company's authority (whether express or implied).

(4) A contract specified in subsection (1)(*c*) may be made on behalf of a company orally by any person acting with the company's authority (whether express or implied).

(5) A contract made in accordance with this section –

(*a*) is effective in law; and

(*b*) binds the company and its successors and all other parties to the contract.

(6) A contract made in accordance with this section may be varied or discharged in the same manner in which it is authorized by this section to be made.

3.61 Contracts made before company's incorporation

(1) This section applies if a contract purports to have been made in the name or on behalf of a company before the company was incorporated.

(2) Subject to any express agreement to the contrary –

(*a*) the contract has effect as a contract entered into by the person purporting to act for the company or as agent for the company; and

(*b*) the person is personally liable on the contract and is entitled to enforce the contract.

(3) After incorporation, the company may ratify the contract to the same extent as if –

(*a*) the company had already been incorporated at the time when the contract was entered into; and

(*b*) the contract had been entered into on the company's behalf by an agent acting without the company's authority.

(4) Despite subsection (2)(*b*), if the contract is ratified by the company, then on and after the ratification, the liability of the person referred to in that subsection is not greater than the liability that the person would have incurred if the person had entered into the contract after the company's incorporation as an agent acting without the company's authority.

3.62 Bills of exchange and promissory notes

If a bill of exchange or promissory note is made, accepted or endorsed in the name of, or by or on behalf or on account of, a company by a person acting with the company's authority, the bill or note is regarded as having been made, accepted or endorsed on the company's behalf.

Division 7 – Execution of Documents

Subdivision 1 – Company Seal

3.63 Company may have common seal etc.

(1) A company may have a common seal.

(2) A company's common seal must be a metallic seal having the company's name engraved on it in legible form.

(3) If subsection (2) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(4) If an officer of a company or a person on behalf of a company uses, or authorizes the use of, a seal that purports to be the company's common seal and that contravenes subsection (2), the officer or person commits an offence and is liable to a fine at level 3.

3.64 Official seal for use abroad

(1) A company having a common seal may have an official seal for use outside Hong Kong.

(2) Such an official seal must be a replica of the company's common seal, but have engraved on it in legible form the name of every place where it is to be used.

(3) A company having an official seal for use in a place may, by writing under its common seal, authorize any person appointed for the purpose to affix, in that place, the official seal to any deed or any other document to which the company is a party.

(4) As between a company and any person dealing with an executing agent of the company, the authority of the agent continues until –

(*a*) if the authorization mentions a period during which the authority is to continue, the end of the period; or

(*b*) if the authorization does not mention such a period, a notice of revocation or termination of the agent's authority has been given to the person.

(5) An executing agent affixing an official seal must, on the deed or other document to which the seal is affixed, certify in writing the date on which, and the place at which, the seal is so affixed.

(6) A deed or other document to which an official seal is affixed binds the company as if it had been executed under the company's common seal.

(7) In this section –

"executing agent" (簽立代理人), in relation to a company, means a person authorized by the company under subsection (3).

3.65 Official seal for sealing share certificates etc.

(1) A company having a common seal may have an official seal –

(*a*) for sealing securities issued by the company; or

(*b*) for sealing documents creating or evidencing securities issued by the company.

(2) Such an official seal must be a replica of the company's common seal, but have engraved on it in legible form the word "securities" or the characters "證券" or both such word and characters.

(3) A company that was incorporated before 31 August 1984 and that has such an official seal may use the seal for sealing any securities or documents mentioned in subsection (1), despite anything in –

(*a*) any instrument constituting or regulating the company; or

(*b*) any instrument, made before that date, relating to securities or documents sealed with the seal.

Subdivision 2 – Execution Requirements

3.66 Execution of documents by company

(1) A company may execute a document under its common seal.

(2) A company may also execute a document –

(*a*) in the case of a company having only one director, by having it signed by the director on the company's behalf; or

(*b*) in the case of a company having 2 or more directors, by having it signed on the company's behalf by –

(i) the 2 directors or any 2 of the directors;

(ii) any of the directors and the secretary of the company; or

(iii) any of the directors and a joint secretary of the company.

(3) For the purposes of subsection (2), if a person is to sign a document on behalf of 2 or more companies, the person must sign the document separately in each capacity.

(4) A document signed in accordance with subsection (2) and expressed (in whatever words) to be executed by the company has effect as if the document had been executed under the company's common seal.

(5) In favour of a person specified in subsection (6), a document is regarded as having been executed by a company if the document purports to have been signed in accordance with subsection (2).

(6) The person is a purchaser in good faith for valuable consideration and includes –

(*a*) a lessee;

(*b*) a mortgagee; or

(*c*) any other person who for valuable consideration acquires the property.

(7) This section also applies to a document that is executed, or purports to be executed, by a company in the name of or on behalf of another person whether or not that other person is also a company.

3.67 Execution of deeds by company

(1) A company may execute a document as a deed by –

(*a*) executing it in accordance with section 3.66;

(*b*) having it expressed (in whatever words) to be executed by the company as a deed; and

(*c*) delivering it as a deed.

(2) For the purposes of subsection (1)(*c*), a document is presumed, unless the contrary is proved, to be delivered as a deed on its being executed in accordance with section 3.66.

(3) If there is any conflict or inconsistency between this section and the provisions of any other Ordinance, this section prevails over those provisions to the extent of the conflict or inconsistency.

3.68 Execution of deeds or other documents by attorney for company

(1) A company may, either generally or in respect of any specific matter, by an instrument executed as a deed, empower any person as its attorney to execute a deed or any other document on its behalf in Hong Kong or elsewhere.

(2) A deed or any other document executed by an attorney on behalf of the company binds the company and has effect as if it were executed by the company.

(3) This section does not affect the operation of any other Ordinance as to the execution of powers of attorney.

Division 8 – Re-registration of Unlimited Company as Company Limited by Shares

3.69 Unlimited company may apply for re-registration as company limited by shares

(1) A company that is registered as an unlimited company on or after 31 August 1984 and that passes a special resolution specified in subsection (2)

may be re-registered as a company limited by shares by delivering to the Registrar for registration an application in accordance with section 3.70.

(2) The special resolution –

(*a*) must resolve that the company is to be re-registered as a company limited by shares;

(*b*) must state the manner in which the liability of the members is to be limited on the re-registration;

(*c*) must provide for the alterations to the company's articles that are necessary to bring the articles into conformity with the requirements of this Ordinance on the articles of a company to be formed under this Ordinance as a company limited by shares;

(*d*) must contain a statement specified in subsection (3); and

(*e*) may state the maximum number of shares that the company may issue.

(3) The statement must –

(*a*) state the total number of shares in the company issued before the re-registration, and the total number of shares that the company proposes to issue on the re-registration;

(*b*) state the amount of share capital issued to its members before the re-registration, and the amount of share capital that the company proposes to issue to its members on the re-registration;

(*c*) state the amount to be paid up and the amount to remain unpaid on the total number of shares issued before the re-registration, and on the total number of shares that the company proposes to issue on the re-registration;

(*d*) if the share capital is to be divided into different classes of shares on the re-registration, also state the classes and, for each class –

(i) the particulars specified in subsection (5);

(ii) the total number of shares in that class issued before the re-registration, and the total number of shares in that class that the company proposes to issue on the re-registration;

(iii) the amount of share capital in that class that the company issued to its members before the re-registration, and the amount of share capital in that class that the company proposes to issue to its members on the re-registration; and

(iv) the amount to be paid up and the amount to remain unpaid on the total number of shares in that class issued before the re-registration, and on the total number of shares in that class that the company proposes to issue on the re-registration; and

(*e*) in respect of each member, state –

(i) the number of shares that the company issued to the member before the re-registration, and the number of shares that the company proposes to issue to the member on the re-registration; and

(ii) the amount of share capital that the company issued to the member before the re-registration, and the amount of share capital that the company proposes to issue to the member on the re-registration.

(4) If the shares proposed to be issued to a member on the re-registration belong to 2 or more classes, the information required under subsection (3)(*e*) must be stated in respect of each class.

(5) The particulars are –

(*a*) particulars of any voting rights attached to shares in the class, including rights that arise only in certain circumstances;

(*b*) particulars of any rights attached to shares in the class, as respects dividends, to participate in a distribution;

(*c*) particulars of any rights attached to shares in the class, as respects capital, to participate in a distribution (including on a winding up); and

(*d*) whether or not shares in the class are redeemable shares.

(6) In this section –

"redeemable shares" (可贖回股份) has the meaning given by section 5.1(1).

3.70 Application for re-registration

(1) An application under section 3.69(1) must –

(*a*) be in the specified form;

(*b*) be accompanied by the prescribed fee; and

(*c*) be accompanied by a copy of the company's articles as proposed to be altered by the special resolution.

(2) Such an application may only be delivered to the Registrar on or after the date on which a copy of the special resolution sent to the Registrar under section 12.86 is received by the Registrar.

3.71 Issue of fresh certificate of incorporation

(1) On registering an application and a copy of articles delivered under section 3.70(1), the Registrar must issue a fresh certificate of incorporation certifying that the company is a company limited by shares.

(2) The certificate must be signed by the Registrar.

(3) On the issue of the certificate –

(*a*) the company becomes a company limited by shares; and

(*b*) the alterations to the company's articles as provided for in the special resolution for re-registration under section 3.69(2)(*c*), despite anything in this Ordinance, take effect.

(4) A certificate of incorporation issued under subsection (1) is conclusive evidence that –

(*a*) all the requirements of this Ordinance in respect of re-registration of the company have been complied with; and

(*b*) the company is re-registered as a company limited by shares under this Ordinance.

3.72 Winding up of company re-registered as company limited by shares

(1) This section applies if –

(*a*) a company is re-registered as a company limited by shares under this Division or under section 19 of the predecessor Ordinance; and

(*b*) the company is wound up.

(2) Despite section 170(1)(*a*) of the Companies (Winding Up Provisions) Ordinance (Cap. 32), a person who is not a member of the company but was a member at the time of the re-registration is liable to contribute to the assets of the company in respect of debts and liabilities of the company contracted before the re-registration if the winding up commences within 3 years beginning with the day of the re-registration.

(3) Despite section 170(1)(*c*) of the Companies (Winding Up Provisions) Ordinance (Cap. 32), a person who was a member or a past member of the company at the time of the re-registration is liable to contribute to the assets of the company in respect of debts and liabilities of the company contracted before the re-registration if every person who was a member of the company at that time is no longer a member of the company.

(4) Subsection (3) applies even though the existing members of the company have satisfied the contribution required to be made by them under the Companies (Winding Up Provisions) Ordinance (Cap. 32).

(5) Despite section 170(1)(*d*) and (*e*) of the Companies (Winding Up Provisions) Ordinance (Cap. 32), there is no limit on the amount that a person is liable to contribute under subsection (2) or (3).

PART 4

SHARE CAPITAL

Division 1 – Nature of Shares

4.1 Nature and transferability of shares

(1) A share or other interest of a member in a company is personal property.

(2) A share or other interest of a member in a company is transferable in accordance with the company's articles.

4.2 No nominal value

(1) On and after the appointed day, shares in a company have no nominal value.

(2) This section applies to shares issued before the appointed day as well as shares issued on or after the appointed day.

(3) In this section –

"appointed day" (指定日期) means the day appointed under section 4.71.

Note: Division 9 contains transitional provisions relating to the introduction of shares having no nominal value.

4.3 Denomination of shares

(1) Shares in a company may be denominated in any currency.

(2) Shares of different classes in a company may be denominated in different currencies.

4.4 Numbering of shares

(1) Each share in a company must be distinguished by an appropriate number, except as provided by subsection (2) or (3).

(2) If, at any time –

(*a*) all the issued shares in a company are fully paid up and rank equally for all purposes; or

(*b*) all the issued shares of a particular class in a company are fully paid up and rank equally for all purposes,

none of those shares is required to have a distinguishing number as long as it remains fully paid up and ranks equally for all purposes with all shares of the same class for the time being issued and fully paid up.

(3) If new shares are issued by a company on the terms that, within a period not exceeding 12 months, they will rank equally for all purposes with all the existing shares, or all the existing shares of a particular class, in the company, neither the new shares nor the corresponding existing shares are required to have distinguishing numbers as long as all of them are fully paid up and rank equally for all purposes.

(4) If subsection (3) applies and the shares are not numbered, any share certificates for the new shares must be appropriately worded or enfaced.

4.5 Share certificate to be evidence of title

In the absence of evidence to the contrary, a certificate issued by a company specifying any shares held by a member in the company is proof of the member's title to the shares.

4.6 Repeal of power to issue stock

On and after the commencement of this section, a company does not have power to convert its shares into stock.

Note: Sections 4.42 and 4.43 contain provisions for the reconversion of stock into shares.

4.7 Repeal of power to issue share warrants

(1) On and after the commencement of this section, a company does not have power to issue a share warrant.

(2) The bearer of a share warrant issued before the commencement of this section is entitled, on surrendering it for cancellation, to have the bearer's name entered in the register of members of the company.

(3) If the company enters the bearer's name in the register of its members without the share warrant being surrendered and cancelled, the company is liable for any loss suffered by a person as a result of the bearer's name being entered in the register.

(4) The company must enter the date of surrender of a share warrant in the register of its members.

(5) If the articles of a company so provide, the bearer of a share warrant may be regarded as a member of the company, either to the full extent or for any purposes specified in the articles.

Division 2 – Allotment and Issue of Shares

4.8 Exercise by directors of power to allot shares or grant rights

(1) Except in accordance with section 4.9, the directors of a company must not exercise any power –

(*a*) to allot shares in the company; or

(*b*) to grant rights to subscribe for, or to convert any security into, shares in the company.

(2) Subsection (1) does not apply to –

(*a*) an allotment of shares, or grant of rights, under an offer made to the members of the company in proportion to their shareholdings;

(*b*) an allotment of shares, or grant of rights, on a bonus issue of shares;

(*c*) an allotment to a founder member of a company of shares that the member, by signing the company's articles, has agreed to take; or

(*d*) an allotment of shares made in accordance with a grant of a right to subscribe for, or to convert any security into, shares

if the right was granted in accordance with an approval under section 4.9.

(3) For the purposes of subsection (2)(*a*), the offer is not required to be made to any member whose address is in a place where the offer is not permitted under the law of that place.

(4) A director commits an offence if the director –

(*a*) contravenes this section; or

(*b*) authorizes or permits, participates in, or fails to take all reasonable steps to prevent, a contravention of this section.

(5) A director who commits an offence under subsection (4) is liable to a fine at level 5 and to imprisonment for 6 months.

(6) Nothing in this section or section 4.9 affects the validity of an allotment or other transaction.

4.9 Allotment of shares or grant of rights with company approval

(1) The directors of a company may exercise a power –

(*a*) to allot shares in the company; or

(*b*) to grant rights to subscribe for, or to convert any security into, shares in the company,

if the company gives approval in advance by resolution of the company.

(2) Approval may be given for a particular exercise of the power or for its exercise generally, and may be unconditional or subject to conditions.

(3) Subject to subsections (4) and (5), an approval expires –

(*a*) if the company is required to hold an annual general meeting, on the earlier of –

(i) the conclusion of the annual general meeting commencing next after the approval was given;

(ii) the expiry of the period within which the next annual general meeting after the approval was given is required to be held; or

(*b*) if the company is not required to hold an annual general meeting –

(i) because of section 12.75(1), on the date on which the requirements of that section are satisfied; or

(ii) in any other case, on the date specified in the approval, which must not be more than 12 months after the approval was given.

(4) An approval may be revoked or varied at any time by resolution of the company.

(5) The directors may allot shares or grant rights after an approval has expired if –

(*a*) the shares are allotted, or the rights are granted, under an offer, agreement or option made or granted by the company before the approval expired; and

(*b*) the approval allowed the company to make or grant an offer, agreement or option that would or might require shares to be allotted, or rights to be granted, after the approval had expired.

4.10 Return of allotment

(1) Within one month after an allotment of shares, a company must deliver to the Registrar for registration a return of the allotment that complies with subsection (2).

(2) A return –

(*a*) must be in the specified form;

(*b*) must include a statement of capital as at the date of the allotment that complies with section 4.69;

(*c*) must state –

(i) the number of shares allotted; and

(ii) the name and address of each allottee;

(*d*) for any shares allotted for consideration (whether wholly or partly cash consideration or non-cash consideration) –

(i) must state the amount paid or regarded as paid on each share and the amount (if any) remaining unpaid or regarded as remaining unpaid on each share;

(ii) in the case of an allotment wholly or partly for non-cash consideration under an arrangement made under Division 2 of Part 13, must contain particulars of the order of the Court of First Instance sanctioning the arrangement; and

(iii) in any other case of an allotment wholly or partly for non-cash consideration, must contain particulars of the contract for sale, or for services or other consideration in respect of which the shares were allotted; and

(*e*) for any shares allotted credited as fully paid up (whether on or without a capitalization) –

(i) must state the amount regarded as paid on each share; and

(ii) must contain particulars of the resolution authorizing the capitalization or allotment.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(4) If a company fails to deliver a return that complies with subsection (2) within one month after an allotment of shares, the Court of First Instance may, on application by the company or a responsible person of the company, extend the period for delivery of the return by a period determined by the Court.

(5) The Court of First Instance may extend a period under subsection (4) only if the Court is satisfied –

(*a*) that failure to deliver the return was accidental or due to inadvertence; or

(*b*) that it is just and equitable to extend the period.

(6) If the Court of First Instance extends the period for delivery of a return, any liability already incurred by the company or a responsible person of the company for an offence under subsection (3) is extinguished and subsection (1) has effect as if the reference to one month were a reference to the extended period.

4.11 Registration of allotment

(1) A company must register an allotment of shares as soon as practicable and in any event within 2 months after the date of the allotment, by entering in the register of its members the information referred to in section 12.92(2) and (3).

(2) If a company fails to register an allotment of shares within 2 months after the date of the allotment, 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.

4.12 Issue of share certificate on allotment

(1) Within 2 months after an allotment of shares, a company must complete the certificates for the shares and have the certificates ready for delivery.

(2) Subsection (1) does not apply if the conditions of issue of the shares provide otherwise.

(3) If a company contravenes this section, 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.

4.13 Court order for delivery of share certificate

(1) If a company contravenes section 4.12 in relation to an allotment of shares, a person entitled to the certificates for the shares may serve a notice on the company requiring it to deliver the certificates to the person within 10 days.

(2) If a company on which notice has been served under subsection (1) does not deliver the certificates within 10 days after service of the notice, the person may apply to the Court of First Instance for an order under subsection (3).

(3) On an application under subsection (2), the Court of First Instance may make an order directing the company and any officer of the company to deliver the certificates to the person within the period specified in the order.

(4) The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of the company responsible for the contravention.

4.14 Validation of issue or allotment

(1) This section applies if a company purports to issue or allot shares and –

(*a*) the issue or allotment is or may be invalid for any reason; or

(*b*) the terms of the issue or allotment are inconsistent with or not authorized by –

(i) this Ordinance or any other Ordinance; or

(ii) the company's articles.

(2) The company, a creditor of the company or a holder or mortgagee of any of the shares may apply to the Court of First Instance for an order validating, or confirming the terms of, the issue or allotment.

(3) The Court of First Instance may make an order under subsection (2) if the Court is satisfied that it is just and equitable to do so.

(4) On delivery of an office copy of the order to the Registrar, the order has effect from the time of the purported issue or allotment.

Division 3 – Commissions and Expenses

4.15 General prohibition of commissions, discounts and allowances

(1) Except as permitted by section 4.16, a company must not apply any of its shares or share capital, either directly or indirectly, in payment of any commission, discount or allowance to a person in consideration of the person –

(*a*) subscribing or agreeing to subscribe (whether absolutely or conditionally) for shares in the company; or

(*b*) procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company.

(2) It is immaterial how the shares or share capital are applied, whether by being added to the purchase money of property acquired by the company or to the contract price of work to be executed for the company, or being paid out of the nominal purchase money or contract price, or otherwise.

(3) Nothing in this section affects the payment of brokerage by a company.

4.16 Permitted commissions

(1) A company may pay a commission to a person in consideration of the person subscribing or agreeing to subscribe (whether absolutely or conditionally) for shares in the company or procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company if the conditions in subsection (2) are satisfied.

(2) The conditions are that –

(*a*) the payment of the commission is authorized by the company's articles;

(*b*) the commission paid or agreed to be paid does not exceed the lesser of –

(i) 10% of the price at which the shares are issued;

(ii) the amount or rate authorized by the articles;

(*c*) if any of the shares are offered to the public for subscription, the prospectus for the public offer discloses –

(i) the amount or rate of the commission; and

(ii) the number of shares (if any) that persons have agreed for a commission to subscribe for absolutely; and

(*d*) if the shares are not offered to the public for subscription, the company, before making the payment –

(i) delivers to the Registrar for registration a notice in the specified form disclosing the amount or rate of the commission and the number of shares (if any) that persons have agreed for a commission to subscribe for absolutely; and

(ii) discloses the amount or rate of the commission and the number of shares (if any) that persons have agreed for a commission to subscribe for absolutely in any circular or notice issued by the company inviting subscriptions for the shares.

(3) A vendor to, promoter of, or other person who receives payment in money or shares from, a company may apply any part of the money or shares so received in payment of any commission the payment of which directly by the company would be permitted by this section.

(4) If a company contravenes the condition referred to in subsection (2)(*d*)(i), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

4.17 Capital may be applied in writing off certain expenses and commission

(1) On or after the appointed day, a company may apply its share capital in writing off –

(*a*) the preliminary expenses of the company;

(*b*) any commission paid under section 4.16 or under section 46 of the predecessor Ordinance; or

(*c*) any other expenses of any issue of shares in the company.

(2) In this section –

"appointed day" (指定日期) means the day appointed under section 4.71.

Division 4 – Transfer and Transmission of Shares

Subdivision 1 – Transfer of Shares

4.18 Requirement for instrument of transfer

(1) A company must not register a transfer of shares in the company unless a proper instrument of transfer has been delivered to the company.

(2) Subsection (1) does not affect any power of a company to register as a member a person to whom the right to shares has been transmitted by operation of law.

4.19 Registration of transfer or refusal of registration

(1) The transferee or transferor of shares in a company may lodge the transfer with the company.

(2) Within 2 months after the transfer is lodged, the company must either –

(*a*) register the transfer; or

(*b*) send the transferee and the transferor notice of refusal to register the transfer.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

4.20 Court order for registration

(1) If a company refuses to register a transfer, the transferee or the transferor may apply to the Court of First Instance for an order under this section.

(2) On an application under subsection (1), the Court of First Instance may order the company to register the transfer, if the Court is satisfied that the application is well-founded.

4.21 Transfer by personal representative

A transfer of a share or other interest of a deceased member of a company by his or her personal representative is as valid as if the personal representative had been the registered holder of that share or interest at the time of execution of the instrument of transfer.

4.22 Certification of transfer

(1) The certification by a company of an instrument of transfer of shares in the company –

(*a*) is a representation by the company to any person acting on the faith of the certification that documents have been produced to the company that evidence title to the shares in the transferor named in the instrument; and

(*b*) is not a representation that the transferor has any title to the shares.

(2) If a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.

(3) For the purposes of this section, an instrument of transfer is certified by a company if it bears –

(*a*) the words "certificate lodged", or words to the same effect, in English or Chinese; and

(*b*) under or adjacent to those words, the signature or initials of a person having the actual or apparent authority to certify transfers on behalf of the company.

(4) Unless the contrary is proved, a signature or initials appearing on an instrument of transfer as referred to in subsection (3)(*b*) must be regarded –

(*a*) as the signature or initials of the person whose signature or initials they purport to be; and

(*b*) as having been placed on the instrument by that person or by another person who has the actual or apparent authority to use the signature or initials for the purpose of certifying transfers on behalf of the company.

4.23 Issue of share certificate on transfer

(1) Within the period specified in subsection (2), a company must complete the certificates for any of its shares that are transferred and have the certificates ready for delivery.

(2) The period is –

(*a*) for a private company, 2 months after the day on which the transfer is lodged with the company;

(*b*) for any other company, 10 business days after the day on which the transfer is lodged with the company.

(3) Subsection (1) does not apply to a transfer if –

(*a*) the conditions of issue of the shares provide otherwise;

(*b*) stamp duty has not been duly paid in respect of the transfer;

(*c*) the transfer is invalid; or

(*d*) the company, being entitled to do so, refuses to register the transfer.

(4) If a company contravenes this section, 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.

(5) In this section –

"business day" (營業日) means a day on which a recognized stock market is open for the business of dealing in securities.

4.24 Court order for delivery of share certificate

(1) If a company contravenes section 4.23 in relation to a transfer of shares, a person entitled to the certificates for the shares may serve a notice on the company requiring it to deliver the certificates to the person within 10 days.

(2) If a company on which notice has been served under subsection (1) does not deliver the certificates within 10 days after service of the notice, the person may apply to the Court of First Instance for an order under subsection (3).

(3) On an application under subsection (2), the Court of First Instance may make an order directing the company and any officer of the company to deliver the certificates to the person within the period specified in the order.

(4) The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of the company responsible for the contravention.

4.25 Compensation regarding forged share transfers

(1) A company may –

(*a*) pay compensation to a person for loss arising from a transfer of shares in the company under a forged transfer or a transfer under a forged power of attorney;

(*b*) provide, by insurance, reservation of capital or accumulation of income, a fund to meet claims for compensation;

(*c*) borrow on the security of its property for the purpose of paying compensation; and

(*d*) impose any reasonable restrictions on the transfer of its shares or with respect to powers of attorney for the transfer of its shares that the company considers necessary to guard against losses arising from forgery.

(2) A company that pays compensation to a person under this section has the same rights and remedies against the person liable for the loss as the person compensated would have had.

(3) If the shares in a company have, by amalgamation or otherwise, become shares in another company, the other company has the same powers under this section as the first company would have had if it had continued.

Subdivision 2 – Transmission of Shares by Operation of Law

4.26 Registration or refusal of registration

(1) This section applies if the right to shares is transmitted to a person by operation of law and the person notifies the company in writing that the person wishes to be registered as a member of the company in respect of the shares.

(2) Within 2 months after receiving the notification, the company must either –

(*a*) register the person as a member of the company in respect of the shares; or

(*b*) send the person notice of refusal of registration.

(3) If a company refuses registration, the person may request a statement of the reasons for the refusal.

(4) If a person makes a request under subsection (3), the company must, within 28 days after receiving the request –

(*a*) send the person a statement of the reasons; or

(*b*) register the person as a member of the company in respect of the shares.

(5) If a company contravenes subsection (2) 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.

4.27 Court order for registration

(1) If a company refuses registration under section 4.26, the person to whom the right to the shares was transmitted may apply to the Court of First Instance for an order under this section.

(2) On an application under subsection (1), the Court of First Instance may order the company to register the person as a member of the company in respect of the shares, if the Court is satisfied that the application is well-founded.

4.28 Pre-emption rights in relation to transmission by law

(1) This section applies if a company's articles give a member or class of members of the company a right of pre-emption or right to purchase shares in the company on the occurrence of an event that constitutes a transmission of the right to the shares by operation of law.

Example: Transmission on the death or bankruptcy of a shareholder.

(2) If this section applies, the registration as a member of the company of the person to whom the right to the shares is transmitted is subject to the right of pre-emption or right to purchase shares contained in the articles and that right may be enforced against the person.

Subdivision 3 – General

4.29 Evidence of grant of probate etc.

For the purposes of a transfer of shares or transmission of the right to shares, a company must accept as sufficient evidence of the grant of probate of the will or letters of administration of a deceased person the production to the company of a document that is by law sufficient evidence of that grant.

Division 5 – Replacement of Listed Companies' Lost Share Certificates

4.30 Interpretation

In this Division –

"eligible person" (合資格人士), in relation to shares in a listed company, means –

(*a*) a registered holder of the shares; or

(*b*) a person who claims to be entitled to have the person's name entered in the register of members of the company in respect of the shares;

"genuine purchaser" (真正購買者), in relation to shares, means –

(*a*) a person (other than a person to whom a new certificate for the shares is issued under this Division) who purchases the shares in good faith for value and without notice of any defect in the title of the seller; or

(*b*) a person who becomes entitled to the shares at any time after the purchase of them by a person referred to in paragraph (*a*);

"new certificate" (新股份證明書) means a share certificate that replaces a share certificate that has been lost;

"original certificate" (原有的股份證明書) means a share certificate that has been lost;

"registered holder" (登記持有人), in relation to shares in a listed company, means a person whose name is entered in the register of members of the company in respect of the shares.

4.31 Application for new certificate

(1) If a share certificate for shares in a listed company has been lost, an eligible person may apply to the company for a new certificate.

(2) The application –

(*a*) must be in the specified form; and

(*b*) must be accompanied by a statutory declaration by the eligible person stating the following –

(i) that the original certificate has been lost;

(ii) when the original certificate was last in the person's possession and how the person ceased to have possession of it;

(iii) whether the person has executed any transfer in respect of the shares, in blank or otherwise;

(iv) that no other person is entitled to have their name entered in the register of members of the company in respect of the shares; and

(v) any other matters that are necessary to verify the grounds on which the application is made.

4.32 Publication requirements

(1) A listed company that intends to issue a new certificate on an application under section 4.31 must publish a notice in the specified form in accordance with this section.

(2) The notice must be published in English and Chinese –

(*a*) on the company's website, if –

(i) the application is made by the registered holder of the shares or by an eligible person who is not the registered holder but who has the registered holder's consent to make the application; and

(ii) the latest value of the shares does not exceed $50,000; or

(*b*) on the company's website and in the Gazette, in any other case.

(3) The notice must be published in the Gazette under subsection (2)(*b*) within one month after it is first published on the company's website.

(4) Before publishing a notice under this section, the company must –

(*a*) deliver a copy of the notice to the recognized stock market concerned; and

(*b*) obtain a certificate from an authorized officer of that stock market that the copy is being exhibited in accordance with subsection (5).

(5) A recognized stock market must exhibit a copy of a notice received under subsection (4)(*a*) in a conspicuous place on the premises on which the stock market operates for a period of at least –

(*a*) one month, for a notice published under subsection (2)(*a*); or

(*b*) 3 months, for a notice published under subsection (2)(*b*).

(6) If the application was made by an eligible person who is not the registered holder of the shares and does not have the registered holder's consent to make the application, the company –

(*a*) must serve a copy of the notice under this section on the registered holder by sending it by registered post to the registered holder's last address appearing in the register of members of the company; and

(*b*) must not publish the notice under this section until at least 3 months after the day on which the copy was served.

(7) In this section –

"latest value" (最新價值) of shares means the value of the shares calculated at the last recorded price paid for shares in the company of the same class at the recognized stock market prior to the making of the application for the new certificate;

"website" (網站), in relation to a company, means the website on which the company is required, by the listing rules applicable to the recognized stock market concerned, to publish announcements, notices or other documents.

4.33 Issue of new certificate

(1) A listed company may issue a new certificate on an application under section 4.31 if –

(*a*) the company has published a notice under section 4.32 and –

(i) if the notice is published under section 4.32(2)(*a*), the notice has been made available on the company's website throughout a period of at least one month; or

(ii) if the notice is published under section 4.32(2)(*b*), the notice has been made available on the company's website throughout a period of at least 3 months and published in the Gazette in accordance with section 4.32(3);

(*b*) the company has not received notice of any other claim in respect of the shares; and

(*c*) in the case of an application by an eligible person who is not the registered holder of the shares –

(i) an instrument of transfer in respect of the shares has been delivered to the company under section 4.18; or

(ii) if the application was made without the registered holder's consent, the company has caused an instrument of transfer to be executed on behalf of the registered holder by a person appointed by the company and executed by the applicant on the applicant's own behalf.

(2) An instrument of transfer referred to in subsection (1)(*c*)(ii) is to be regarded as an instrument of transfer duly delivered to the company under section 4.18.

(3) A listed company that issues a new certificate must without delay –

(*a*) cancel the original certificate; and

(*b*) record the issue of the new certificate and cancellation of the original certificate in the register of its members.

(4) For the purposes of subsection (1)(*a*), a failure to make a notice available on a company's website throughout a period mentioned in that subsection is to be disregarded if –

(*a*) the notice 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.

(5) In this section –

"website" (網站), in relation to a company, has the meaning given by section 4.32(7).

4.34 Public notice of issue of new certificate

(1) A listed company that issues a new certificate must, within 14 days after the date of issue –

(*a*) publish in the Gazette a notice in the specified form of the issue of the new certificate and cancellation of the original certificate; and

(*b*) deliver a copy of the notice to the recognized stock market concerned.

(2) If a listed company contravenes this section, 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.

4.35 Orders for rectification of the register

(1) Subject to this section, if a listed company issues a new certificate in respect of shares, nothing in this Division affects the power of the Court of First Instance to make an order under section 12.99 in favour of a person claiming to be entitled to the shares as against –

(*a*) the person to whom the new certificate is issued; or

(*b*) a person whose name is subsequently entered in the register of members of the company in respect of the shares.

(2) The Court of First Instance must not make an order under section 12.99 as against a person referred to in subsection (1)(*b*) if that person is a genuine purchaser of the shares.

(3) If the Court of First Instance makes an order under section 12.99 as against the person to whom the new certificate is issued or a person whose name is subsequently entered in the register of members of the company in respect of the shares –

(*a*) the Court must not order the payment of damages by the company; and

(*b*) the company is not otherwise liable for any damage caused by the issue of the new certificate or cancellation of the original certificate in accordance with this Division.

Note: Section 12.99 gives the Court of First Instance power to make an order for rectification of the register of members of a company.

4.36 Liability if rectification cannot be ordered

(1) This section applies if an order cannot be made under section 12.99 because of section 4.35(2).

(2) The company is not liable for any damage suffered by the claimant because of the issue of the new certificate or cancellation of the original certificate, unless the company has acted deceitfully.

(3) If the genuine purchaser purchased the shares from the person to whom the new certificate is issued, the person to whom the new certificate is issued is liable to the claimant for the value of the shares as at the date of purchase.

(4) If the genuine purchaser purchased the shares from a person whose name was subsequently entered in the register of members of the company in respect of the shares, the person to whom the new certificate is issued and any person whose name was subsequently entered in the register in respect of the shares (other than a genuine purchaser) are jointly and severally liable to the claimant for the value of the shares as at the date the shares were purchased by the genuine purchaser.

(5) In this section –

"claimant" (申索人) means the person in whose favour an order could have been made under section 12.99 but for section 4.35(2).

4.37 Applicant to pay expenses

(1) An applicant for a new certificate must pay all expenses relating to the application.

(2) A listed company may refuse to deal, or to deal further, with an application until it is satisfied that the applicant has made reasonable provision for payment of the expenses relating to the application.

Division 6 – Alteration of Share Capital

4.38 Permitted alteration of share capital

(1) A company may, by resolution of the company, alter its share capital in any one or more of the ways set out in subsection (2).

(2) The company may –

(*a*) increase its share capital by allotting and issuing new shares in accordance with this Part;

(*b*) capitalize its profits, with or without issuing new shares;

(*c*) allot and issue bonus shares with or without increasing its share capital;

(*d*) consolidate and divide all or any of its share capital;

(*e*) subdivide all or any of its shares;

(*f*) cancel shares –

(i) that, at the date the resolution is passed, have not been taken or agreed to be taken by any person; or

(ii) that have been forfeited.

(3) A company may capitalize its profits without issuing new shares, or allot and issue bonus shares without increasing its share capital, only on or after the appointed day.

(4) In any subdivision of shares, the proportion between the amount paid and the amount (if any) remaining unpaid on each reduced share must be the same as it was in the case of the share from which the reduced share is derived.

(5) A resolution under this section may authorize a company to exercise a power conferred by this section –

(*a*) on more than one occasion;

(*b*) at a specified time or in specified circumstances.

(6) If shares are cancelled under subsection (2)(*f*), the company must reduce its share capital by the amount of the shares cancelled.

(7) For the purposes of Part 5, a cancellation of shares under this section is not a reduction of share capital.

(8) A company's articles may exclude or restrict the exercise of a power conferred by this section.

(9) In this section –

"appointed day" (指定日期) means the day appointed under section 4.71.

4.39 Notice of alteration of share capital

(1) Within one month after passing a resolution under section 4.38, a company must deliver a notice in the specified form to the Registrar for registration in relation to the alteration of share capital.

(2) The notice must include a statement of capital as at the date of the alteration of share capital that complies with section 4.69.

(3) A company is not required to deliver a notice under this section in relation to an alteration of share capital involving an allotment of shares.

Note: For an allotment of shares, section 4.10 requires a company to deliver a return of the allotment to the Registrar.

(4) If a company contravenes this section, 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.

4.40 Redenomination of shares

(1) On or after the appointed day, a company may, by resolution of the company, convert its share capital or any class of shares from one currency to another currency. This is known as a redenomination.

(2) A resolution under this section may authorize a company to redenominate its shares –

(*a*) on more than one occasion;

(*b*) at a specified time or in specified circumstances.

(3) The redenomination of shares does not affect any rights or obligations of members under the company's articles, or any restrictions affecting members under the company's articles.

(4) In particular, it does not affect any entitlement to dividends (including entitlement to dividends in a particular currency), voting rights or liability in respect of amounts remaining unpaid on shares (including liability in a particular currency).

(5) For this purpose, the company's articles include the terms on which any shares in the company are allotted or held.

(6) A company's articles may exclude or restrict the exercise of a power conferred by this section.

(7) In this section –

"appointed day" (指定日期) means the day appointed under section 4.71.

4.41 Notice of redenomination

(1) Within one month after passing a resolution under section 4.40, a company must deliver a notice in the specified form to the Registrar for registration in relation to the redenomination.

(2) The notice must include a statement of capital as at the date of the redenomination that complies with section 4.69.

(3) If a company contravenes this section, 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.

4.42 Reconversion of stock into shares

(1) A company that has converted paid up shares into stock (before the repeal by this Ordinance of the power to do so) may, by resolution of the company, reconvert that stock into paid up shares.

Note: Section 4.6 repeals the power of a company to convert its shares into stock.

(2) A resolution under this section may authorize a company to exercise the power to reconvert stock –

(*a*) on more than one occasion;

(*b*) at a specified time or in specified circumstances.

4.43 Notice of reconversion

(1) Within one month after passing a resolution under section 4.42, a company must deliver a notice in the specified form to the Registrar for registration in relation to the reconversion of stock.

(2) The notice must include a statement of capital as at the date of the reconversion that complies with section 4.69.

(3) If a company contravenes this section, 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.

Division 7 – Classes of Shares and Class Rights

Subdivision 1 – Companies Having a Share Capital

4.44 Application

This Subdivision applies to a company that has a share capital.

4.45 Rights attached to shares

In this Ordinance, a reference to the rights attached to a share in a class of shares in a company is a reference to the rights of the holder of that share as a member of the company.

4.46 Classes of shares

(1) For the purposes of this Ordinance, shares are in one class if the rights attached to them are in all respects uniform.

(2) The rights attached to shares are not to be regarded as different from those attached to other shares only because they do not carry the same rights to dividends in the 12 months immediately following their allotment.

4.47 Description of shares of different classes

(1) A share certificate issued by a company that has different classes of shares must contain in a prominent position a statement –

(*a*) stating that the company's share capital is divided into different classes of shares; and

(*b*) specifying the voting rights attached to shares in each class.

(2) If a company has a class of shares the holders of which are not entitled to vote at general meetings of the company –

(*a*) the descriptive title of shares in the class must include the words "non voting" or the Chinese characters "無表決權"; and

(*b*) the company must ensure that those words appear legibly on any share certificate, prospectus or directors' report issued by the company.

(3) Subsection (2) does not apply to shares that are described as preference shares or preferred shares.

(4) If a company contravenes this section, 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.

4.48 Varying class rights

(1) Rights attached to shares in a class of shares in a company may be varied only –

(*a*) in accordance with provisions in the company's articles for the variation of those rights; or

(*b*) if there are no such provisions, with the consent of holders of shares in that class given in accordance with this section.

(2) Subsection (1) is without prejudice to any other restrictions on the variation of the rights.

Example: A company could make an agreement with the holders of shares in a class that imposes greater restrictions on the variation of class rights than those in the company's articles or in this section.

(3) The consent required for the purposes of this section is –

(*a*) written consent of holders representing at least 75% of the total voting rights of holders of shares in the class; or

(*b*) a special resolution passed at a separate general meeting of holders of shares in the class sanctioning the variation.

(4) A variation takes effect –

(*a*) if no application is made under section 4.50 for it to be disallowed, at the end of the period in which applications may be made under that section; or

(*b*) if an application is made within that period, at the time the application is withdrawn or finally determined (unless the variation is disallowed).

(5) 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 any such provision into the articles, is itself to be regarded as a variation of those rights.

(6) Nothing in this section affects the Court of First Instance's powers under sections 13.8, 13.9 and 14.4.

4.49 Notifying class members of variation

(1) If the rights attached to shares in any class of shares in a company are varied, the company must give written notice of the variation to each holder of shares in that class within 14 days after the variation is made.

(2) If a company contravenes this section, 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.

4.50 Disallowance or confirmation of variation

(1) If the rights attached to shares in any class of shares in a company are varied, holders representing at least 10% of the total voting rights of holders of shares in the class may apply to the Court of First Instance to have the variation disallowed.

(2) An application must be made within 28 days after the date on which the variation is made.

(3) An application may be made on behalf of the members entitled to make it by any one or more of them appointed in writing by all of them.

(4) The following persons are entitled to be heard on an application –

(*a*) the applicant;

(*b*) any other person who appears to the Court of First Instance to be interested in the application.

(5) The Court of First Instance may, by order, disallow the variation if satisfied that the variation would unfairly prejudice the members represented by the applicant.

(6) If the Court of First Instance is not so satisfied, it must, by order, confirm the variation.

(7) Nothing in this section affects –

(*a*) the right of a member to petition the Court of First Instance under section 14.3; or

(*b*) the Court's powers under section 14.4.

4.51 Delivery of court order to Registrar

(1) If the Court of First Instance makes an order under section 4.50 in relation to a company, the company must deliver a copy of the order to the Registrar within 21 days after it is made.

(2) If a company contravenes this section, 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.

4.52 Notifying Registrar of variation

(1) If the rights attached to shares in any class of shares in a company are varied, the company must deliver to the Registrar, within one month after the date on which the variation takes effect –

(*a*) a copy of the resolution or other document that authorized the variation; and

(*b*) a notice in the specified form including a statement of capital, as at the date on which the variation takes effect, that complies with section 4.69.

(2) Subsection (1)(*a*) does not apply if the company is required to deliver a copy of the resolution or other document to the Registrar under another provision of this Ordinance.

(3) If a company contravenes this section, 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.

Subdivision 2 – Companies without a Share Capital

4.53 Application

This subdivision applies to a company that does not have a share capital.

4.54 Rights of members

In this Ordinance, a reference to the rights of a class of members of a company that does not have a share capital is a reference to the rights of the members in that class in their capacity as members of the company.

4.55 Classes of members

For the purposes of this Ordinance, members of a company that does not have a share capital are in one class if the rights of the members are in all respects uniform.

4.56 Varying class rights

(1) Rights of a class of members of a company that does not have a share capital may be varied only –

(*a*) in accordance with provisions in the company's articles for the variation of those rights; or

(*b*) if there are no such provisions, with the consent of the members of that class given in accordance with this section.

(2) Subsection (1) is without prejudice to any other restrictions on the variation of the rights.

Example: A company could make an agreement with the members of a class that imposes greater restrictions on the variation of class rights than those in the company's articles or in this section.

(3) The consent required for the purposes of this section is –

(*a*) written consent of at least 75% of the members in the class; or

(*b*) a special resolution passed at a separate general meeting of the members in the class sanctioning the variation.

(4) A variation takes effect –

(*a*) if no application is made under section 4.58 for it to be disallowed, at the end of the period in which applications may be made under that section; or

(*b*) if an application is made within that period, at the time the application is withdrawn or finally determined (unless the variation is disallowed).

(5) 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 any such provision into the articles, is itself to be regarded as a variation of those rights.

(6) Nothing in this section affects the Court of First Instance's powers under sections 13.8, 13.9 and 14.4.

4.57 Notifying class members of variation

(1) If the rights of any class of members of a company that does not have a share capital are varied, the company must give written notice of the variation to each member in that class within 14 days after the variation is made.

(2) If a company contravenes this section, 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.

4.58 Disallowance or confirmation of variation

(1) If the rights of any class of members of a company that does not have a share capital are varied, members representing at least 10% of the members in the class may apply to the Court of First Instance to have the variation disallowed.

(2) An application must be made within 28 days after the date on which the variation is made.

(3) An application may be made on behalf of the members entitled to make it by any one or more of them appointed in writing by all of them.

(4) The following persons are entitled to be heard on an application –

(*a*) the applicant;

(*b*) any other person who appears to the Court of First Instance to be interested in the application.

(5) The Court of First Instance may, by order, disallow the variation if satisfied that the variation would unfairly prejudice the members represented by the applicant.

(6) If the Court of First Instance is not so satisfied, it must, by order, confirm the variation.

(7) Nothing in this section affects –

(*a*) the right of a member to petition the Court of First Instance under section 14.3; or

(b) the Court's powers under section 14.4.

4.59 Delivery of court order to Registrar

(1) If the Court of First Instance makes an order under section 4.58 in relation to a company, the company must deliver a copy of the order to the Registrar within 21 days after it is made.

(2) If a company contravenes this section, 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.

4.60 Notifying Registrar of variation

(1) If the rights of any class of members of a company that does not have a share capital are varied, the company must deliver to the Registrar, within one month after the date on which the variation takes effect –

(*a*) a copy of the resolution or other document that authorized the variation; and

(*b*) a notice in the specified form.

(2) Subsection (1)(*a*) does not apply if the company is required to deliver a copy of the resolution or other document to the Registrar under another provision of this Ordinance.

(3) If a company contravenes this section, 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.

Subdivision 3 – General

4.61 Variation includes abrogation

In this Division and (unless the context otherwise requires) in any provision in a company's articles for the variation of class rights, a reference to a variation of those rights includes a reference to the abrogation of those rights.

Division 8 – Supplementary and Miscellaneous

Subdivision 1 – Relief from Share Capital Requirements

4.62 Interpretation

(1) In this Division –

"appointed day (指定日期) means the day appointed under section 4.71;

"arrangement" (安排) means any agreement, scheme or arrangement;

"company" (公司), except in reference to an issuing company, includes any body corporate;

"equity share capital" (權益股本) means a company's issued share capital excluding any part of that capital that, neither as respects dividends nor as respects capital, carries any right to participate beyond a specified amount in a distribution;

"equity shares" (權益股份) means shares comprised in a company's equity share capital;

"issuing company" (發行公司) means a company that issues shares;

"non-equity shares" (非權益股份) means shares in a company other than equity shares;

"transfer" (轉讓) of shares includes transfer of a right to be included in the company's register of members in respect of the shares.

(2) In this Division –

(*a*) a reference to the acquisition by a company of shares includes the acquisition of shares by a nominee of the company;

(*b*) a reference to the issue or transfer of shares to a company includes the issue or transfer of shares to a nominee of the company;

(*c*) a reference to the transfer of shares by a company includes the transfer of shares by a nominee of the company.

4.63 Group reconstruction relief

(1) This section applies if an issuing company –

(*a*) is a wholly owned subsidiary of another company ("the holding company"); and

(*b*) issues shares on or after the appointed day –

(i) to the holding company; or

(ii) to another wholly owned subsidiary of the holding company,

in consideration for the transfer to the issuing company of non-cash assets of a company ("the transferor company") that is a member of the group of companies that comprises the holding company and all its wholly owned subsidiaries.

(2) Any excess of the value of the assets transferred over their net base value may be disregarded when recording as share capital of the issuing company the amount of consideration for the issue by the issuing company of its shares. Consequently, the minimum amount of consideration required to be recorded as share capital of the issuing company is the net base value of the assets transferred.

(3) The net base value of the assets transferred is the amount by which the base value of the assets transferred exceeds the base value of any liabilities of the transferor company assumed by the issuing company as consideration for the assets transferred.

(4) For the purposes of this section –

(*a*) the base value of assets transferred is the lesser of –

(i) the cost of those assets to the transferor company;

(ii) the amount at which those assets are stated in the transferor company's accounting records immediately before the transfer;

(*b*) the base value of liabilities assumed is the amount at which they are stated in the transferor company's accounting records immediately before the transfer.

4.64 Merger relief

(1) This section applies if an issuing company has secured at least a 90% equity holding in another company under an arrangement providing for the issue on or after the appointed day of equity shares in the issuing company on terms that the consideration for the shares issued is to be provided –

(*a*) by the issue or transfer to the issuing company of equity shares in the other company; or

(*b*) by the cancellation of any equity shares in the other company not held by the issuing company.

(2) Any excess of the value of the equity shares acquired or cancelled under the arrangement over the subscribed capital of the other company attributable to those shares may be disregarded when recording as share capital of the issuing company the amount of consideration for the issue by the issuing company of its shares. Consequently, the minimum amount of consideration required to be recorded as share capital of the issuing company in respect of the shares issued under the arrangement is the subscribed capital of the other company attributable to the equity shares acquired or cancelled.

(3) If the arrangement also provides for the issue of any shares in the issuing company on terms that the consideration for those shares is to be provided –

(*a*) by the issue or transfer to the issuing company of non-equity shares in the other company; or

(*b*) by the cancellation of any non-equity shares in the other company not held by the issuing company,

any excess of the value of the non-equity shares acquired or cancelled under the arrangement over the subscribed capital of the other company attributable to those shares may be disregarded when recording as share capital of the issuing company the amount of consideration for the issue by the issuing company of its shares.

(4) This section does not apply in a case falling within section 4.63.

4.65 Merger relief: meaning of 90% equity holding

(1) This section has effect in determining, for the purposes of section 4.64, whether a company ("company A") has secured at least a 90% equity holding in another company ("company B") under an arrangement mentioned in section 4.64(1).

(2) Company A has secured at least a 90% equity holding in company B if, in consequence of an acquisition or cancellation of equity shares in company B under that arrangement, company A holds in aggregate 90% or more of the equity shares in company B (whether or not all or any of the equity shares in company B held by company A were acquired under that arrangement).

(3) If the equity shares in company B are divided into different classes of shares, company A is not regarded as having secured at least a 90% equity holding in company B unless the requirements of subsection (2) are met in relation to each of those classes of shares taken separately.

(4) For the purposes of this section, the following shares are regarded as held by company A –

(*a*) shares held by a company that is company A's holding company or subsidiary;

(*b*) shares held by a subsidiary of company A's holding company; and

(*c*) shares held by nominees of company A or of a company referred to in paragraph (*a*) or (*b*).

4.66 Relief may be reflected in company's statement of financial position

An amount corresponding to the amount that, because of this Subdivision, is not required to be recorded as a company's share capital may also be disregarded in determining the amount at which any shares or other consideration provided for the shares issued is to be included in the company's statement of financial position.

4.67 Regulations

(1) The Financial Secretary may make regulations for restricting or otherwise modifying the relief provided by this Subdivision.

(2) Regulations made under this section may make different provision for different cases or classes of cases and may contain any incidental or supplementary provisions that the Financial Secretary thinks fit.

(3) Regulations made under this section are subject to the approval of the Legislative Council.

Subdivision 2 – Miscellaneous

4.68 Provision for different amounts to be paid on shares

If authorized by its articles to do so, a company may –

(*a*) make arrangements on the issue of shares for a difference between the shareholders in the amounts and times of payment of calls on their shares;

(*b*) accept from any member the whole or part of the amount remaining unpaid on any shares held by the member, although no part of that amount has been called up; and

(*c*) pay a dividend in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

4.69 Statement of capital

(1) This section applies if a provision of this Part or Part 5 requires a statement of capital to be included in a return or notice delivered to the Registrar.

(2) A statement of capital must state –

(*a*) the total number of issued shares in the company;

(*b*) the amount paid up and the amount (if any) remaining unpaid on the total number of issued shares in the company; and

(*c*) for each class of shares –

(i) the particulars specified in subsection (3);

(ii) the total number of issued shares in the class; and

(iii) the amount paid up and the amount (if any) remaining unpaid on the total number of issued shares in the class.

(3) The particulars are –

(*a*) particulars of any voting rights attached to shares in the class, including rights that arise only in certain circumstances;

(*b*) particulars of any rights attached to shares in the class, as respects dividends, to participate in a distribution;

(*c*) particulars of any rights attached to shares in the class, as respects capital, to participate in a distribution (including on a winding up); and

(*d*) whether or not shares in the class are redeemable shares.

(4) In this section –

"redeemable shares" (可贖回股份) has the meaning given by section 5.1(1).

4.70 Notice of paid up capital

(1) An official document of a company that states the company's issued capital must also state no less prominently the company's paid up capital.

(2) If a company issues, circulates or distributes an official document in Hong Kong that does not comply with 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) In this section –

"official document" (正式文件) of a company, means a notice, circular, advertisement or other official publication of the company.

4.71 Appointed day

The Financial Secretary may, by notice published in the Gazette, appoint a day for the purposes of this Part.

Note: The appointed day is the day on which shares cease to have a nominal value (see section 4.2). The appointed day is also relevant to other provisions of this Part, for example, sections 4.17(1) and 4.38(3) and Subdivision 1 of this Division.

Division 9 – Transitional and Saving

Subdivision 1 – General Transitional and Saving Provisions

4.72 Share warrants

(1) This section applies if a company has issued a share warrant before the commencement of section 4.7 but has not complied with section 97(1) of the predecessor Ordinance before that commencement.

(2) Section 97(1) of the predecessor Ordinance continues to apply to the company in respect of the share warrant as if that section had not been repealed.

(3) If the particulars of a share warrant have been entered in the register of members of the company in accordance with section 97(1) of the predecessor Ordinance, those particulars are regarded as the details required by Subdivision 1 of Division 2 of Part 12 to be entered in the register.

4.73 Description of shares of different classes

(1) Section 4.47 applies to a share certificate, prospectus or directors' report issued on or after the commencement of that section.

(2) Section 57A of the predecessor Ordinance continues to apply to a share certificate, prospectus or directors' report issued before the commencement of section 4.47 as if that section 57A had not been repealed.

4.74 Allotment of shares or grant of rights with company approval

Section 4.8 does not apply to an allotment of shares by a company on or after the commencement of that section in accordance with an offer, agreement or

option made or granted by the company before the commencement of the Companies (Amendment) Ordinance 1984 (6 of 1984).

4.75 Relief from share capital requirements

(1) Subdivision 1 of Division 8 applies in relation to an issue of shares on or after the appointed day whether the arrangement for the issue was made before, on or after that day.

(2) In this section –

"appointed day" (指定日期) means the day appointed under section 4.71.

Subdivision 2 – Transitional Provisions Relating to Abolition of Nominal Value

4.76 Interpretation

In this Subdivision –

"appointed day" (指定日期) means the day appointed under section 4.71.

4.77 References to amount paid on shares issued before appointed day

For the purposes of the operation of this Ordinance on and after the appointed day in relation to a share issued before that day –

(*a*) the amount paid on the share is the sum of all amounts paid to the company at any time for the share; and

(*b*) the amount remaining unpaid on the share is the difference between the issue price of the share and the amount paid on the share.

4.78 Treatment of share premium account and capital redemption reserve account on appointed day

At the beginning of the appointed day, any amount standing to the credit of the company's share premium account and capital redemption reserve account becomes part of the company's share capital.

4.79 Use of amount standing to credit of share premium account

(1) Despite section 4.78, a company may, on or after the appointed day, use the amount that was standing to the credit of its share premium account immediately before that day to –

(*a*) pay up, in accordance with an agreement made before the appointed day, shares that are to be issued on or after that day to members of the company as fully paid bonus shares;

(*b*) write off –

(i) the preliminary expenses of the company incurred before the appointed day; or

(ii) the expenses incurred, commission paid, or discount allowed, before the appointed day, in respect of any issue of shares in the company; or

(*c*) provide for the premium payable on redemption of redeemable preference shares issued before the commencement of the Companies (Amendment) Ordinance 1991 (77 of 1991).

(2) Despite section 4.78, if redeemable shares issued by a company on or after the commencement of the Companies (Amendment) Ordinance 1991 but before the appointed day are redeemed on or after the appointed day, any premium payable on their redemption may be paid out of the proceeds of a fresh issue of shares made for the purpose of the redemption, up to an amount equal to the lesser of –

(*a*) the aggregate of the premiums received by the company on the issue of the shares redeemed;

(*b*) the amount that was standing to the credit of the company's share premium account immediately before the appointed day less any amounts already applied under subsection (1) or this subsection.

(3) If an amount is paid under subsection (2), the remaining amount available for the purposes of subsection (1) or (2) must be reduced by a corresponding amount.

4.80 Calls on partly paid shares

The liability of a shareholder for calls in respect of money remaining unpaid on shares issued before the appointed day (whether on account of the nominal value of the shares or by way of premium) is not affected by the share ceasing to have a nominal value.

4.81 References in contracts and other documents to par or nominal value

(1) This section applies for the purpose of interpreting and applying on or after the appointed day –

(*a*) a contract entered into before that day (including a company's articles);

(*b*) a resolution of a company or of any of its members made before that day; or

(*c*) a trust deed or other document executed before that day.

(2) A reference to the par or nominal value of a share (whether made expressly or by implication) is a reference to –

(*a*) if the share was issued before the appointed day, the nominal value of the share immediately before that day;

(*b*) if the share is issued on or after the appointed day but shares of the same class were on issue immediately before that day, the nominal value that the share would have had if it had been issued immediately before that day; or

(*c*) if the share is issued on or after the appointed day and shares of the same class were not on issue immediately before that day, the nominal value determined by the directors.

(3) A reference to share premium is a reference to any residual share capital in relation to the share.

(4) A reference to a right to a return of capital on a share is a reference to a right to a return of capital of a value equal to the amount paid in respect of the nominal value of the share.

(5) A reference to a distribution in a winding up in proportion to the capital paid up on the shares is a reference to a distribution in a winding up in proportion to the amount paid in respect of the nominal value of the shares.

(6) A reference to the aggregate par or nominal value of the company's issued share capital is a reference to that aggregate as it existed immediately before the appointed day and –

(*a*) increased to take account of the nominal value of any shares issued on or after the appointed day; and

(*b*) reduced to take account of the nominal value of any shares cancelled on or after the appointed day.

PART 5

TRANSACTIONS IN RELATION TO SHARE CAPITAL

Division 1 – Preliminary

5.1 Interpretation

(1) In this Part –

"Commission" (監察機關) means –

(*a*) subject to paragraphs (*b*) and (*c*), the Securities and Futures Commission referred to in section 3(1) of the Securities and Futures Ordinance (Cap. 571);

(*b*) if any relevant transfer order made under section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or

(*c*) if any relevant transfer order made under section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provisions of that order;

"contingent buy-back contract" (待確定回購合約) means a contract entered into by a company relating to any of its shares –

(*a*) that is not a contract to buy back those shares; but

(*b*) under which the company may (subject to any conditions) become entitled or obliged to buy back those shares;

"distributable profits" (可分派利潤), in relation to the making of a payment by a company, means those profits out of which the company could lawfully make a distribution equal in value to the payment;

Note: Division 2 of Part 6 contains prohibitions and restrictions on a company in making distributions.

"redeemable shares" (可贖回股份) means shares that are to be redeemed, or are liable to be redeemed, at the option of the company or the shareholder;

"specified Chinese language newspaper" (指明中文報章) means a Chinese language newspaper that is specified under subsection (2);

"specified English language newspaper" (指明英文報章) means an English language newspaper that is specified under subsection (2);

"unlisted company" (非上市公司) means a company that does not have any of its shares listed on a recognized stock market.

(2) The Chief Secretary for Administration may specify Chinese language newspapers and English language newspapers for the purposes of this Part and must publish a list of the specified newspapers in the Gazette.

Division 2 – Solvency Test

5.2 Application of Division

This Division has effect for the following transactions –

(*a*) a reduction of share capital by special resolution supported by a solvency statement under Subdivision 2 of Division 3;

(*b*) a payment out of capital in respect of a share redemption or buy-back under Division 4;

(*c*) the giving of financial assistance by a company under Subdivision 4 of Division 5.

5.3 Solvency test

A company satisfies the solvency test in relation to a transaction if –

(*a*) immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and

(*b*) either –

(i) if it is intended to commence the winding up of the company within 12 months after the date of the transaction, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or

(ii) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the transaction.

5.4 Solvency statement

(1) A solvency statement in relation to a transaction is a statement that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction.

(2) In forming an opinion for the purpose of making a solvency statement, a director must –

(*a*) inquire into the company's state of affairs and prospects; and

(*b*) take into account all the liabilities of the company (including contingent and prospective liabilities).

(3) A solvency statement –

(*a*) must be in the specified form;

(*b*) must state –

(i) the date on which it is made; and

(ii) the name of each director making it; and

(*c*) must be signed by each director making it.

(4) Subsection (3)(*a*) does not apply to a solvency statement made for the purposes of the giving of financial assistance by a company under Subdivision 4 of Division 5.

5.5 Offences regarding solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it 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 6 and to imprisonment for 6 months.

5.6 Power to modify solvency test by regulation

(1) The Chief Executive in Council may make regulations –

(*a*) modifying the solvency test or its application to any transaction or class of transactions; or

(*b*) modifying the matters that a director is required to take into account in forming an opinion for the purpose of making a solvency statement.

(2) Regulations made under this section –

(*a*) may make different provision for different cases or classes of cases; and

(*b*) may contain any further consequential provisions, and any incidental and supplementary provisions, that the Chief Executive in Council thinks fit.

(3) Regulations made under this section are subject to the approval of the Legislative Council.

Division 3 – Reduction of Share Capital

Subdivision 1 – General Provisions

5.7 Permitted reductions of share capital

(1) A company may, in accordance with the procedure specified in section 5.8, reduce its share capital under this Division in any way.

Examples:

1. A company may extinguish or reduce the liability on any of its shares in respect of share capital not paid up.

2. A company may, either with or without extinguishing or reducing liability on any of its shares –
   - (*a*) cancel any paid-up share capital that is lost or unrepresented by available assets; or
   - (*b*) repay any paid-up share capital in excess of the company's wants.

(2) However, a company must not reduce its share capital if, as a result of the reduction, there would no longer be any member of the company holding shares other than redeemable shares.

(3) This Division is subject to any provision of a company's articles that prohibits or restricts the reduction of the company's share capital.

5.8 Procedure for a company to reduce its share capital

The procedure for a company to reduce its share capital under this Division is –

(*a*) by special resolution supported by a solvency statement under Subdivision 2; or

(*b*) by special resolution confirmed by the Court of First Instance under Subdivision 3.

5.9 Offence if share capital is reduced in contravention of Division

(1) If a company reduces its share capital in contravention of this Division, the company, and every responsible person of the company, commit an offence and each is liable –

(*a*) on conviction on indictment to a fine of $1,250,000 and to imprisonment for 5 years; or

(*b*) on summary conviction to a fine of $150,000 and to imprisonment for 12 months.

(2) An offence is not committed under this section in relation to a reduction of share capital by a company only because one or more directors of the company commit an offence under section 5.5 in making a solvency statement for the purposes of the reduction of share capital.

(3) An offence is not committed under this section if the reduction of share capital occurs as a result of a share redemption or buy-back in accordance with Division 4 or as otherwise provided in this Ordinance.

Example: A reduction of share capital could occur as a result of an order of the Court of First Instance under Part 13.

5.10 Liability of members following reduction of share capital

(1) If a company's share capital is reduced under this Division, a past or present member of the company is not liable in respect of a share to a call or contribution exceeding in amount the difference (if any) between –

(*a*) the issue price of the share; and

(*b*) the aggregate of the amount paid up on the share (if any) and the amount reduced on the share.

(2) Subsection (1) is subject to section 5.28.

(3) Nothing in this section affects the rights of the contributories among themselves.

Subdivision 2 – Reduction of Share Capital by Special Resolution Supported by Solvency Statement

5.11 Special resolution for reduction of share capital

(1) A company may reduce its share capital by special resolution in accordance with this Subdivision.

(2) The special resolution and the reduction of share capital take effect when the return under section 5.20 or 5.21 in relation to the reduction is registered by the Registrar.

5.12 Solvency statement

(1) All directors of the company must make a solvency statement that complies with Division 2 in relation to the reduction of share capital.

(2) The special resolution for reduction of share capital must be passed within 15 days after the date of the solvency statement.

(3) If the special resolution is proposed as a written resolution, a copy of the solvency statement must be sent to every member of the company at or before the time when the proposed resolution is sent to them.

(4) If the special resolution is proposed at a meeting, a copy of the solvency statement must be made available for inspection by members at the meeting.

(5) The special resolution is not effective if subsection (3) or (4) (as applicable) is not complied with.

5.13 Special resolution: exercise of voting rights

(1) If the special resolution for reduction of share capital is proposed as a written resolution, a member of the company holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(2) If the special resolution is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(3) For the purposes of subsection (2) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(4) The special resolution is not effective if a demand for a poll referred to in subsection (3)(*b*) is refused.

(5) This section does not apply in the case of a reduction of share capital that applies equally to all issued shares in the company.

5.14 Public notice of reduction of share capital

(1) Within one week after the date of the special resolution for reduction of share capital, the company must publish a notice in the Gazette –

(*a*) stating that the company has approved a reduction of share capital;

(*b*) specifying the amount of share capital to be reduced and the date of the special resolution;

(*c*) stating where the special resolution and solvency statement are available for inspection; and

(*d*) stating that a member of the company who did not consent to or vote in favour of the special resolution or a creditor of the company may, within 5 weeks after the date of the special resolution, apply to the Court of First Instance under section 5.16 for cancellation of the special resolution.

(2) Within one week after the date of the special resolution, the company must also –

(*a*) publish a notice to the same effect as the notice under subsection (1) in at least one specified Chinese language newspaper and at least one specified English language newspaper; or

(*b*) give written notice to that effect to each of its creditors.

(3) If the 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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(4) The company must deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company –

(*a*) publishes the notice under subsection (1); or

(*b*) if earlier, first publishes the notice or gives notice to creditors under subsection (2).

(5) If the 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 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

5.15 Inspection of special resolution and solvency statement

(1) The company must ensure that the special resolution for reduction of share capital and the solvency statement made in relation to it are kept at its

registered office or at a place prescribed by regulations made under section 12.125 for the period –

(*a*) beginning on the day on which the company –

(i) publishes the notice under section 5.14(1); or

(ii) if earlier, first publishes the notice or gives notice to creditors under section 5.14(2); and

(*b*) ending 5 weeks after the date of the special resolution.

(2) The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period.

(3) If the 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.

(4) If the company contravenes subsection (2), the Court of First Instance may by order require the company to permit an immediate inspection.

5.16 Application to Court by members or creditors

(1) Subject to subsection (2), a member or creditor of the company may apply to the Court of First Instance, within 5 weeks after the date of the special resolution for reduction of share capital, for cancellation of the resolution.

(2) A member who consented to or voted in favour of the special resolution is not entitled to apply.

(3) An application may be made on behalf of the persons entitled to apply by any one or more of them appointed in writing by all of them for the purpose.

(4) If an application is made under this section –

(*a*) the applicant must, as soon as possible, serve the application on the company; and

(*b*) the company must give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company.

(5) If the company contravenes subsection (4)(*b*), 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.

5.17 Power to adjourn proceedings

(1) The Court of First Instance may adjourn proceedings on an application under section 5.16 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members or dissentient creditors.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.18 Court's power to confirm or cancel special resolution

(1) On an application under section 5.16, the Court of First Instance must make an order confirming or cancelling the special resolution for reduction of share capital, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the special resolution, it may by order alter or extend any date or period of time specified –

(*a*) in the special resolution; or

(*b*) in any provision of this Division applying to the special resolution or the reduction of share capital.

(3) If the Court of First Instance thinks fit, the order may –

(*a*) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;

(*b*) provide for the protection of the interests of members or creditors of the company;

(*c*) make any alteration to the company's articles that may be required as a consequence;

(*d*) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.17.

5.19 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.18, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) If the 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.

5.20 Registration of return if no court application

(1) If –

(*a*) no application is made under section 5.16 in respect of the special resolution for reduction of share capital; and

(*b*) the company delivers a return that complies with subsection (2) to the Registrar no earlier than 5 weeks and

no later than 7 weeks after the date of the special resolution,

the Registrar must register the return.

Notes:

1. The special resolution and the reduction of share capital take effect when the return is registered by the Registrar (see section 5.11(2)).

2. The company is also required to send a copy of the special resolution to the Registrar within 15 days after it is passed (see section 12.86).

3. If the company's articles are altered by the special resolution, the company is also required to notify the Registrar of the alteration within 15 days after it takes effect (see section 3.27).

(2) The return –

(*a*) must be in the specified form;

(*b*) must contain particulars of the reduction of share capital; and

(*c*) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.

5.21 Registration of return if court application

(1) If –

(*a*) an application is made under section 5.16 in respect of the special resolution for reduction of share capital;

(*b*) either –

(i) the Court of First Instance makes an order under section 5.18 confirming the special resolution; or

(ii) the proceedings on the application are ended without determination by the Court (for example, by the withdrawal of the application); and

(*c*) the company delivers to the Registrar a return that complies with subsection (2) –

(i) within 15 days after the making of the order, or within any longer period ordered by the Court; or

(ii) within 15 days after the proceedings are ended without determination by the Court or, if there are more than one such proceedings, the last of them are so ended,

the Registrar must register the return.

Notes:

1. The special resolution and the reduction of share capital take effect when the return is registered by the Registrar (see section 5.11(2)).

2. The company is also required to send a copy of the special resolution to the Registrar within 15 days after it is passed (see section 12.86) and deliver an office copy of the order of the Court of First Instance to the Registrar within 15 days after the making of the order, or within any longer period ordered by the Court (see section 5.19).

(2) The return –

(*a*) must be in the specified form;

(*b*) must contain particulars of the reduction of share capital; and

(*c*) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.

Subdivision 3 – Reduction of Share Capital Confirmed by the Court

5.22 Special resolution and application to Court for confirmation of reduction of share capital

(1) A company may pass a special resolution for reduction of share capital under this Subdivision and apply by petition to the Court of First Instance for an order confirming the reduction.

(2) Unless the Court of First Instance directs otherwise, section 5.23 (creditors entitled to object to reduction of share capital) applies if the proposed reduction of share capital involves either –

(*a*) diminution of liability in respect of unpaid share capital; or

(*b*) the payment to a shareholder of any paid-up share capital.

(3) The Court of First Instance may direct that section 5.23 is not to apply to any class or classes of creditors if the Court thinks it proper to do so, having regard to any special circumstances of the case.

(4) The Court of First Instance may direct that section 5.23 is to apply in any other case.

5.23 Creditors entitled to object to reduction of share capital

(1) If this section applies (see section 5.22(2) and (4)), a creditor of the company is entitled to object to the reduction of share capital if the creditor is entitled, at the date fixed by the Court of First Instance, to any debt or claim that would be admissible in proof against the company if the company were to commence being wound up on that date.

(2) The Court of First Instance must settle a list of creditors entitled to object.

(3) For that purpose, the Court of First Instance –

(*a*) must ascertain, as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims; and

(*b*) may publish a notice fixing a period within which, or a date by which, creditors not on the list are to claim to be entered on the list or are to be excluded from the right of objecting.

(4) If a creditor on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court of First Instance may,

if it thinks fit, dispense with the consent of the creditor on the company securing payment of the debt or claim.

(5) For that purpose, the debt or claim must be secured by appropriating (as the Court of First Instance directs) the following amount –

(*a*) if the company admits the full amount of the debt or claim or, though not admitting it, is willing to provide for it, the full amount of the debt or claim; or

(*b*) if the company does not admit, and is not willing to provide for, the full amount of the debt or claim, or if the amount is contingent or not ascertained, an amount fixed by the Court after an inquiry and adjudication as if the company were being wound up by the Court.

5.24 Offence in connection with creditors list

(1) An officer of a company –

(*a*) must not intentionally or recklessly –

(i) conceal the name of a creditor entitled to object to the reduction of share capital; or

(ii) misrepresent the nature or amount of the debt or claim of a creditor; or

(*b*) must not be knowingly concerned in any such concealment or misrepresentation.

(2) A person who contravenes subsection (1) 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 6 and to imprisonment for 6 months.

5.25 Court order confirming reduction of share capital

(1) On an application by petition under section 5.22, the Court of First Instance may make an order confirming the reduction of share capital on any terms and conditions it thinks fit.

(2) The Court of First Instance must not confirm the reduction of share capital unless it is satisfied, with respect to every creditor of the company who is entitled to object to the reduction of share capital under section 5.23, that –

(*a*) the creditor's consent has been obtained; or

(*b*) the creditor's debt or claim has been discharged, has determined or has been secured.

5.26 Registration of order, minute and return

(1) If –

(*a*) the Court of First Instance makes an order under section 5.25 confirming the reduction of share capital; and

(*b*) within 15 days after the making of the order, or within any longer period ordered by the Court, the company delivers to the Registrar –

(i) an office copy of the order;

(ii) a minute that complies with subsection (2) and that is approved by the Court; and

(iii) a return that complies with subsection (3),

the Registrar must register the order, minute and return.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) The minute must state, with respect to the company's share capital as altered by the order –

(*a*) the amount of the share capital;

(*b*) the total number of issued shares in the company;

(*c*) the amount of each share; and

(*d*) the amount paid up and the amount (if any) remaining unpaid on each share.

(3) The return –

(*a*) must be in the specified form;

(*b*) must contain particulars of the reduction of share capital (by reference to the order or minute, or otherwise); and

(*c*) must contain a statement of capital, as at the time immediately after the reduction of share capital, that complies with section 4.69.

(4) The special resolution, as confirmed by the order, takes effect on registration of the order, minute and return by the Registrar.

(5) Notice of the registration must be published in the manner directed by the Court of First Instance.

5.27 Certification of registration

(1) The Registrar must certify the registration of an order, minute and return under section 5.26.

(2) The certificate must be signed by the Registrar or bear the Registrar's printed signature.

(3) The certificate is conclusive evidence –

(*a*) that the requirements of this Ordinance for the reduction of share capital have been complied with; and

(*b*) that the company's share capital is as stated in the minute.

5.28 Liability to creditors omitted from list of creditors

(1) This section applies to a reduction of share capital confirmed by the Court of First Instance under section 5.25 if –

(*a*) a creditor entitled to object to the reduction of share capital was not entered on the list of creditors because the creditor was not aware –

(i) of the proceedings for reduction of share capital; or

(ii) of their nature or effect with respect to the creditor's debt or claim; and

(*b*) after the reduction of share capital the company is unable to pay the debt or claim.

(2) A person who was a member of the company on the date of registration of the order confirming the special resolution for the reduction is liable to contribute for the payment of the debt or claim an amount not exceeding the amount that the person would have been liable to contribute if the company had commenced to be wound up on the day before that date.

(3) If the company is wound up, the Court of First Instance, on application by the creditor and proof of the creditor's lack of awareness referred to in subsection (1)(*a*), may, if it thinks fit –

(*a*) settle a list of persons liable to contribute under this section; and

(*b*) make and enforce calls and orders on them as if they were ordinary contributors in a winding up.

(4) Nothing in this section affects the rights of the contributories among themselves.

Division 4 – Share Redemptions and Buy-backs

Subdivision 1 – Redeemable Shares

5.29 Issue of redeemable shares

(1) Subject to subsections (2) and (3), a company may issue redeemable shares.

(2) A company's articles may prohibit or restrict the issue of redeemable shares.

(3) A company must not issue redeemable shares at a time when there are no issued shares in the company other than redeemable shares.

5.30 Terms, conditions and manner of redemption

(1) The directors of a company may determine the terms, conditions and manner of redemption of shares if they are authorized to do so –

(*a*) by the company's articles; or

(*b*) by resolution of the company.

(2) A resolution under subsection (1)(*b*) may be an ordinary resolution even if it amends the company's articles.

(3) If the directors are authorized under subsection (1) to determine the terms, conditions and manner of redemption of shares –

(*a*) they must do so before the shares are allotted; and

(*b*) any obligation of the company to state in a statement of capital the rights attached to the shares extends to the terms, conditions and manner of redemption.

(4) If the directors are not authorized under subsection (1), the terms, conditions and manner of redemption of shares must be stated in the company's articles.

Subdivision 2 – Share Buy-backs

5.31 General power of company to buy back its own shares

(1) Subject to subsections (2) and (3) and Subdivision 5, a company may buy back its own shares in accordance with –

(*a*) for a listed company, Subdivision 3;

(*b*) for an unlisted company, Subdivision 4.

(2) A company's articles may prohibit or restrict a buy-back by the company of its own shares.

(3) A company must not buy back its own shares if, as a result of the buy-back, there would no longer be any member of the company holding shares other than redeemable shares.

Note: Section 5.62(5) provides that a buy-back that contravenes subsection (3) is void.

5.32 Retention and inspection of share buy-back contracts

(1) This section applies to –

(*a*) a listed company that enters into a contract for the buy-back of its own shares that is authorized under section 5.35; and

(*b*) an unlisted company that –

(i) under an authorization under section 5.39, enters into a contract for the buy-back of its own shares;

(ii) under an authorization under section 5.42, agrees to a variation of a contract for the buy-back of its own shares;

(iii) under an authorization under section 5.46, agrees to release its rights under a contract for the buy-back of its own shares; or

(iv) under an authorization under section 5.49, agrees to a variation of an agreement to release its rights under a contract for the buy-back of its own shares.

(2) The company must keep at its registered office or at a place prescribed by regulations made under section 12.125 –

(*a*) a copy of the contract or agreement if it is in writing; and

(*b*) if not, a memorandum of its terms.

(3) The copy or memorandum must be kept from the conclusion of the contract or agreement until the end of the period of 10 years beginning on the day on which the buy-back of all the shares under the contract is completed or the day on which the contract otherwise terminates.

(4) Subject to subsection (5), the company must make the copy or memorandum available during business hours for inspection without charge by –

(*a*) a member of the company; and

(*b*) any other person, in the case of a listed company.

(5) The company may, by resolution, impose reasonable restrictions on the making available of the copy or memorandum for inspection, as long as not less than 2 hours per day are allowed for inspection.

(6) If a company contravenes subsection (2) or (3), or if an inspection required under subsection (4) is refused, 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) In the case of a refusal of an inspection required under subsection (4), the Court of First Instance may by order compel an immediate inspection.

(8) In this section –

"contract" (合約) includes a contingent buy-back contract.

Subdivision 3 – Share Buy-backs: Listed Companies

5.33 Share buy-back under general offer

(1) A listed company may buy back its own shares under a general offer that is authorized in advance by resolution of the company.

(2) The company must include with the notice of the proposed resolution –

(*a*) a copy of the document containing the proposed general offer; and

(*b*) a statement, signed by the directors of the company, containing information that would enable a reasonable person to form a valid and justifiable opinion as to the merits of the offer.

(3) If, under the proposed general offer, a member of the company may be compelled to dispose of the member's shares under Division 5 of Part 13 (compulsory acquisition after general offer for share buy-back) –

(*a*) the company must appoint an independent investment adviser to advise members who may be affected by the compulsory disposal on the merits of the offer; and

(*b*) the resolution authorizing the offer must be a special resolution on which no non-tendering member votes.

(4) A person is eligible for appointment as an investment adviser under subsection (3)(*a*) only if –

(*a*) the person is a corporation licensed to carry on, or an authorized financial institution registered for carrying on, a business in advising on securities or advising on corporate finance under Part V of the Securities and Futures Ordinance (Cap. 571); and

(*b*) the person is not –

(i) a member, officer, shadow director or employee of the company making the general offer or of an associated company of that company; or

(ii) an associated company of the company making the general offer.

(5) For the purposes of a special resolution referred to in subsection (3)(*b*) –

(*a*) a non-tendering member is regarded as voting not only if the non-tendering member votes on a poll on the question whether the resolution should be passed but also if the

non-tendering member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(6) In this section –

"general offer" (公開要約) has the meaning given by section 13.40;

"non-tendering member" (不售股成員) has the meaning given by section 13.38.

5.34 Share buy-back on recognized stock market or approved stock exchange

(1) A listed company may buy back its own shares on a recognized stock market or on an approved stock exchange if the buy-back is authorized in advance by resolution of the company.

(2) The company must include a memorandum of the terms of the proposed buy-back with the notice of the proposed resolution.

(3) A resolution authorizing a buy-back under this section is valid for the period expiring on the date of the next annual general meeting of the company, and that period may be extended by the company at that annual general meeting until the date of the following annual general meeting.

(4) In this section –

"approved stock exchange" (核准證券交易所) means a stock exchange approved for the purposes of this section by notice published in the Gazette by –

(*a*) the Commission; and

(*b*) the recognized exchange company that operates the recognized stock market on which the shares concerned are listed.

5.35 Share buy-back otherwise than under section 5.33 or 5.34

(1) A listed company may buy back its own shares otherwise than under section 5.33 or 5.34 if the contract for buy-back of the shares is authorized in advance by special resolution of the company.

(2) A contract may take the form of a contingent buy-back contract.

(3) The company must include with the notice of the proposed special resolution –

(*a*) a copy of the proposed contract or, if it is not in writing, a memorandum of its terms; and

(*b*) a statement, signed by the directors of the company, after having made due and diligent inquiry of the members of the company holding the shares to which the proposed contract relates, containing information that would enable a reasonable person to form a valid and justifiable opinion as to the merits of the contract.

(4) A special resolution under this section is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(5) For the purposes of subsection (4) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(6) A special resolution under this section is not effective if a demand for a poll referred to in subsection (5)(*b*) is refused.

5.36 Exemptions

(1) The Commission may exempt any listed company from any of the provisions of section 5.33, 5.34 or 5.35, subject to any conditions it thinks fit.

(2) The Commission may –

(*a*) suspend or withdraw an exemption granted under subsection (1) on the ground that the conditions subject to which the exemption was granted have not been complied with or on any other ground the Commission thinks fit; or

(*b*) vary any condition imposed under subsection (1).

5.37 No assignment of right to buy back own shares

The following rights of a listed company are not capable of being assigned –

(*a*) rights under a general offer authorized under section 5.33;

(*b*) rights under a buy-back on a recognized stock market or on an approved stock exchange authorized under section 5.34;

(*c*) rights under a contract authorized under section 5.35.

Note: A contract authorized under section 5.35 includes a contingent buy-back contract authorized under that section (see section 5.35(2)).

5.38 Release of right to buy back own shares

(1) An agreement by a listed company to release its rights under a contract authorized under section 5.35 or under a general offer authorized under

section 5.33 is void unless the terms of the release agreement are authorized in advance by special resolution of the company.

(2) Section 5.35(3), (4), (5) and (6) applies to the authorization for a proposed release agreement as it applies to the authorization for a proposed contract under section 5.35.

Subdivision 4 – Share Buy-backs: Unlisted Companies

5.39 Share buy-back under contract

(1) An unlisted company may buy back its own shares under a contract that is authorized in advance by special resolution of the company.

(2) A contract may take the form of a contingent buy-back contract.

(3) The authorization for a contract may be varied, revoked or from time to time renewed by a special resolution of the company.

(4) A special resolution conferring, varying, revoking or renewing the authorization for a contract is subject to sections 5.40 and 5.41.

5.40 Resolution authorizing contract: disclosure of contract details

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a contract under section 5.39.

(2) A copy of the proposed contract (if it is in writing) or a memorandum setting out its terms (if it is not) must be made available to members –

(*a*) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(*b*) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section

12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed contract relates.

(4) A copy of a proposed contract made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed contract.

(5) The special resolution is not effective if the requirements of this section are not complied with.

5.41 Resolution authorizing contract: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a contract under section 5.39.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be

passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(*b*) is refused.

5.42 Variation of authorized contract

(1) An unlisted company may agree to a variation of a contract authorized under section 5.39 if the variation agreement is authorized in advance by special resolution of the company.

(2) The authorization for a variation agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a variation agreement is subject to sections 5.43 and 5.44.

5.43 Resolution authorizing variation: disclosure of details of variation

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.42.

(2) A copy of the proposed variation agreement (if it is in writing) or a memorandum giving details of the proposed variation agreement (if it is not) must be made available to members –

(*a*) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(*b*) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section 12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original contract or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed variation agreement relates.

(5) A copy of a proposed variation agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed variation agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

5.44 Resolution authorizing variation: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.42.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(*b*) is refused.

5.45 No assignment of right to buy back own shares

The rights of an unlisted company under a contract authorized under section 5.39 (as varied from time to time under section 5.42) are not capable of being assigned.

5.46 Release of right to buy back own shares

(1) An agreement by an unlisted company to release its rights under a contract authorized under section 5.39 (as varied from time to time under section 5.42) is void unless the terms of the release agreement are authorized in advance by special resolution of the company.

(2) The authorization for a release agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a release agreement is subject to sections 5.47 and 5.48.

5.47 Resolution authorizing release: disclosure of details of release

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a release agreement under section 5.46.

(2) A copy of the proposed release agreement (if it is in writing) or a memorandum giving details of the proposed release agreement (if it is not) must be made available to members –

(*a*) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(*b*) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section 12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original contract or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed release agreement relates.

(5) A copy of a proposed release agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed release agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

5.48 Resolution authorizing release: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a release agreement under section 5.46.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(*b*) is refused.

5.49 Variation of release of right to buy back own shares

(1) An unlisted company may agree to a variation of a release agreement authorized under section 5.46 if the variation agreement is authorized in advance by special resolution of the company.

(2) The authorization for a variation agreement may be varied, revoked or from time to time renewed by special resolution of the company.

(3) A special resolution conferring, varying, revoking or renewing the authorization for a variation agreement is subject to sections 5.50 and 5.51.

5.50 Resolution authorizing variation of release: disclosure of details of variation

(1) This section applies in relation to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.49.

(2) A copy of the proposed variation agreement (if it is in writing) or a memorandum giving details of the proposed variation agreement (if it is not) must be made available to members –

(*a*) in the case of a written resolution, by being sent to every member of the company at or before the time when the proposed resolution is sent to them; or

(*b*) in the case of a resolution proposed at a meeting, by being made available for inspection by members of the company –

(i) at the company's registered office or at a place prescribed by regulations made under section

12.125, for a period of not less than 15 days ending on the date of the meeting; and

(ii) at the meeting.

(3) There must also be made available to members in accordance with subsection (2) a copy of the original release agreement or memorandum, together with any variations previously made.

(4) A memorandum referred to in subsection (2) must include the names of members holding shares to which the proposed variation agreement relates.

(5) A copy of a proposed variation agreement made available under subsection (2) must have annexed to it a memorandum specifying any of those names that do not appear in the proposed variation agreement.

(6) The special resolution is not effective if the requirements of this section are not complied with.

5.51 Resolution authorizing variation of release: exercise of voting rights

(1) This section applies to a special resolution to confer, vary, revoke or renew the authorization for a variation agreement under section 5.49.

(2) If the special resolution is proposed as a written resolution, a member holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(3) If the special resolution is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(4) For the purposes of subsection (3) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(5) The special resolution is not effective if a demand for a poll referred to in subsection (4)(*b*) is refused.

Subdivision 5 – Payment for Share Redemptions and Buy-backs

5.52 Payment for redemption or buy-back

(1) If a company redeems or buys back its own shares, the shares must be paid for on redemption or buy-back.

(2) Subject to subsections (3) and (4), a company may make a payment in respect of a redemption or buy-back of its own shares –

(*a*) out of the company's distributable profits;

(*b*) out of the proceeds of a fresh issue of shares made for the purpose of the redemption or buy-back; or

(*c*) out of capital in accordance with this Subdivision.

(3) A listed company must not make a payment out of capital in respect of a buy-back of its own shares on a recognized stock market or on an approved stock exchange under section 5.34.

(4) Subject to subsection (3), a payment referred to in subsection (5) may be made by a company only –

(*a*) out of the company's distributable profits; or

(*b*) out of capital in accordance with this Subdivision.

(5) Subsection (4) applies to a payment by a company in consideration of any of the following –

(*a*) the company acquiring any right with respect to the buy-back of its own shares under Subdivision 3 or 4;

(*b*) the variation of a contract authorized under Subdivision 4;

(*c*) the release of any of the company's rights with respect to the buy-back of any of its own shares under Subdivision 3 or 4; or

(*d*) the variation of the release of any of the company's rights with respect to the buy-back of any of its own shares under Subdivision 4.

5.53 Special resolution for payment out of capital

(1) Subject to section 5.52(3), a company may make a payment out of capital in respect of the redemption or buy-back of its own shares by special resolution in accordance with this Subdivision.

(2) Subject to section 5.58, the payment out of capital and the redemption or buy-back must be made no earlier than 5 weeks and no later than 7 weeks after the date of the special resolution.

Note: The Court of First Instance has power to alter or extend this period (see section 5.60).

5.54 Solvency statement

(1) All directors of the company must make a solvency statement that complies with Division 2 in relation to the payment out of capital.

(2) The special resolution for payment out of capital must be passed within 15 days after the date of the solvency statement.

(3) If the special resolution is proposed as a written resolution, a copy of the solvency statement must be sent to every member of the company at or before the time when the proposed resolution is sent to them.

(4) If the special resolution is proposed at a meeting, a copy of the solvency statement must be made available for inspection by members at the meeting.

(5) The special resolution is not effective if subsection (3) or (4) (as applicable) is not complied with.

5.55 Special resolution: exercise of voting rights

(1) If the special resolution for payment out of capital is proposed as a written resolution, a member of the company holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(2) If the special resolution for payment out of capital is proposed at a meeting, the resolution is not effective if –

(*a*) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and

(*b*) the resolution would not have been passed if the member had not done so.

(3) For the purposes of subsection (2) –

(*a*) a member holding shares to which the resolution relates is regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;

(*b*) any member of the company may demand a poll on that question; and

(*c*) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.

(4) The special resolution is not effective if a demand for a poll referred to in subsection (3)(*b*) is refused.

(5) This section does not apply to a buy-back by a listed company under a general offer in accordance with section 5.33.

5.56 Public notice of payment out of capital

(1) Within one week after the date of the special resolution for payment out of capital, the company must publish a notice in the Gazette –

(*a*) stating that the company has approved a payment out of capital;

(*b*) specifying the amount of the payment out of capital and the date of the special resolution;

(*c*) stating where the special resolution and solvency statement are available for inspection; and

(*d*) stating that a member of the company who did not consent to or vote in favour of the special resolution or a creditor of the company may, within 5 weeks after the date of the special resolution, apply to the Court of First Instance under section 5.58 for cancellation of the special resolution.

(2) Within one week after the date of the special resolution, the company must also –

(*a*) publish a notice to the same effect as the notice under subsection (1) in at least one specified Chinese language newspaper and at least one specified English language newspaper; or

(*b*) give written notice to that effect to each of its creditors.

(3) If the 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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

(4) The company must deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company –

(*a*) publishes the notice under subsection (1); or

(*b*) if earlier, first publishes the notice or gives notice to creditors under subsection (2).

(5) If the 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 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

5.57 Inspection of special resolution and solvency statement

(1) The company must ensure that the special resolution for payment out of capital and the solvency statement made in relation to it are kept at its registered office or at a place prescribed by regulations made under section 12.125 for the period –

(*a*) beginning on the day on which the company –

(i) publishes the notice under section 5.56(1); or

(ii) if earlier, first publishes the notice or gives notice to creditors under section 5.56(2); and

(*b*) ending 5 weeks after the date of the special resolution.

(2) The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period.

(3) If the 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.

(4) If the company contravenes subsection (2), the Court of First Instance may by order require the company to permit an immediate inspection.

5.58 Application to Court by members or creditors

(1) Subject to subsection (2), a member or creditor of the company may apply to the Court of First Instance, within 5 weeks after the date of the special resolution for payment out of capital, for cancellation of the resolution.

(2) A member who consented to or voted in favour of the special resolution is not entitled to apply.

(3) An application may be made on behalf of the persons entitled to apply by any one or more of them appointed in writing by all of them for the purpose.

(4) If an application is made under this section –

(*a*) the applicant must, as soon as possible, serve the application on the company; and

(*b*) the company must give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company.

(5) If the company contravenes subsection (4)(*b*), 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.

5.59 Power to adjourn proceedings

(1) The Court of First Instance may adjourn proceedings on an application under section 5.58 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members or dissentient creditors.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.60 Court's power to confirm or cancel special resolution

(1) On an application under section 5.58, the Court of First Instance must make an order confirming or cancelling the special resolution for payment out of capital, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the special resolution, it may by order alter or extend any date or period of time specified –

(*a*) in the special resolution; or

(*b*) in any provision of this Division applying to the special resolution, the payment out of capital or the redemption or buy-back.

(3) If the Court of First Instance thinks fit, the order may –

(*a*) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;

(*b*) provide for the protection of the interests of members or creditors of the company;

(*c*) make any alteration to the company's articles that may be required as a consequence;

(*d*) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.59.

5.61 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.60, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) If the 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.

Subdivision 6 – General Provisions

5.62 General prohibition on acquisition of own shares

(1) Except as provided by this Ordinance, a company must not acquire its own shares, whether by redemption, buy-back, subscription or otherwise.

(2) If a company contravenes subsection (1), an offence is committed by –

(*a*) the company;

(*b*) every responsible person of the company; and

(*c*) every non-tendering member of the company (as defined by section 13.38) who knowingly permits the contravention.

(3) A person who commits an offence under subsection (2) is liable –

(*a*) on conviction on indictment to a fine of $1,250,000 and to imprisonment for 5 years; or

(*b*) on summary conviction to a fine of $150,000 and to imprisonment for 12 months.

(4) Subject to subsection (5) and Division 2 of Part 14 (remedies for unfair prejudice to members' interests), a redemption or buy-back of shares by a company under this Division is not void only because of a failure to comply with this Division.

(5) A buy-back that contravenes section 5.31(3) is void.

5.63 No redemption or buy-back of unpaid or partly-paid shares

A company must not redeem or buy back its own shares unless they are fully paid.

5.64 Effect of redemption or buy-back

(1) Shares redeemed or bought back under this Division are regarded as cancelled on redemption or buy-back.

(2) On redemption or buy-back of its own shares, a company must –

(*a*) reduce the amount of its share capital if the shares were redeemed or bought back out of capital;

(*b*) reduce the amount of its profits if the shares were redeemed or bought back out of profits; or

(*c*) reduce the amount of its share capital and profits proportionately if the shares were redeemed or bought back out of both capital and profits,

by the total amount of the price paid by the company for the shares.

5.65 Fresh issue of shares before redemption or buy-back

(1) If a company is about to redeem or buy back its own shares, the company may issue shares up to the value of the shares to be redeemed or bought back as if those shares had never been issued.

(2) If new shares are issued before the redemption or buy-back of existing shares, the new shares are regarded for the purposes of the Eighth Schedule to the predecessor Ordinance as not having been issued under

subsection (1) unless the existing shares are redeemed or bought back within one month after the issue of the new shares.

5.66 Return of share redemption or buy-back

(1) A company that redeems or buys back any shares under this Division must, within 14 days after the date on which the shares are delivered to the company, deliver a return to the Registrar for registration.

(2) The return –

(*a*) must be in the specified form;

(*b*) must set out, for the shares of each class redeemed or bought back –

(i) the number of shares and the aggregate amount paid by the company for them; and

(ii) the date on which they were delivered to the company;

(*c*) must contain a statement of capital, as at the time immediately after the redemption or buy-back, that complies with section 4.69;

(*d*) in the case of a listed company, must also state the maximum and minimum prices paid in respect of the shares of each class redeemed or bought back; and

(*e*) in the case of a redemption or buy-back financed by a payment out of capital, must also state particulars of the payment including the date and amount of the payment.

Note: If the redemption or buy-back results in an alteration of the company's articles, the company is also required to notify the Registrar of the alteration within 15 days after it takes effect (see section 3.27).

(3) Details of shares delivered to the company on different dates and under different contracts may be included in a single return. If this is done, the amount required to be stated under subsection (2)(*b*)(i) is the aggregate amount paid by the company for all the shares to which the return relates.

(4) If the 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 6 and, in the case of a continuing offence, to a further fine of $2,000 for each day during which the offence continues.

5.67 Effect of company's failure to redeem or buy back

(1) This section applies if, under this Division, a company –

(*a*) issues redeemable shares; or

(*b*) agrees to buy back any of its own shares.

(2) The company is not liable in damages for any failure on its part to redeem or buy back any of the shares.

(3) Subsection (2) is without prejudice to any right of the holder of the shares other than the right to sue the company for damages for the failure.

(4) A court must not grant an order for specific performance of the terms of the redemption or buy-back if the company shows that it is unable to make a payment in respect of the redemption or buy-back out of distributable profits.

5.68 Effect on a winding up of company's failure to redeem or buy back

(1) This section applies if–

(*a*) a company –

(i) issues redeemable shares under this Division; or

(ii) agrees to buy back any of its own shares under this Division;

(*b*) the company is wound up; and

(*c*) at the commencement of the winding up any of those shares have not been redeemed or bought back.

(2) The terms of the redemption or buy-back may be enforced against the company.

(3) Subsection (2) does not apply if –

(*a*) the terms of the redemption or buy-back provided for the redemption or buy-back to take place at a date later than that of the commencement of the winding up; or

(*b*) during the period –

(i) beginning on the day on which the redemption or buy-back was to have taken place; and

(ii) ending on the commencement of the winding up,

the company could not at any time have lawfully made a payment in respect of the redemption or buy-back out of distributable profits.

(4) Shares are regarded as cancelled when they are redeemed or bought back under subsection (2).

(5) The following must be paid in priority to any amount that the company is liable under subsection (2) to pay in respect of any shares –

(*a*) all other debts and liabilities of the company (other than any due to members in their capacity as such); and

(*b*) if other shares carry rights (whether as to capital or income) that are preferred to the rights as to capital attaching to those shares, any amount due in satisfaction of those preferred rights.

(6) Subject to subsection (5), any amount payable under subsection (2) must be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members.

(7) If, under section 264A of the Companies (Winding Up Provisions) Ordinance (Cap. 32)[1], a creditor of a company is entitled to payment of any interest only after payment of all other debts of the company, the company's

[1] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

debts and liabilities for the purposes of subsection (5) include the liability to pay that interest.

5.69 Power to modify by regulation

(1) The Chief Executive in Council may make regulations modifying any of the provisions of this Division with respect to –

(*a*) the authorization required for a company to buy back its own shares;

(*b*) the authorization required for the release by a company of its rights under a contract for the buy-back of its own shares, including a contingent buy-back contract; and

(*c*) the information to be included in a return by a company to the Registrar in relation to a share redemption or buy-back.

(2) Regulations made under this section –

(*a*) may make different provision for different cases or classes of cases; and

(*b*) may contain any further consequential provisions, and any incidental and supplementary provisions, that the Chief Executive in Council thinks fit.

(3) Regulations made under this section are subject to the approval of the Legislative Council.

Division 5 – Financial Assistance for Acquisition of Own Shares

Subdivision 1 – Preliminary

5.70 Interpretation

(1) In this Division –

"financial assistance" (資助) means –

(*a*) financial assistance given by way of gift;

(*b*) financial assistance given –

(i) by way of guarantee, security or indemnity (other than an indemnity in respect of the indemnifier's own neglect or default); or

(ii) by way of release or waiver;

(*c*) financial assistance given –

(i) by way of a loan or any other agreement under which any of the obligations of the person giving the assistance are to be fulfilled at a time when in accordance with the agreement any obligation of another party to the agreement remains unfulfilled; or

(ii) by way of the novation of, or the assignment of rights arising under, a loan or other agreement referred to in subparagraph (i); or

(*d*) any other financial assistance given by a company if –

(i) the net assets of the company are reduced to a material extent by the giving of the assistance; or

(ii) the company has no net assets;

"liabilities" (負債) includes any amount retained as reasonably necessary for the purpose of providing for any liability or loss that is –

(*a*) likely to be incurred; or

(*b*) certain to be incurred but uncertain as to the amount or as to the date on which it will arise;

"net assets" (淨資產) of a company that gives any financial assistance under this Division, means the amount by which the aggregate of the company's assets exceeds the aggregate of its liabilities (taking the amount of both assets and liabilities to be as stated in the company's accounting records immediately before the financial assistance is given).

(2) In this Division –

(*a*) a reference to a person incurring a liability includes the person changing their financial position by making an agreement or arrangement (whether enforceable or unenforceable, and whether made on the person's own account or with any other person) or by any other means; and

(*b*) a reference to a company giving financial assistance for the purpose of reducing or discharging a liability incurred by a person for the purpose of the acquisition of shares includes the company giving financial assistance for the purpose of wholly or partly restoring the person's financial position to what it was before the acquisition took place.

Subdivision 2 – General Prohibition on Financial Assistance for Acquisition of Own Shares

5.71 Prohibition on financial assistance for acquisition of shares or for reducing or discharging liability for acquisition

(1) If a person is acquiring or proposing to acquire shares in a company or its holding company, the company must not give financial assistance directly or indirectly for the purpose of the acquisition before or at the same time as the acquisition takes place, except as provided by this Division.

(2) If –

(*a*) a person has acquired shares in a company or its holding company; and

(*b*) any person has incurred a liability for the purpose of the acquisition,

the company must not give financial assistance directly or indirectly for the purpose of reducing or discharging the liability, except as provided by this Division.

(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 of $150,000 and to imprisonment for 12 months.

5.72 Consequences of failing to comply with Division

If a company gives financial assistance in contravention of this Division, the validity of the financial assistance and of any contract or transaction connected with it is not affected only because of the contravention.

Note: Offences may be committed by the company and a responsible person of the company for contravention of certain provisions of this Division (see for example section 5.71(3)).

Subdivision 3 – Exceptions from Prohibition

5.73 General exceptions

This Division does not prohibit any of the following transactions –

(*a*) the distribution of a company's assets –

(i) by way of dividend lawfully made; or

(ii) in the course of winding up the company;

(*b*) the allotment of bonus shares;

(*c*) the reduction of a company's share capital in accordance with Division 3;

(*d*) the redemption or buy-back of a company's own shares in accordance with Division 4;

(*e*) anything done in accordance with a court order under Division 2 of Part 13 (arrangements and compromises);

(*f*) anything done under an arrangement made under section 237 of the Companies (Winding Up Provisions) Ordinance (Cap. 32) (power of liquidator to accept shares, etc, as consideration for sale of property of company);

(*g*) anything done under an arrangement made between a company and its creditors that is binding on the creditors because of section 254 of the Companies (Winding Up Provisions) Ordinance (Cap. 32) (arrangement, when binding on creditors).

5.74 Principal purpose exception

This Division does not prohibit a company from giving financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition if –

(*a*) either –

(i) the company's principal purpose in giving the assistance is not to give it for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition; or

(ii) the giving of the assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for such an acquisition is only an incidental part of some larger purpose of the company; and

(*b*) the assistance is given in good faith in the interests of the company.

5.75 Exception for money lending businesses

Subject to section 5.78, this Division does not prohibit the lending of money by a company in the ordinary course of business if the lending of money is part of the ordinary business of the company.

5.76 Exception for employee share schemes

(1) Subject to section 5.78, this Division does not prohibit –

(*a*) the giving by a company, in good faith in the interests of the company, of financial assistance for the purposes of an employee share scheme; or

(*b*) the giving of financial assistance by a company for the purposes of, or in connection with, anything done by the company or another company in the same group of companies for the purposes of enabling or facilitating transactions in shares in the company or its holding company between, and involving the acquisition of beneficial ownership of those shares by –

(i) persons employed or formerly employed in good faith by that company or another company in the same group of companies; or

(ii) spouses, widows, widowers, or minor children of persons referred to in subparagraph (i).

(2) In this section –

"children" (子女) includes step-children and illegitimate children;

"employee share scheme" (僱員股份計劃) means a scheme for encouraging or facilitating the holding of shares in a company by or for the benefit of –

(*a*) persons employed or formerly employed in good faith by that company or another company in the same group of companies; or

(*b*) the spouses, widows, widowers, or minor children of persons referred to in paragraph (*a*);

"minor children" (未成年子女) means children who are under 18 years of age.

5.77 Exception for loans to employees

(1) Subject to section 5.78, this Division does not prohibit the making by a company of loans to its eligible employees for the purpose of enabling them to acquire fully paid shares in the company or its holding company to be held by them by way of beneficial ownership.

(2) In this section –

"child" (子女) includes step-child and illegitimate child;

"eligible employees" (合資格的僱員), in relation to a company, means persons employed in good faith by the company, other than –

(*a*) a director of the company;

(*b*) a director's spouse;

(*c*) a director's child who is under 18 years of age;

(*d*) a trustee of a trust (other than an employee share scheme as defined by section 5.76(2) or a pension scheme) –

(i) the beneficiaries of which include a person referred to in paragraph (*a*), (*b*) or (*c*); or

(ii) the terms of which confer a power on the trustees that may be exercised for the benefit of a person referred to in paragraph (*a*), (*b*) or (*c*); or

(*e*) a partner of a person referred to in paragraph (*a*), (*b*) or (*c*) or of a trustee referred to in paragraph (*d*).

5.78 Special restriction for listed companies

Section 5.75, 5.76 or 5.77 applies to a listed company only if –

(*a*) the company has net assets that are not reduced by the giving of the financial assistance; or

(*b*) to the extent that those assets are reduced, the assistance is provided by a payment out of distributable profits.

Subdivision 4 – Authorization for Giving Financial Assistance

5.79 Financial assistance not exceeding 5% of shareholders funds

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

(*a*) the directors resolve, before the assistance is given, that –

(i) the company should give the assistance;

(ii) giving the assistance is in the best interests of the company; and

(iii) the terms and conditions under which the assistance is to be given are fair and reasonable to the company;

(*b*) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;

(*c*) the aggregate amount of the assistance and any other financial assistance given under this section that has not been repaid does not exceed 5% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company (as that aggregate amount is disclosed in the most recent audited financial statement of the company);

(*d*) the company receives fair value in connection with the giving of the assistance; and

(*e*) the assistance is given not more than 12 months after the day on which the solvency statement is made under paragraph (*b*).

(2) The resolution of the directors under subsection (1)(*a*) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(*a*)(i), (ii) and (iii).

(3) Within 15 days after giving financial assistance under this section, the company must send to each member of the company a copy of the solvency statement made under subsection (1)(*b*) and a notice containing the following information –

(*a*) the class and number of shares in respect of which the assistance was given;

(*b*) the consideration paid or payable for those shares;

(*c*) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares;

(*d*) the nature, the terms and, if quantifiable, the amount of the assistance.

(4) If the 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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

5.80 Financial assistance with approval of all members

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

(*a*) the directors resolve, before the assistance is given, that –

(i) the company should give the assistance;

(ii) giving the assistance is in the best interests of the company; and

(iii) the terms and conditions under which the assistance is to be given are fair and reasonable to the company;

(*b*) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;

(*c*) the giving of the assistance is approved by written resolution of all members of the company before the assistance is given; and

(*d*) the assistance is given not more than 12 months after the day on which the solvency statement is made under paragraph (*b*).

(2) The resolution of the directors under subsection (1)(*a*) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(*a*)(i), (ii) and (iii).

5.81 Financial assistance by notice to members

(1) A company may give financial assistance for the purpose of the acquisition of a share in the company or its holding company or for the purpose of reducing or discharging a liability incurred for the purpose of such an acquisition if –

(*a*) the directors resolve, before the assistance is given, that –

(i) the company should give the assistance;

(ii) giving the assistance is in the best interests of the company and is of benefit to those members of the company not receiving the assistance; and

(iii) the terms and conditions under which the assistance is to be given are fair and reasonable to

the company and to those members not receiving the assistance;

(*b*) on the same day on which the directors pass the resolution, the directors who vote in favour of it make a solvency statement that complies with Division 2 in relation to the giving of the assistance;

(*c*) the company sends to each member of the company a copy of the solvency statement made under paragraph (*b*) and a notice containing the following information –

(i) the nature and terms of the assistance and the name of the person to whom it will be given;

(ii) if it will be given to a nominee for another person, the name of that other person;

(iii) the text of the resolution of the directors;

(iv) any further information and explanation that would be necessary for a reasonable member to understand the nature of the assistance and the implications of giving it for the company and the members; and

(*d*) the assistance is given –

(i) not less than 28 days after the day on which the notice and copy of the solvency statement are sent to members under paragraph (*c*); and

(ii) not more than 12 months after the day on which the solvency statement is made under paragraph (*b*).

(2) The resolution of the directors under subsection (1)(*a*) must set out in full the grounds for their conclusions as to the matters referred to in subsection (1)(*a*)(i), (ii) and (iii).

5.82 Application to court for restraining order

(1) Within 28 days after the day on which a company sends a notice and copy of a solvency statement to members under section 5.81(1)(*c*), a member of the company or the company may apply to the Court of First Instance for an order restraining the giving of financial assistance on the ground that –

(*a*) the giving of the assistance is not –

(i) in the best interests of the company; or

(ii) of benefit to those members of the company not receiving the assistance; or

(*b*) the terms and conditions under which the assistance is to be given are not fair and reasonable to –

(i) the company; or

(ii) those members not receiving the assistance.

(2) If an application is made under this section –

(*a*) the applicant must, as soon as possible, serve the application on the company (unless the company is the applicant); and

(*b*) the company must give the Registrar notice in the specified form of the application –

(i) within 7 days after the day on which the application is served on the company; or

(ii) if the company is the applicant, within 7 days after the day on which the application is made.

(3) If the company contravenes subsection (2)(*b*), 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.

5.83 Power to adjourn application

(1) The Court of First Instance may adjourn proceedings on an application under section 5.82 so that an arrangement may be made to the Court's satisfaction for the protection of the interests of dissentient members.

(2) The Court of First Instance may give any directions and make any orders it thinks expedient for facilitating or carrying into effect any such arrangement.

5.84 Court's power to confirm or restrain giving of financial assistance

(1) On an application under section 5.82, the Court of First Instance must make an order confirming or restraining the giving of financial assistance, and may do so on any terms and conditions it thinks fit.

(2) If the Court of First Instance confirms the giving of financial assistance, it may by order alter or extend any date or period of time specified –

(*a*) in the directors' resolution under section 5.81(1)(*a*); or

(*b*) in any provision of this Division applying to the giving of financial assistance.

(3) If the Court of First Instance thinks fit, the order may –

(*a*) provide for the company to buy back the shares of any of its members and for the reduction accordingly of the company's share capital;

(*b*) make any alteration to the company's articles that may be required as a consequence;

(*c*) require the company not to make any, or any specified, alteration to its articles.

(4) If the order of the Court of First Instance requires the company not to make any, or any specified, alteration to its articles, the company does not have power to make any such alteration without leave of the Court.

(5) The powers of the Court of First Instance under this section do not limit its powers under section 5.83.

5.85 Company to deliver copy of court order to Registrar

(1) Within 15 days after the making of an order by the Court of First Instance under section 5.84, or within any longer period ordered by the Court, the company must deliver an office copy of the order to the Registrar for registration.

Note: If the order of the Court of First Instance makes an alteration to the company's articles, the company is also required to notify the Registrar of the alteration under section 3.34.

(2) If the 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.

Division 6 – Transitional and Saving

5.86 Redeemable shares issued before commencement

Any redeemable preference shares issued before the commencement of the Companies (Amendment) Ordinance 1991 (77 of 1991) and any redeemable shares issued after that commencement but before the commencement of section 5.29 (issue of redeemable shares) may be redeemed in accordance with this Ordinance.

5.87 Effect of company's failure to redeem or buy back

Sections 5.67 (effect of company's failure to redeem or buy back) and 5.68 (effect on a winding up of company's failure to redeem or buy back) do not apply in relation to any redeemable preference shares issued before the commencement of the Companies (Amendment) Ordinance 1991 (77 of 1991).

5.88 Reduction of share capital confirmed by the Court

(1) Despite their repeal, sections 58 (so far as it relates to a reduction of share capital), 59, 60, 61, 61A, 62 and 63 of the predecessor Ordinance continue to apply in relation to a resolution for reducing share capital that was passed under section 58(1) of the predecessor Ordinance before the commencement of Subdivision 3 of Division 3 of this Part.

(2) Division 3 of this Part does not apply to a reduction of share capital referred to in subsection (1).

5.89 Share buy-backs

(1) An authorization by a listed company that was in force under section 49BA(2)(*a*) or (7) of the predecessor Ordinance immediately before the commencement of section 5.33 (share buy-back under general offer) continues in force and has effect as if it were an authorization under section 5.33.

(2) An authorization by a listed company that was in force under section 49BA(2)(*b*) of the predecessor Ordinance immediately before the commencement of section 5.34 (share buy-back on recognized stock market or approved stock exchange) continues in force and has effect as if it were an authorization under section 5.34.

(3) An authorization by a listed company that was in force under section 49BA(5) or 49E(2) of the predecessor Ordinance immediately before the commencement of section 5.35 (share buy-back otherwise than under section 5.33 or 5.34) continues in force and has effect as if it were an authorization under section 5.35.

(4) An authorization by a listed company that was in force under section 49F(3) of the predecessor Ordinance immediately before the commencement of section 5.38 (release of right to buy back own shares) continues in force and has effect as if it were an authorization under section 5.38.

(5) An authorization by an unlisted company that was in force under section 49D or 49E(3) of the predecessor Ordinance immediately before the

commencement of section 5.39 (share buy-back under contract) continues in force and has effect as if it were an authorization under section 5.39 and may be varied, revoked or from time to time renewed accordingly.

(6) An authorization by an unlisted company that was in force under section 49F(2) of the predecessor Ordinance immediately before the commencement of section 5.46 (release of right to buy back own shares) continues in force and has effect as if it were an authorization under section 5.46 and may be varied, revoked or from time to time renewed accordingly.

5.90 Payment out of capital for share redemption or buy-back

(1) Despite their repeal, sections 49I, 49J, 49K, 49L, 49M, 49N, 49O and 58(1A), (1B), (1C) and (1D) of the predecessor Ordinance continue to apply in relation to a payment out of capital for the redemption or purchase by a private company of its own shares if the directors' statement under section 49K of the predecessor Ordinance was made before the commencement of Subdivision 5 of Division 4 of this Part.

(2) Subdivision 5 of Division 4 of this Part does not apply to a payment out of capital referred to in subsection (1).

5.91 Financial assistance by unlisted company for acquisition of its own shares

(1) Despite their repeal, sections 47E, 47F, 47G and 48 of the predecessor Ordinance continue to apply in relation to the giving of financial assistance by an unlisted company if the directors' statement under section 47E(6) of the predecessor Ordinance was made before the commencement of Subdivision 2 of Division 5 of this Part.

(2) Subdivision 2 of Division 5 of this Part does not apply to the giving of financial assistance referred to in subsection (1).

5.92 Specified newspapers

Until the Chief Secretary for Administration publishes a list of Chinese language newspapers and English language newspapers in the Gazette under section 5.1(2), a Chinese language newspaper or an English language newspaper specified in the list of newspapers last published under section 71A(3)(*a*) of the predecessor Ordinance is taken to be a specified Chinese language newspaper or a specified English language newspaper (as the case may be) for the purposes of this Part.

PART 6

DISTRIBUTION OF PROFITS AND ASSETS

Division 1 – Preliminary

6.1 Interpretation

(1) In this Part –

"called up share capital" (已催繳股本), in relation to a company, means so much of its share capital as equals the aggregate amount of the calls made on its shares (whether or not those calls have been paid), together with –

(*a*) any share capital paid up without being called; and

(*b*) any share capital to be paid on a specified future date under the articles, the terms of allotment of the relevant shares, or any other arrangements for payment of those shares,

and "uncalled share capital" (未催繳股本) is to be read accordingly;

"capitalization" (資本化), in relation to a company's profits, means any of the following operations (whenever carried out) –

(*a*) applying the profits in wholly or partly paying up unissued shares in the company to be allotted to members of the company as fully or partly paid bonus shares; or

(*b*) transferring the profits to share capital;

"distribution" (分派) means every description of distribution of a company's assets to its members, whether in cash or otherwise, except distribution by way of –

(*a*) an issue of shares as fully or partly paid bonus shares;

(*b*) a redemption or buy-back of any shares in the company out of capital (including the proceeds of any fresh issue of

shares), or out of unrealized profits, in accordance with Division 4 of Part 5;

(*c*) a reduction of share capital by extinguishing or reducing any member's liability on any of the company's shares in respect of share capital not paid up, or by repaying paid up share capital;

(*d*) a distribution of assets to the members on the company's winding up; or

(*e*) financial assistance given by the company to a member under section 5.79, 5.80 or 5.81;

"financial assistance" (資助) has the meaning given by section 5.70(1);

"financial items" (財務項目) means all of the following –

(*a*) profits, losses, assets and liabilities;

(*b*) provisions;

(*c*) share capital and reserves (including undistributable reserves);

"net assets" (淨資產), in relation to a company, means the aggregate of the company's assets less the aggregate of its liabilities;

"undistributable reserves" (不可分派的儲備), in relation to a company, means –

(*a*) subject to subsection (2), the amount by which the company's accumulated, unrealized profits, so far as not previously utilized by capitalization, exceeds its accumulated, unrealized losses, so far as not previously written off in a reduction or reorganization of capital; or

(*b*) any other reserve that the company is prohibited from distributing by an Ordinance (other than this Part) or by its articles.

(2) In paragraph (*a*) of the definition of "undistributable reserves" in subsection (1), a reference to capitalization excludes a transfer of profits of the company to its capital redemption reserve on or after 1 September 1991.

(3) In this Part –

(*a*) a reference to profits of any particular description is a reference to profits of that description made at any time; and

(*b*) a reference to losses of any particular description is a reference to losses of that description made at any time.

(4) For the purposes of this Part, a financial statement is a referential financial statement if the distribution in question is made pursuant to determinations made by reference to financial items as stated in the financial statement under section 6.11.

6.2 Realized profits and losses

(1) In this Part, a reference to realized profits or realized losses of a company is a reference to those profits or losses of the company that are treated as realized profits or realized losses for the purpose of any financial statement of the company in accordance with principles generally accepted, at the time when the financial statement is prepared, with respect to the determination for accounting purposes of realized profits or realized losses.

(2) Subsection (1) does not affect any specific provision (whether in an Ordinance or otherwise) for the treatment of profits or losses of any description as realized.

(3) If, after making all reasonable enquiries, a company's directors are unable to determine whether or not a particular profit or loss made before 1 September 1991 is realized, they may treat the profit as realized, and the loss as unrealized, for the purposes of this Part.

6.3 Certain amount treated as realized profit or loss

(1) For the purposes of this Part, a provision other than an amount specified in subsection (2) is treated as a realized loss.

(2) The amount is one written off or retained by way of providing for a diminution in value of a fixed asset appearing on a revaluation of –

(*a*) all of the company's fixed assets; or

(*b*) all of the company's fixed assets other than goodwill.

(3) For the purposes of subsection (2), any consideration by the directors of the value at a particular time of a fixed asset is regarded as a revaluation of the asset if –

(*a*) in the case of a listed company, the conditions specified in subsection (4)(*a*) and (*b*) are satisfied; or

(*b*) in the case of any other company –

(i) where the referential financial statement is the financial statement specified in section 6.13, the conditions specified in subsection (4)(*a*) and (*b*) are satisfied; or

(ii) where the referential financial statement is the financial statement specified in section 6.14 or 6.15, the condition specified in subsection (4)(*a*) is satisfied.

(4) The conditions are –

(*a*) the directors are satisfied that the aggregate value at that time of the company's fixed assets is not less than the aggregate amount at which they are for the time being stated in a financial statement of the company; and

(*b*) it is stated in a note to the referential financial statement that –

(i) the directors have considered the value of the company's fixed assets without actually revaluing them;

(ii) the directors are satisfied that the aggregate value at the time of consideration of those assets is or was not less than the aggregate amount at which they are or were for the time being stated in a financial statement of the company; and

(iii) accordingly, by virtue of this subsection, amounts are stated in the referential financial statement on the basis that a revaluation of the company's fixed assets is regarded as having taken place at that time.

(5) For the purposes of this Part, if –

(*a*) on the revaluation of a fixed asset, an unrealized profit is shown to have been made; and

(*b*) on or after the revaluation, a sum is written off or retained for depreciation of the fixed asset over a period,

the amount by which the sum exceeds the projected sum in relation to the depreciation of that asset over the period is treated as a realized profit made over the period.

(6) In determining whether a company has made a profit or loss on an asset for the purposes of subsection (5), the value given to the asset in the earliest available record of its value made on or after its acquisition by the company is to be regarded as the cost of the asset if –

(*a*) there is no record of the original cost of the asset; or

(*b*) a record of the original cost of the asset cannot be obtained without unreasonable expense or delay.

(7) In subsection (5) –

"projected sum" (預計款項), in relation to a depreciation of a fixed asset, means a sum that would have been written off or retained for depreciation if the revaluation of the asset had not been made.

(8) For the purposes of this section, an asset of a company is regarded as a fixed asset if it is intended for use in the company's activities, or otherwise to be held for the purpose of the company's activities, on a continuing basis.

6.4 Certain amount relating to insurance company with long term business treated as realized profit or loss

(1) This section applies to a company that is an insurer and carries on long term business.

(2) For the purposes of this Part –

(*a*) an amount properly transferred to the statement of comprehensive income of the company from a surplus in the fund maintained by it in respect of the long term business is treated as a realized profit; and

(*b*) a deficit in that fund is treated as a realized loss.

(3) Subject to subsection (2), any profit or loss arising in the company's long term business is to be disregarded for the purposes of this Part.

(4) In this section –

(*a*) a reference to a surplus in a fund maintained by a company is a reference to an excess of the assets representing the fund over the company's liabilities attributable to its long term business, as shown by an actuarial investigation; and

(*b*) a reference to a deficit in such a fund is a reference to an excess of those liabilities over those assets, as shown by an actuarial investigation.

(5) In this section –

"actuarial investigation" (精算調查) means an investigation –

(*a*) made under section 18 of the Insurance Companies Ordinance (Cap. 41); or

(*b*) made pursuant to a requirement imposed under section 32 of that Ordinance;

"insurer" (保險人) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41);

"long term business" (長期業務) has the meaning given by section 2(1) of the Insurance Companies Ordinance (Cap. 41).

6.5 Distribution in kind: certain amount treated as realized profit

If a company makes a distribution consisting of or including a non-cash asset, and any part of the amount at which the asset is stated in the referential financial statement represents an unrealized profit, that part of that amount is treated as a realized profit for the purpose of determining, before or after the distribution, whether or not the distribution is made in contravention of section 6.6, 6.7 or 6.8.

Division 2 – Prohibitions and Restrictions

6.6 Prohibition on certain distributions

(1) A company may only make a distribution out of profits available for distribution.

(2) For the purposes of this section, a company's profits available for distribution are its accumulated, realized profits, so far as not previously utilized by distribution or capitalization, less its accumulated, realized losses, so far as not previously written off in a reduction or reorganization of capital.

6.7 Listed company may only make certain distributions

(1) A listed company may only make a distribution –

(*a*) if the amount of its net assets is not less than the aggregate of its called up share capital and undistributable reserves; and

(*b*) if, and to the extent that, the distribution does not reduce the amount of those assets to an amount less than that aggregate.

(2) A listed company must not include any uncalled share capital as an asset for the purpose of determining the amount of its net assets under this section.

6.8 Restriction on application of unrealized profits

A company must not apply an unrealized profit in paying up debentures or in paying up any amount unpaid on its issued shares.

6.9 Financial Secretary may modify or exempt requirement in relation to investment company

(1) On application by an investment company, the Financial Secretary may –

(*a*) modify, in relation to the company, the requirement of section 6.6, 6.7 or 6.8; or

(*b*) exempt the company from any such requirement.

(2) The Financial Secretary may make a modification or exemption under subsection (1) subject to any terms and conditions that the Financial Secretary thinks fit.

(3) In this section –

"investment company" (投資公司) means a listed company whose principal business consists of investing its funds in securities, land or other assets with the aim of –

(*a*) spreading investment risk; and

(*b*) giving its members the benefit of the results of the management of the assets.

6.10 Consequences of unlawful distribution

(1) This section applies if –

(*a*) a company makes a distribution, or part of a distribution, to one of its members in contravention of –

(i) section 6.6, 6.7 or 6.8; or

(ii) a requirement of that section as modified under section 6.9; and

(*b*) at the time of the distribution, the member knows or has reasonable grounds for believing that the distribution, or that part of the distribution (as the case may be) is made in contravention of that section or modified requirement.

(2) If the distribution is made in cash, the member is liable to repay the distribution, or that part of the distribution (as the case may be) to the company.

(3) If the distribution is made otherwise than in cash, the member is liable to pay to the company a sum equal to the value of the distribution or that part of the distribution (as the case may be) at the time of the distribution.

(4) This section does not affect any obligation otherwise imposed on a member of a company to repay a distribution unlawfully made to the member.

(5) This section does not apply in relation to –

(*a*) any payment made by a company in respect of the redemption or buy-back by the company of shares in itself; or

(*b*) any financial assistance given by a company in contravention of section 5.71.

Division 3 – Provisions Supplementary to Division 2

6.11 Justification of distribution by reference to financial statement

The amount of a distribution that may be made without contravening section 6.6, 6.7 or 6.8 is to be determined by reference to the financial items as stated in the financial statement specified in Division 4.

6.12 Successive distributions

(1) This section applies if –

(*a*) a company proposes to make a distribution pursuant to determinations made by reference to financial items as stated in a financial statement; and

(*b*) the company –

(i) has made one or more prior distributions pursuant to determinations made by reference to financial items as stated in the financial statement; or

(ii) since the financial statement was prepared, has given financial assistance specified in subsection (3) or has made a payment specified in subsection (4).

(2) Section 6.11 applies for the purpose of determining the amount of the proposed distribution that may be made without contravening section 6.6, 6.7 or 6.8, or a requirement of that section as modified under section 6.9, as if the amount of the proposed distribution were increased by the amount of the prior distributions, financial assistance and other payments.

(3) The financial assistance is financial assistance given under Division 5 of Part 5 by the company out of its distributable profits.

(4) The payment is –

(*a*) a payment made by the company in respect of the buy-back by the company of shares in itself (except a payment

lawfully made otherwise than out of distributable profits); or

(*b*) a payment made by the company of any description specified in section 5.52(5) (except a payment lawfully made otherwise than out of distributable profits).

Division 4 – Specified Financial Statement

6.13 Last annual financial statement specified for purposes of section 6.11

(1) Subject to sections 6.14 and 6.15, the financial statement specified for the purposes of section 6.11 is the company's financial statement for the previous financial year, in relation to which subsections (2), (3), (4), (5), (6) and (7) are complied with.

(2) The financial statement must –

(*a*) have been laid before the company in general meeting under section 9.73(1); or

(*b*) have been sent to every member under section 9.74(3).

(3) The financial statement must –

(*a*) have been properly prepared in accordance with this Ordinance; or

(*b*) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose specified in subsection (9).

(4) Without limiting subsection (3), the financial statement must –

(*a*) give a true and fair view of the financial position of the company as at the end of the financial year concerned; and

(*b*) give a true and fair view of the financial performance of the company for the financial year concerned.

(5) The company's auditor must have prepared a report on the financial statement under section 9.49.

(6) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statement has been properly prepared in accordance with this Ordinance, the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (9).

(7) A written statement under subsection (6) –

(*a*) may be made at the time of the report or subsequently; and

(*b*) must be laid before the company in general meeting or sent to every member to whom the auditor's report is sent under section 9.74(3).

(8) A written statement under subsection (6) is sufficient for the purpose of a distribution to which it relates and that has been proposed. If such a written statement relates to distributions of any particular description, the statement is also sufficient for the purpose of a distribution included in those distributions, even though the distribution has not been proposed at the time of the statement.

(9) The purpose specified for subsections (3) and (6) is the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.

6.14 Interim financial statement specified for purposes of section 6.11

(1) This section applies where the distribution would be made in contravention of section 6.6, 6.7 or 6.8 if the amount of distribution that may be made were determined by reference to the financial items as stated in the financial statement specified in section 6.13.

(2) The financial statement specified for the purposes of section 6.11 is the company's financial statement –

(*a*) in the case of a listed company –

(i) that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and

(ii) in relation to which subsections (3), (5), (6), (9) and (10) are complied with; or

(*b*) in the case of any other company, that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items.

(3) Subject to subsection (4), the financial statement must –

(*a*) have been properly prepared in accordance with this Ordinance; or

(*b*) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.

(4) The requirement under subsection (3) for a financial statement to be properly prepared in accordance with this Ordinance has effect subject to any modification that is necessary for applying that requirement to a financial statement prepared otherwise than for a financial year.

(5) Without limiting subsection (3), the financial statement must –

(*a*) give a true and fair view of the financial position of the company as at the date of the financial statement; and

(*b*) give a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(6) The financial statement must be accompanied by a directors' declaration that complies with subsections (7) and (8).

(7) The declaration must state whether, in the directors' opinion, the financial statement –

(*a*) gives a true and fair view of the financial position of the company as at the date of the financial statement; and

(*b*) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(8) The declaration –

(*a*) must be authorized by a resolution of the directors;

(*b*) must specify the date on which it is made; and

(*c*) must be signed on the directors' behalf by a director.

(9) If any director votes against the resolution authorizing the declaration, the financial statement must also be accompanied by –

(*a*) a list of the directors who voted against that resolution; and

(*b*) whichever of the following is applicable –

(i) where the directors decide that the reasons for voting against the resolution are material and should be disclosed to the members without being requested, the details of those reasons;

(ii) where the directors decide that the reasons for voting against the resolution are material but should not be disclosed to the members without being requested, or are immaterial, or need not be considered, a statement to that effect.

(10) A copy of the financial statement and of the accompanying directors' declaration must have been delivered to the Registrar. If the financial statement and declaration is not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statement and declaration in either of those languages.

6.15 Initial financial statement specified for purposes of section 6.11

(1) If the distribution is proposed to be declared before any financial statement is laid before the company in general meeting under section 9.73(1) or sent to every member under section 9.74(3), the financial statement specified for the purposes of section 6.11 is the company's financial statement –

(*a*) in the case of a listed company –

(i) that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items; and

(ii) in relation to which subsections (2), (4), (7), (8), (9) and (10) are complied with; or

(*b*) in the case of any other company, that is necessary to enable a reasonable judgement to be made as to the amounts of the financial items.

(2) The financial statement must –

(*a*) have been properly prepared in accordance with this Ordinance; or

(*b*) have been properly prepared in accordance with this Ordinance, except only in relation to the matters that are not material for the purpose specified in subsection (11).

(3) The requirement under subsection (2) for a financial statement to be properly prepared in accordance with this Ordinance has effect subject to any modification that is necessary for applying that requirement to a financial statement prepared otherwise than for a financial year.

(4) The financial statement must be accompanied by a directors' declaration that complies with subsections (5) and (6).

(5) The declaration must state whether, in the directors' opinion, the financial statement –

(*a*) gives a true and fair view of the financial position of the company as at the date of the financial statement; and

(*b*) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(6) The declaration –

(*a*) must be authorized by a resolution of the directors;

(*b*) must specify the date on which it is made; and

(*c*) must be signed on the directors' behalf by a director.

(7) If any director votes against the resolution authorizing the declaration, the financial statement must also be accompanied by –

(*a*) a list of the directors who voted against that resolution; and

(*b*) whichever of the following is applicable –

(i) where the directors decide that the reasons for voting against the resolution are material and should be disclosed to the members without being requested, the details of those reasons;

(ii) where the directors decide that the reasons for voting against the resolution are material but should not be disclosed to the members without being requested, or are immaterial, or need not be considered, a statement to that effect.

(8) The company's auditor must have prepared a report on the financial statement stating whether, in the auditor's opinion –

(*a*) the financial statement has been properly prepared in accordance with this Ordinance; and

(*b*) the financial statement –

(i) gives a true and fair view of the financial position of the company as at the date of the financial statement; and

(ii) gives a true and fair view of the financial performance of the company for the period in respect of which the financial statement is prepared.

(9) If, in the auditor's report, the auditor has not given an unqualified opinion to the effect that the financial statement satisfies subsection (8)(*a*) and (*b*), the auditor must have given a written statement as to whether, in the auditor's opinion, the matter in respect of which the report is qualified is material for the purpose specified in subsection (11).

(10) A copy of the financial statement, of the accompanying directors' declaration, of the auditor's report of the financial statement, and of any written statement under subsection (9), must have been delivered to the Registrar. If the financial statement, declaration, report or written statement is not in English or Chinese, the copy must have been accompanied by a certified translation of the financial statement, declaration, report or written statement in either of those languages.

(11) The purpose specified for subsections (2) and (9) is the purpose of determining, by reference to the financial items as stated in the financial statement, whether the distribution would be made in contravention of section 6.6, 6.7 or 6.8.

Division 5 – Miscellaneous

6.16 Saving for certain older provisions in articles

If, immediately before 1 September 1991, a company was authorized by a provision of its articles to apply its unrealized profits in paying up, in full or in part, unissued shares to be allotted to the members as fully or partly paid bonus

shares, that provision continues (subject to any alteration of the articles) as authority for those profits to be so applied after that date.

6.17 Saving for other restrictions on distribution

This Part does not affect any Ordinance or rule of law, or any provision of a company's articles, restricting the sums out of which, or the cases in which, a distribution may be made.

PART 7

DEBENTURES

Division 1 – Preliminary

7.1 Interpretation

(1) In this Part –

"branch register" (登記支冊) means a branch register kept under section 7.9;

"debenture" (債權證), in relation to a company –

(*a*) includes bonds and any other debt securities of the company, whether or not constituting a charge on the assets of the company; and

(*b*) except in sections 7.2, 7.7(2)(*a*), 7.9 and 7.28(1)(*a*) and Divisions 3 and 4, includes debenture stock;

"register of debenture holders" (債權證持有人登記冊) means a register kept under section 7.2.

(2) For the purposes of this Part, a register of holders of debentures kept under section 74A of the predecessor Ordinance is regarded as a register of debenture holders kept under section 7.2.

Division 2 – Register of Debenture Holders

7.2 Register of debenture holders

(1) If a company issues a series of debentures, or any debenture stock, that are not transferable by delivery, the company must keep in the English or Chinese language a register of the holders of the debentures or debenture stock.

(2) A register of debenture holders must state –

(*a*) the name and address of each holder of debentures or debenture stock;

(*b*) the amount of debentures or debenture stock held by each holder;

(*c*) the date on which each person is entered in the register as a holder of debentures or debenture stock; and

(*d*) the date on which any person ceases to be a holder of debentures or debenture stock.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

7.3 Place where register must be kept available for inspection

(1) A company must keep its register of debenture holders 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 debenture holders is kept. 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) If the register of debenture holders of a company formed and registered under this Ordinance has been kept at the registered office of the company at all times since the register came into existence, then subsection (2) does not apply in relation to the register.

(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.

7.4 Right to inspect and request copy

(1) Except when the register of debenture holders of a company is closed under section 7.7, the register must be open for inspection –

(*a*) by any person who is registered in the register as a debenture holder of the company, without charge;

(*b*) by any member of the company, without charge; and

(*c*) by any other person, on payment of a prescribed fee.

(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 debenture holders of a company; or

(*b*) any part of the register.

(3) A debenture holder of a company or the trustee for all debenture holders of a company is entitled, on request and on payment of a prescribed fee, to be provided with a copy of any trust deed or any other document securing the debentures.

(4) If a person makes a request under subsection (2) or (3), the company must provide the copy to the person within the prescribed period after the request and prescribed fee are received by the company.

(5) When a person inspects the register, or the company provides a 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.

(6) 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 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 (4), 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) or (3) (as the case may be) are being abused.

7.5 Application and saving

(1) Despite the repeal of section 75 of the predecessor Ordinance –

(*a*) that section continues to apply to an inspection of a register of holders of debentures on or after that repeal if the request for the inspection is received by the company before the commencement of section 7.4;

(*b*) that section continues to apply to a request for a copy of a register of holders of debentures or any part of it if the request is received by the company before that commencement; and

(*c*) that section continues to apply to a request for a copy of any trust deed or any other document securing any issue of debentures if the request is received by the company before that commencement.

(2) If, by virtue of subsection (1), a person inspects the register of holders of debentures, or is provided with a copy of the register or any part of it, in accordance with section 75 of the predecessor Ordinance, the company must also inform the person of the most recent date (if any) on which alterations were made to the register.

7.6 Consequences of contravening requirements as to register owing to other person's default

If a company's register of debenture holders 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 7.4(4), then the power of the Court of First Instance under section 7.4(7) extends to the making of an order against that other person and that other person's officers and other employees.

7.7 Power to close register of debenture holders

(1) A company may, on giving notice in accordance with subsection (2), close its register of debenture holders, or any part of it, for any time or times not exceeding in the whole 30 days in each year.

(2) A notice for the purposes of subsection (1) –

(*a*) in the case of a company having any of the debentures or debenture stock mentioned in section 7.2(1) listed on a recognized stock market, 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 by a resolution passed in that year by a majority in value of the debenture holders present in person or, if proxies are permitted, by proxy at a meeting summoned for the purpose or otherwise in accordance with the trust deed or any other document securing the debentures.

(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.

7.8 Application and saving

Despite the repeal of section 99 of the predecessor Ordinance, that section continues to apply in relation to a closure of a register of debenture holders on or after that repeal if the notice for the purposes of section 99(1) of the predecessor Ordinance is given before the commencement of section 7.7.

7.9 Branch register of debenture holders

(1) If a company issues in a place outside Hong Kong a series of debentures, or any debenture stock, that are not transferable by delivery, the company may, if it is authorized to do so by its articles, cause to be kept there a branch register of the holders of the debentures or debenture stock who are resident there.

(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 branch register must give to the Registrar a notice in the specified form of any change in the address where the branch register is kept, within 14 days after the change.

(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.

7.10 Keeping of branch register

(1) A branch register must be kept in the same manner in which the company's register of debenture holders (in this section called the principal register) is by this Ordinance required to be kept.

(2) A company that keeps a branch register may close it in the same manner in which the principal register may be closed under section 7.7 except that the advertisement referred to in that section must be inserted in a newspaper circulating generally 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 made in the branch register as soon as possible after it 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 entered up from time to time.

(4) A duplicate of a branch register is 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.

7.11 Transactions in debentures registered in branch register

(1) The debentures registered in a branch register of a company must be distinguished from those registered in the company's register of debenture holders.

(2) No transaction with respect to any debentures registered in a branch register may, during the continuance of that registration, be registered in any other register.

7.12 Discontinuance of branch register

(1) A company may discontinue a branch register.

(2) If a company discontinues 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 debenture holders.

(3) If a company discontinues a branch register, it must within 14 days after the discontinuance give to the Registrar a notice in the specified form informing the Registrar of –

(*a*) the discontinuance; and

(*b*) the register to which the entries have been transferred.

(4) 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.

Division 3 – Allotment of Debentures or Debenture Stock

7.13 Return of allotment

(1) Within one month after an allotment of debentures or debenture stock, a company must deliver to the Registrar for registration a return of the allotment that complies with subsection (2).

(2) A return –

(*a*) must be in the specified form; and

(*b*) must state –

(i) the amount of debentures or debenture stock allotted;

(ii) the name and address of each allottee;

(iii) the date of allotment of debentures or debenture stock; and

(iv) the date of redemption of debentures or debenture stock.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(4) If a company fails to deliver a return that complies with subsection (2) within one month after an allotment of debentures or debenture stock, the Court of First Instance may, on application by the company or a responsible person of the company, extend the period for delivery of the return by a period determined by the Court.

(5) The Court of First Instance may extend a period under subsection (4) only if the Court is satisfied –

(*a*) that failure to deliver the return was accidental or due to inadvertence; or

(*b*) that it is just and equitable to extend the period.

(6) If the Court of First Instance extends the period for delivery of a return, any liability already incurred by the company or a responsible person of the company for an offence under subsection (3) is extinguished and subsection (1) has effect as if the reference to one month were a reference to the extended period.

7.14 Registration of allotment

(1) A company must register an allotment of debentures or debenture stock as soon as practicable and in any event within 2 months after the date of the allotment, by entering in its register of debenture holders the information referred to in section 7.2(2).

(2) If a company fails to register an allotment of debentures or debenture stock within 2 months after the date of the allotment, 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.

7.15 Issue of debenture or certificate for debenture stock on allotment

(1) Within 2 months after an allotment of debentures or debenture stock, a company must –

(*a*) in the case of an allotment of debentures, complete the debentures and have them ready for delivery; or

(*b*) in the case of an allotment of debenture stock, complete the certificates for the debenture stock and have them ready for delivery.

(2) Subsection (1) does not apply if the conditions of allotment of debentures or debenture stock provide otherwise.

(3) If a company contravenes this section, 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.

7.16 Court order for delivery of debenture or certificate for debenture stock

(1) If a company contravenes section 7.15 in relation to an allotment of debentures or debenture stock, a person entitled to the debentures or certificates for the debenture stock may serve a notice on the company requiring it to deliver the debentures or certificates to the person within 10 days.

(2) If a company on which notice has been served under subsection (1) does not deliver the debentures or certificates within 10 days after service of the notice, the person may apply to the Court of First Instance for an order under subsection (3).

(3) On an application under subsection (2), the Court of First Instance may make an order directing the company and any officer of the company to deliver the debentures or certificates to the person within the period specified in the order.

(4) The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of the company responsible for the contravention.

Division 4 – Transfer of Debentures or Debenture Stock

7.17 Requirement for instrument of transfer

(1) A company must not register a transfer of debentures or debenture stock of the company unless a proper instrument of transfer has been delivered to the company.

(2) Subsection (1) does not affect any power of a company to register as a debenture holder a person to whom the right to debentures or debenture stock has been transmitted by operation of law.

7.18 Registration of transfer or refusal of registration

(1) The transferee or transferor of debentures or debenture stock of a company may lodge the transfer with the company.

(2) Within 2 months after the transfer is lodged, the company must either –

(*a*) register the transfer; or

(*b*) send the transferee and the transferor notice of refusal to register the transfer.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

7.19 Certification of transfer

(1) The certification by a company of an instrument of transfer of any debentures or debenture stock of the company –

(*a*) is a representation by the company to any person acting on the faith of the certification that documents have been produced to the company that evidence title to the debentures or debenture stock in the transferor named in the instrument; and

(*b*) is not a representation that the transferor has any title to the debentures or debenture stock.

(2) If a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.

(3) For the purposes of this section, an instrument of transfer is certified by a company if it bears –

(*a*) the words "certificate lodged", or words to the same effect, in English or Chinese; and

(*b*) under or adjacent to those words, the signature or initials of a person having the actual or apparent authority to certify transfers on behalf of the company.

(4) Unless the contrary is proved, a signature or initials appearing on an instrument of transfer as referred to in subsection (3)(*b*) must be regarded –

(*a*) as the signature or initials of the person whose signature or initials they purport to be; and

(*b*) as having been placed on the instrument by that person or by another person who has the actual or apparent authority to use the signature or initials for the purpose of certifying transfers on behalf of the company.

7.20 Issue of debenture or certificate for debenture stock on transfer

(1) Within the period specified in subsection (2), a company must –

(*a*) in the case of a transfer of debentures, complete the debentures and have them ready for delivery; or

(*b*) in the case of a transfer of debenture stock, complete the certificates for the debenture stock and have them ready for delivery.

(2) The period is –

(*a*) for a private company, 2 months after the day on which the transfer is lodged with the company;

(*b*) for any other company, 10 business days after the day on which the transfer is lodged with the company.

(3) Subsection (1) does not apply to a transfer if –

(*a*) the conditions of issue of the debentures or debenture stock provide otherwise;

(*b*) stamp duty has not been paid in respect of the transfer;

(*c*) the transfer is invalid; or

(*d*) the company, being entitled to do so, refuses to register the transfer.

(4) If a company contravenes this section, 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.

(5) In this section –

"business day" (營業日) means a day on which a recognized stock market is open for the business of dealing in securities.

7.21 Court order for delivery of debenture or certificate for debenture stock

(1) If a company contravenes section 7.20 in relation to a transfer of debentures or debenture stock, a person entitled to the debentures or certificates for the debenture stock may serve a notice on the company requiring it to deliver the debentures or certificates to the person within 10 days.

(2) If a company on which notice has been served under subsection (1) does not deliver the debentures or certificates within 10 days after service of the notice, the person may apply to the Court of First Instance for an order under subsection (3).

(3) On an application under subsection (2), the Court of First Instance may make an order directing the company and any officer of the company to deliver the debentures or certificates to the person within the period specified in the order.

(4) The order may provide that all costs of and incidental to the application are to be borne by the company or by an officer of the company responsible for the contravention.

Division 5 – Miscellaneous Provisions

7.22 Evidence of grant of probate etc.

For the purposes of a transfer of debentures or transmission of the right to debentures, a company must accept as sufficient evidence of the grant of probate of the will or letters of administration of a deceased person the production to the company of a document that is by law sufficient evidence of that grant.

7.23 Form of register of holders of debentures kept under instrument made by company

(1) This section applies to a register of holders of debentures that is required to be kept under an instrument made by a company.

(2) If a provision of the instrument requires the register to be kept in a legible form, the provision is to be construed as requiring the register to be kept either –

(*a*) in a legible form; or

(*b*) in a non-legible form capable of being reproduced in a legible form.

7.24 Perpetual debentures

(1) Despite any rule of equity to the contrary, a condition contained in any debentures, or in a deed securing any debentures, is not invalid only because the debentures are, by the condition, made –

(*a*) irredeemable;

(*b*) redeemable only on the happening of a contingency (however remote); or

(*c*) redeemable only on the expiration of a period of time (however long).

(2) Subsection (1) applies to debentures whenever issued and to deeds whenever executed.

7.25 Power to reissue redeemed debentures

(1) This section applies if a company has, whether before, on or after the commencement of this section, redeemed any debentures previously issued.

(2) A company has, and is to be regarded as always having had, the power to reissue redeemed debentures, either by reissuing the same debentures or by issuing new debentures in their place, unless –

(*a*) a provision to the contrary (express or implied) is contained in the company's articles or any contract made by the company; or

(*b*) the company has, by passing a resolution to that effect or by any other act, manifested its intention that the debentures are to be cancelled.

(3) On a reissue of any redeemed debentures, a person entitled to the debentures has, and is to be regarded as always having had, the same priorities as if the debentures had never been redeemed.

(4) A reissue of redeemed debentures, whether before, on or after the commencement of this section –

(*a*) is regarded as an issue of new debentures for the purposes of stamp duty; and

(*b*) is not regarded as an issue of new debentures for the purposes of any provision limiting the amount or number of debentures to be issued.

(5) A person lending money on the security of any debentures reissued under this section that appear to be stamped may give the debentures in evidence in any proceedings for enforcing the person's security.

(6) Subsection (5) does not apply if the person had notice or, but for the person's negligence, might have discovered, that the debentures were not stamped.

(7) The stamp duty and penalty payable under the Stamp Duty Ordinance (Cap. 117) in respect of any debentures reissued under this section are to be paid by the company.

(8) Where any debentures redeemed before 1 July 1933 are reissued on or after that date, the reissue does not prejudice, and is to be regarded as never having prejudiced, any right or priority that any person would have had under or by virtue of any mortgage or charge created before that date.

7.26 Deposit of debentures to secure advances

If a company has, whether before, on or after the commencement of this section, deposited any of its debentures to secure advances from time to time on current account or otherwise, the debentures are not to be regarded as having been redeemed only because of the account of the company having ceased to be in debit while the debentures remained so deposited.

7.27 Specific performance of contracts to subscribe for debentures

A contract with a company to take up and pay for any debentures of the company may be enforced by an order for specific performance.

7.28 Court may order meeting of debenture holders

(1) This section applies to any person who holds –

(*a*) any debentures that form part of a series issued by a company and that are of equal ranking with the other debentures of that series; or

(*b*) any debenture stock of a company.

(2) If a person to whom this section applies, either alone or jointly with any other such person, holds not less than the specified percentage of the value of the company's debentures, the person may apply to the Court of First Instance for a meeting of the company's debenture holders to be held to give directions to the trustee for the debenture holders.

(3) Subsection (2) may be excluded by the debentures, or the trust deeds or other documents securing the debentures.

(4) In this section –

"specified percentage" (指明百分比) means –

(*a*) 10%; or

(*b*) the higher percentage that may be provided for in the debentures, or the trust deeds or other documents securing the debentures.

(5) Despite the repeal of section 75A of the predecessor Ordinance, that section continues to apply in relation to any requisition made before the commencement of this section for a meeting of debenture holders and to any relevant meeting of debenture holders.

7.29 Liability of trustees for debenture holders

(1) A provision contained in –

(*a*) a trust deed securing an issue of debentures; or

(*b*) a contract with the holders of debentures secured by a trust deed,

is void to the extent that it would exempt a trustee of the trust deed from, or indemnify the trustee against, liability for breach of trust for the trustee's failure to show the degree of care and diligence required of the trustee as a trustee, having regard to the provisions of the trust deed conferring on the trustee any powers, authorities or discretions.

(2) Subsection (1) does not –

(*a*) invalidate a release otherwise validly given in respect of anything done, or omitted to be done, by a trustee before the giving of the release;

(*b*) invalidate any provision enabling such a release to be given –

(i) on being agreed to by a majority of not less than 75% in value of the debenture holders present and voting in person or, if proxies are permitted, by proxy at a meeting summoned for the purpose; and

(ii) either with respect to specific acts or omissions or on the trustee dying or ceasing to act;

(*c*) invalidate any provision in force on 31 August 1984 so long as any person who is then entitled to the benefit of the provision, or who is afterwards given the benefit of the provision under subsection (3), remains a trustee of the trust deed; or

(*d*) deprive any person of any exemption or right to be indemnified in respect of anything done, or omitted to be done, by the person while any provision mentioned in paragraph (*c*) was in force.

(3) While a trustee of a trust deed remains entitled to the benefit of a provision saved by subsection (2)(*c*) or (*d*), the benefit may be given, in accordance with subsection (4), to –

(*a*) all present and future trustees of the trust deed; or

(*b*) any named trustees or proposed trustees of the trust deed.

(4) The benefit is to be given by a resolution passed by a majority of not less than 75% in value of the debenture holders present in person or, if proxies are permitted, by proxy at a meeting summoned for the purpose –

(*a*) in accordance with the provisions of the trust deed; or

(*b*) if the trust deed makes no provision for summoning meetings, in a manner approved by the Court of First Instance.

7.30 Immunity of trustees for debenture holders

A trustee for a debenture holder is not liable for anything done, or omitted to be done, in accordance with any direction given to the trustee at a meeting held under section 7.28.

PART 8

REGISTRATION OF CHARGES

Division 1 – Preliminary

8.1 Interpretation

(1) In this Part –

"charge" (押記) includes mortgage;

"identity card" (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177).

(2) For the purposes of this Part –

(*a*) if a ship or aircraft of a registered non-Hong Kong company is registered in Hong Kong, it is regarded as property in Hong Kong of the company even though it is physically located outside Hong Kong; and

(*b*) if a ship or aircraft of a registered non-Hong Kong company is registered in a place outside Hong Kong, it is regarded as property outside Hong Kong of the company even though it is physically located in Hong Kong.

(3) In Divisions 2 and 4, a reference to a person interested in a charge excludes the company or registered non-Hong Kong company creating the charge.

(4) For the purposes of Divisions 2 and 3, a copy of an instrument in relation to a charge delivered for registration is a certified copy if it is certified as a true copy –

(*a*) by –

(i) a director or secretary of the company or registered non-Hong Kong company delivering the copy for registration; or

(ii) a person authorized by that company or non-Hong Kong company for the purpose; or

(*b*) by –

(i) any other person interested in the charge; or

(ii) in the case of –

(A) an interested person who is an individual, a person authorized by the interested person for the purpose; or

(B) an interested person that is a body corporate, a person authorized by the interested person for the purpose, or a director or secretary of the interested person.

(5) In Division 6, a reference to the charged property of a registered non-Hong Kong company is a reference to –

(*a*) the property in Hong Kong of the company and subject to a charge created by the company, except property that was not in Hong Kong when the charge was created; or

(*b*) the property in Hong Kong of the company and subject to a charge that subsisted when the property was acquired by the company, except property that was not in Hong Kong when it was so acquired.

8.2 Application

This Part does not apply to a registered non-Hong Kong company –

(*a*) that delivers a notice to the Registrar under section 16.21(1) of the fact that it has ceased to have a place of business in Hong Kong; or

(*b*) in relation to which the Registrar enters in the Register a statement of dissolution under section 16.22(2).

Division 2 – Obligation to Register Specified Charges after Creation

8.3 Specified charge

(1) In this Division, a reference to a specified charge is a reference to any of the following charges created on or after the commencement of this section –

(*a*) a charge on uncalled share capital of the company;

(*b*) a charge created or evidenced by an instrument that, if executed by an individual, would require registration as a bill of sale;

(*c*) a charge on land (wherever situate) or any interest in land, except a charge for any rent or other periodical sum issuing out of land;

(*d*) a charge on book debts of the company;

(*e*) a charge on calls made but not paid;

(*f*) a charge on instalments due, but not paid, on the issue price of shares;

(*g*) a charge on a ship or any share in a ship;

(*h*) a charge on an aircraft or any share in an aircraft;

(*i*) a charge on –

(i) goodwill;

(ii) a patent or a licence under a patent;

(iii) a trademark; or

(iv) a copyright or a licence under a copyright;

(*j*) a floating charge on the company's undertaking or property.

(2) For the purposes of subsection (1)(*c*), the holding of debentures entitling the holder to a charge on land is not regarded as an interest in the land.

(3) For the purposes of subsection (1)(*d*) –

(*a*) the deposit by way of security of a negotiable instrument given to secure the payment of book debts is not regarded as a charge on those book debts; and

(*b*) if a company deposits money with another person, a charge on the company's right to enforce repayment of the money is not regarded as a charge on book debts of the company.

(4) For the purposes of subsection (1)(*d*) and (*j*), if a company charters a ship from a shipowner, the shipowner's lien on the subfreights for amounts due under the charter is regarded neither as a charge on book debts of the company nor as a floating charge on the company's undertaking or property.

8.4 Company must register specified charge created by it

(1) A company must deliver a statement of the particulars of every specified charge created by the company, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (5)(*a*).

(2) Where –

(*a*) a specified charge created by a company –

(i) is given in a debenture forming part of a series by reference to any other instrument containing the charge (whether or not also contained in the debenture); or

(ii) is contained in a debenture forming part of a series (but not given in the debenture by reference to any other instrument); and

(*b*) every holder of the debentures of the series is entitled equally to the benefit of the charge,

the company is regarded as having complied with subsection (1) in relation to the specified charge if the company delivers a statement of the particulars of the

charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (5)(*b*).

(3) A person interested in a specified charge –

(*a*) may deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (5)(*a*); or

(*b*) may, in the case of subsection (2), deliver a statement of the particulars of the charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (5)(*b*).

(4) The instrument is –

(*a*) for the purposes of subsection (2)(*a*)(i), the instrument by reference to which the specified charge is given; or

(*b*) for the purposes of subsection (2)(*a*)(ii), any one debenture of the series.

(5) The registration period is –

(*a*) for the purposes of subsection (1) or (3)(*a*) –

(i) 21 days after the date on which the specified charge is created; or

(ii) where the specified charge is created outside Hong Kong and comprising property situate outside Hong Kong, 21 days after the date on which a certified copy of the instrument creating or evidencing that charge could, if despatched with due diligence, have been received in Hong Kong in due course of post; and

(*b*) for the purposes of subsection (2) or (3)(*b*) –

(i) 21 days after the execution of the instrument by reference to which the specified charge is given or if there is no such instrument, 21 days after the execution of the first debenture of the series; or

(ii) where the specified charge is created outside Hong Kong and comprising property situate outside Hong Kong, 21 days after the date on which a certified copy of the specified instrument could, if despatched with due diligence, have been received in Hong Kong in due course of post.

(6) A statement of the particulars of a specified charge –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(7) If a person interested in a specified charge pays to the Registrar any prescribed fee for the registration of a statement of the particulars of the charge, the fee is recoverable from the company creating the charge.

(8) If a specified charge is created in Hong Kong and comprises property situate outside Hong Kong, a certified copy of an instrument creating or purporting to create the charge may be delivered to the Registrar for registration under subsection (1), (2) or (3) even though further proceedings may be necessary to make that charge valid or effectual according to the law of the place in which the property is situate.

8.5 Registered non-Hong Kong company must register specified charge created by it

(1) A registered non-Hong Kong company must deliver a statement of the particulars of every specified charge created by the company on property in Hong Kong of the company, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (6)(*a*).

(2) Where –

(*a*) a specified charge created by a registered non-Hong Kong company on property in Hong Kong of the company –

(i) is given in a debenture forming part of a series by reference to any other instrument containing the charge (whether or not also contained in the debenture); or

(ii) is contained in a debenture forming part of a series (but not given in the debenture by reference to any other instrument); and

(*b*) every holder of the debentures of the series is entitled equally to the benefit of the charge,

the company is regarded as having complied with subsection (1) in relation to the specified charge if the company delivers a statement of the particulars of the charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (6)(*b*).

(3) A person interested in a specified charge –

(*a*) may deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (6)(*a*); or

(*b*) may, in the case of subsection (2), deliver a statement of the particulars of the charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (6)(*b*).

(4) The instrument is –

(*a*) for the purposes of subsection (2)(*a*)(i), the instrument by reference to which the specified charge is given; or

(*b*) for the purposes of subsection (2)(*a*)(ii), any one debenture of the series.

(5) Subsections (1) and (2) do not apply to a charge on property if the property was not in Hong Kong when the charge was created by the registered non-Hong Kong company.

(6) The registration period is –

(*a*) for the purposes of subsection (1) or (3)(*a*), 21 days after the date on which the specified charge is created; and

(*b*) for the purposes of subsection (2) or (3)(*b*) –

(i) 21 days after the execution of the instrument by reference to which the specified charge is given; or

(ii) if there is no such instrument, 21 days after the execution of the first debenture of the series.

(7) A statement of the particulars of a specified charge –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(8) If a person interested in a specified charge pays to the Registrar any prescribed fee for the registration of a statement of the particulars of the charge, the fee is recoverable from the registered non-Hong Kong company creating the charge.

8.6 Consequences of contravention of section 8.4 or 8.5

(1) This section applies if –

(*a*) a company contravenes section 8.4(1) in relation to a specified charge, and a person interested in the charge has not registered the charge under section 8.4(3); or

(*b*) a registered non-Hong Kong company contravenes section 8.5(1) in relation to a specified charge, and a person interested in the charge has not registered the charge under section 8.5(3).

(2) Subject to section 8.15, the company or registered non-Hong Kong company, and every responsible person of the company or non-Hong Kong company, commit an offence.

(3) A person who commits an offence under subsection (2) 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) Subject to section 8.15, the specified charge is void against any liquidator and creditor of the company or registered non-Hong Kong company so far as any security on its undertaking or property is conferred by the charge.

(5) Subsection (4) does not prejudice any contract or obligation for repayment of the money secured by the specified charge.

(6) At the lender's option, the money secured by a specified charge becomes immediately payable when the charge becomes void under subsection (4).

Division 3 – Obligation to Register Existing Charges

8.7 Company must register charge existing on property acquired

(1) This section applies if –

(*a*) a company acquires property subject to a charge; and

(*b*) the charge is of a kind that a statement of its particulars would have been required by section 8.4(1) to be delivered for registration had it been created by the company after the acquisition.

(2) The company must deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or

evidencing the charge, to the Registrar for registration within the registration period specified in subsection (3).

(3) The registration period is –

(*a*) 21 days after the date on which the acquisition is completed; or

(*b*) where the property is situate, and the charge was created, outside Hong Kong, 21 days after the date on which a certified copy of the instrument creating or evidencing the charge could, if despatched with due diligence, have been received in Hong Kong in due course of post.

(4) A statement of the particulars of a charge –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(5) Subject to section 8.15, if a company contravenes subsection (2), the company, and every responsible person of the company, commit an offence.

(6) A person who commits an offence under subsection (5) 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.

8.8 Registered non-Hong Kong company must register charge existing on property acquired

(1) This section applies if –

(*a*) a registered non-Hong Kong company acquires property in Hong Kong subject to a charge; and

(*b*) the charge is of a kind that a statement of its particulars would have been required by section 8.5(1) to be delivered for registration had it been created by the registered non-Hong Kong company after the acquisition.

(2) Subsection (1)(*a*) does not apply to a charge on property if the property was not in Hong Kong when the property was acquired by the registered non-Hong Kong company.

(3) The registered non-Hong Kong company must deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (4).

(4) The registration period is 21 days after the date on which the acquisition is completed.

(5) A statement of the particulars of a charge –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(6) Subject to section 8.15, if a registered non-Hong Kong company contravenes subsection (3), the company, and every responsible person of the company, commit an offence.

(7) A person who commits an offence under subsection (6) 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.

8.9 Registered non-Hong Kong company must register charge existing on property on date of company's registration under Part 16

(1) This section applies if –

(*a*) a registered non-Hong Kong company has, on the date of its registration under Part 16, property in Hong Kong subject to –

(i) a charge created by the company; or

(ii) a charge that subsisted when the property was acquired; and

(*b*) the charge is of a kind that a statement of its particulars would have been required by section 8.5(1) or 8.8(3) to be

delivered for registration had the charge been created by the company, or had the property been acquired by the company, after the company has been registered under Part 16.

(2) The registered non-Hong Kong company must deliver a statement of the particulars of the charge, together with a certified copy of the instrument (if any) creating or evidencing the charge, to the Registrar for registration within the registration period specified in subsection (5).

(3) If, in the case of subsection (1)(*a*)(i) –

(*a*) the charge –

(i) is given in a debenture forming part of a series by reference to any other instrument containing the charge (whether or not also contained in the debenture); or

(ii) is contained in a debenture forming part of a series (but not given in the debenture by reference to any other instrument); and

(*b*) every holder of the debentures of the series is entitled equally to the benefit of the charge,

the registered non-Hong Kong company is regarded as having complied with subsection (2) in relation to the charge if that company delivers a statement of the particulars of the charge, together with a certified copy of an instrument specified in subsection (4), to the Registrar for registration within the registration period specified in subsection (5).

(4) The instrument is –

(*a*) for the purposes of subsection (3)(*a*)(i), the instrument by reference to which the charge is given; or

(*b*) for the purposes of subsection (3)(*a*)(ii), any one debenture of the series.

(5) The registration period is 21 days after the date on which the registered non-Hong Kong company is registered under Part 16.

(6) A statement of the particulars of a charge –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(7) Subject to section 8.15, if a registered non-Hong Kong company contravenes subsection (2), the company, and every responsible person of the company, commit an offence.

(8) A person who commits an offence under subsection (7) 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 4 – Obligation to Register Other Particulars of Debentures

8.10 Company or registered non-Hong Kong company must register particulars of issue of debentures

(1) This section applies if –

(*a*) a debenture forming part of a series –

(i) contains a charge created by a company or registered non-Hong Kong company; or

(ii) gives a charge created by a company or registered non-Hong Kong company, by reference to any other instrument containing the charge;

(*b*) every holder of the debentures of the series is entitled equally to the benefit of the charge; and

(*c*) a statement of the particulars of the charge is delivered for registration under section 8.4(2), 8.5(2) or 8.9(3).

(2) The company or registered non-Hong Kong company must deliver a statement of the particulars of every issue of the debentures of the series to the

Registrar for registration within the registration period specified in subsection (4).

(3) A person interested in the charge may deliver a statement of the particulars of an issue of debentures to the Registrar for registration within the registration period specified in subsection (4).

(4) The registration period is –

(*a*) if a statement of the particulars of the charge is delivered for registration under section 8.4(2) or 8.5(2) –

(i) in the case of an issue of debentures made at the time of the creation of the charge, the registration period specified in relation to the registration of the charge in section 8.4(5)(*b*) or 8.5(6)(*b*); or

(ii) in the case of any subsequent issue of debentures, 21 days after the date of the issue; or

(*b*) if a statement of the particulars of the charge is delivered for registration under section 8.9(3) –

(i) in the case of an issue of debentures made on or before the registration under Part 16, the registration period specified in relation to the registration of the charge in section 8.9(5); or

(ii) in the case of any subsequent issue of debentures, 21 days after the date of the issue.

(5) A statement of the particulars of an issue of debentures –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(6) Without limiting section 2.5, a statement of the particulars of an issue of debentures must contain the date and the amount of the issue.

(7) If a person interested in a charge pays to the Registrar any prescribed fee for the registration of a statement of the particulars of an issue of

debentures, the fee is recoverable from the company or registered non-Hong Kong company creating the charge.

(8) Subject to section 8.15, if subsection (2) is contravened, and a person interested in the charge has not delivered a statement of the particulars of the issue of debentures for registration under subsection (3), the company or registered non-Hong Kong company, and every responsible person of the company or non-Hong Kong company, commit an offence.

(9) A person who commits an offence under subsection (8) 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) A contravention of subsection (2) does not affect the validity of the debentures issued.

(11) In this section, a reference to the time of the creation of a charge is a reference to the time of execution of –

(*a*) the instrument by reference to which the charge is given; or

(*b*) if there is no such instrument, the first debenture of the series.

8.11 Company or registered non-Hong Kong company must register particulars of commission etc. in relation to debentures

(1) This section applies if –

(*a*) any commission, allowance or discount has been paid or made, directly or indirectly, by a company or registered non-Hong Kong company to any person in consideration of the person –

(i) subscribing or agreeing to subscribe, absolutely or conditionally, for any debenture of the company or registered non-Hong Kong company; or

(ii) procuring or agreeing to procure absolute or conditional subscriptions for any debenture of the company or registered non-Hong Kong company;

(*b*) the debenture –

(i) creates or evidences a charge; or

(ii) forms part of a series of debentures, and either contains a charge or gives a charge by reference to any other instrument containing a charge;

(*c*) the charge is created by the company or registered non-Hong Kong company; and

(*d*) a statement of the particulars of the charge is required to be delivered for registration under –

(i) section 8.4(1);

(ii) section 8.5(1); or

(iii) section 8.9(2).

(2) The company or registered non-Hong Kong company must deliver a statement of the particulars of the commission, allowance or discount to the Registrar for registration within the registration period specified in subsection (6)(*a*).

(3) Where –

(*a*) in the case of subsection (1)(*d*)(i), a statement of the particulars of the charge is delivered for registration under section 8.4(2); or

(*b*) in the case of subsection (1)(*d*)(ii), a statement of the particulars of the charge is delivered for registration under section 8.5(2),

the company or registered non-Hong Kong company is regarded as having complied with subsection (2) if it delivers a statement of the particulars of the commission, allowance or discount to the Registrar for registration within the registration period specified in subsection (6)(*b*).

(4) Where, in the case of subsection (1)(*d*)(iii), a statement of the particulars of the charge is delivered for registration under section 8.9(3), the registered non-Hong Kong company is regarded as having complied with subsection (2) if it delivers a statement of the particulars of the commission, allowance or discount to the Registrar for registration within the registration period specified in subsection (6)(*c*).

(5) A person interested in the charge –

(*a*) may deliver a statement of the particulars of the commission, allowance or discount to the Registrar for registration within the registration period specified in subsection (6)(*a*); or

(*b*) may, in the case of subsection (3), deliver a statement of the particulars of the commission, allowance or discount to the Registrar for registration within the registration period specified in subsection (6)(*b*).

(6) The registration period is –

(*a*) for the purposes of subsection (2) or (5)(*a*) –

(i) in the case of subsection (1)(*d*)(i), the registration period specified in relation to the registration of the charge in section 8.4(5)(*a*);

(ii) in the case of subsection (1)(*d*)(ii), the registration period specified in relation to the registration of the charge in section 8.5(6)(*a*); or

(iii) in the case of subsection (1)(*d*)(iii), the registration period specified in relation to the registration of the charge in section 8.9(5);

(*b*) for the purposes of subsection (3) or (5)(*b*) –

(i) in the case of an issue of debentures made at the time of the creation of the charge, the registration

period specified in relation to the registration of that charge in section 8.4(5)(*b*) or 8.5(6)(*b*); or

(ii) in the case of any subsequent issue of debentures, 21 days after the date of the issue; or

(*c*) for the purposes of subsection (4) –

(i) in the case of an issue of debentures made on or before the registration under Part 16, the registration period specified in relation to the registration of that charge in section 8.9(5); or

(ii) in the case of any subsequent issue of debentures, 21 days after the date of the issue.

(7) A statement of the particulars of any commission, allowance or discount –

(*a*) must be in the specified form; and

(*b*) must be accompanied by the prescribed fee.

(8) If a person interested in the charge pays to the Registrar any prescribed fee for the registration of a statement of the particulars of the commission, allowance or discount, the fee is recoverable from the company or registered non-Hong Kong company creating the charge.

(9) For the purposes of this section, the deposit of any debenture as security for any debt of a company or registered non-Hong Kong company is not regarded as an issue of debentures at a discount.

(10) In this section, a reference to the time of the creation of a charge is a reference to the time of execution of –

(*a*) the instrument by reference to which the charge is given; or

(*b*) if there is no such instrument, the first debenture of the series.

8.12 Consequences of contravention of section 8.11

(1) Subject to section 8.15, if section 8.11(2) is contravened, and a person interested in the charge has not delivered a statement of the particulars of the commission, allowance or discount (as the case may be) for registration under section 8.11(5), the company or registered non-Hong Kong company, and every responsible person of the company or non-Hong Kong company, commit an offence.

(2) A person who commits an offence under subsection (1) 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) A contravention of section 8.11(2) does not affect the validity of the debentures issued.

Division 5 – Supplementary Provisions to Divisions 2, 3 and 4

8.13 Registrar must acknowledge receipt of documents delivered for registration

(1) This section applies if a statement of the particulars of a charge, and the requisite accompanying instrument, are delivered by a company or registered non-Hong Kong company, or by a person interested in the charge, to the Registrar for registration under Division 2 or 3.

(2) The Registrar must issue a receipt to the company or registered non-Hong Kong company, or to the interested person, acknowledging that the statement, and the requisite accompanying instrument, were delivered to the Registrar for registration under Division 2 or 3 on the date specified in the receipt.

8.14 Notification to Registrar of payment of debt, release, etc.

(1) This section applies if –

(*a*) the debt secured by a registered charge has been paid or satisfied in whole or in part; or

(*b*) the whole or any part of the property or undertaking subject to a registered charge –

(i) has been released from the charge; or

(ii) has ceased to form part of the company's or registered non-Hong Kong company's property or undertaking.

(2) The company or registered non-Hong Kong company, or the mortgagee or person entitled to the charge, may notify the Registrar of the payment, satisfaction, release or cessation.

(3) A notification –

(*a*) must be in the specified form;

(*b*) must be accompanied by the prescribed fee; and

(*c*) must be accompanied by a certified copy of any instrument required by the Registrar for the purpose of evidencing the payment, satisfaction, release or cessation.

(4) If the Registrar is satisfied from the instrument accompanying a notification that the payment, satisfaction, release or cessation did take place, the Registrar must process the notification, and the accompanying instrument, in the same way as if they were delivered to the Registrar for registration.

(5) For the purposes of this section, a copy of an instrument is a certified copy if it is certified as a true copy by –

(*a*) the mortgagee or the person entitled to the charge; or

(*b*) in the case of –

(i) a mortgagee or entitled person who is an individual, a person authorized by the mortgagee or entitled person for the purpose; or

(ii) a mortgagee or entitled person that is a body corporate –

(A) a person authorized by the mortgagee or entitled person for the purpose; or

(B) a director or secretary of the mortgagee or entitled person.

(6) For the purposes of this section, a charge is a registered charge if –

(*a*) a statement of the particulars of the charge, and the requisite accompanying instrument, are delivered to the Registrar for registration under Division 2 or 3; and

(*b*) the Registrar records the information contained in the statement, and in that instrument, for the purposes of section 2.8(1).

8.15 Extension of time for registration and rectification of registered particulars

(1) The Court of First Instance may, on application by the company or registered non-Hong Kong company or by a person interested in the charge, order that –

(*a*) the registration period specified in section 8.4(5), 8.5(6), 8.7(3), 8.8(4), 8.9(5), 8.10(4) or 8.11(6) in relation to a charge or debenture be extended; or

(*b*) an omission or mis-statement of any particular in any of the following be rectified –

(i) a statement of the particulars of a charge, or any accompanying instrument, delivered for registration under Division 2 or 3;

(ii) a statement of the particulars of an issue of debentures, or a statement of the particulars of commission, allowance or discount, delivered for registration under Division 4;

(iii) a notification, or any accompanying instrument, under section 8.14.

(2) The Court of First Instance may make an order under subsection (1) on any terms and conditions that the Court thinks just and expedient.

(3) The Court of First Instance must not make an order unless the Court is satisfied that –

(*a*) the failure to deliver a statement mentioned in subsection (1)(*b*)(i) or (ii), or any accompanying instrument, within that registration period, or the omission or mis-statement –

(i) was accidental;

(ii) was due to inadvertence or to some other sufficient cause; or

(iii) is not of a nature to prejudice the position of creditors or members of the company or registered non-Hong Kong company; or

(*b*) it is just and equitable to grant the relief on other grounds.

(4) The Court of First Instance may make an order to rectify an omission or mis-statement of any particular in any accompanying instrument mentioned in subsection (1)(*b*)(i) or (iii) to the extent as permitted by common law rules and equitable principles.

Note: Rectification may be ordered if there is strong and convincing evidence that the instrument failed accurately to record the intention of the parties.

(5) If the Court of First Instance makes an order extending a registration period, any liability already incurred for an offence under section 8.6(2), 8.7(5), 8.8(6), 8.9(7), 8.10(8) or 8.12(1) in relation to the registration of the charge or debenture is extinguished, unless the Court directs otherwise.

Division 6 – Notice to Registrar of Enforcement of Security

8.16 Notice of appointment of receiver or manager

(1) If a person obtains an order for the appointment of a receiver or manager of the property of a company or the charged property of a registered

non-Hong Kong company, or appoints such a receiver or manager under the powers contained in an instrument, the person must, within 7 days after the date of the order or of the appointment under those powers, deliver a statement of that fact to the Registrar for registration.

(2) A statement under subsection (1) must include –

(*a*) the name and address of the person appointed as receiver or manager; and

(*b*) the number of that person's identity card, or if that person does not have an identity card, the number and issuing country of any passport held by that person.

(3) A statement under subsection (1) must be accompanied by the prescribed fee.

(4) If a person whose particulars are required to be included in a statement delivered to the Registrar under subsection (1) ceases to act as receiver or manager, the person must, within 7 days after the date of the cessation, deliver a statement of the cessation to the Registrar for registration.

(5) If there is any change to the particulars of a person included in a statement delivered to the Registrar under subsection (1), the person must, within 14 days after the date of the change, deliver a statement of that change to the Registrar for registration unless the person has ceased to act as receiver or manager and has delivered a statement of the cessation to the Registrar under subsection (4).

(6) A statement under subsection (1), (4) or (5) must be in the specified form.

(7) If a person contravenes subsection (1), (4) or (5), the person 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.

(8) In this section –

"manager" (管理人) excludes a special manager of the estate or business of a company or registered non-Hong Kong company appointed under section 216 of the Companies (Winding Up Provisions) Ordinance (Cap. 32).[1]

8.17 Notice of mortgagee entering into possession of property

(1) If a person enters into possession of the property of a company, or the charged property of a registered non-Hong Kong company, as mortgagee, the person must, within 7 days after the date of entering into possession, deliver a statement of that fact to the Registrar for registration.

(2) A statement under subsection (1) must include –

(*a*) if the person is an individual –

(i) the person's name and address; and

(ii) the number of the person's 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

(*b*) if the person is a body corporate, its name and the address of its registered or principal office.

(3) A statement under subsection (1) must be accompanied by the prescribed fee.

(4) If a person whose particulars are required to be included in a statement delivered to the Registrar under subsection (1) goes out of possession of the property or charged property, the person must, within 7 days after going out of possession, deliver a statement of that fact to the Registrar for registration.

[1] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

(5) If there is any change to the particulars of a person included in a statement delivered to the Registrar under subsection (1), the person must, within 14 days after the date of the change, deliver a statement of that change to the Registrar for registration unless the person has gone out of possession of the property or charged property and has delivered a statement of that fact to the Registrar under subsection (4).

(6) A statement under subsection (1), (4) or (5) must be in the specified form.

(7) If a person contravenes subsection (1), (4) or (5), the person 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.

Division 7 – Company's and Registered Non-Hong Kong Company's Records and Register of Charges

8.18 Obligation to keep copies of instruments creating charges

(1) A company must keep at its registered office, or at a place prescribed by regulations made under section 12.125 –

(*a*) a copy of every instrument creating a charge requiring registration under this Part; and

(*b*) a copy of every instrument creating a charge requiring registration under Part III of the predecessor Ordinance.

(2) A registered non-Hong Kong company must keep at its principal place of business in Hong Kong, or at a place prescribed by regulations made under section 8.23 –

(*a*) a copy of every instrument creating a charge requiring registration under this Part; and

(*b*) a copy of every instrument creating a charge requiring registration under Part III of the predecessor Ordinance.

(3) Where –

(*a*) a series of debentures is issued by a company or registered non-Hong Kong company;

(*b*) the debentures contain a charge requiring registration under this Part or under Part III of the predecessor Ordinance; and

(*c*) the terms of the debentures are the same,

the company or registered non-Hong Kong company is regarded as having complied with subsection (1) or (2) in relation to the debentures if it keeps a copy of one of the debentures in accordance with that subsection.

(4) A company or registered non-Hong Kong company must –

(*a*) within 14 days after a copy of an instrument mentioned in subsection (1) or (2) is first kept at a place, notify the Registrar of the place; and

(*b*) within 14 days after there is a change in the place where a copy of such an instrument is kept, notify the Registrar of the change.

(5) A notification under subsection (4)(*a*) or (*b*) must be in the specified form.

(6) Subsection (4)(*a*) does not require a company or registered non-Hong Kong company to notify the Registrar of the place where a copy of an instrument is kept if –

(*a*) the copy has been kept at the company's registered office, or the registered non-Hong Kong company's principal place of business in Hong Kong, at all times since it came into existence; or

(*b*) the copy was in existence on 31 August 1984 and has been kept at that registered office or principal place of business at all times since then.

(7) If subsection (1), (2) or (4) is contravened, the company or registered non-Hong Kong company, and every responsible person of the company or non-Hong Kong 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.

8.19 Obligation of company to keep register of charges

(1) A company must keep a register of charges and enter in the register –

(*a*) every charge specifically affecting property of the company; and

(*b*) every floating charge on the whole or part of the company's property or undertaking.

(2) A register of charges must be kept under subsection (1) –

(*a*) at the company's registered office; or

(*b*) at a place prescribed by regulations made under section 12.125.

(3) An entry for a charge under subsection (1) must give –

(*a*) the amount secured by the charge;

(*b*) a description of the property charged; and

(*c*) except in the case of securities to bearer, the names of the persons entitled to the charge.

(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 4 and, in the case of a continuing offence, to a further fine of $700 for each day during which the offence continues.

(5) If an officer of the company knowingly and wilfully authorizes or permits the omission of an entry required to be made under subsection (1), the officer commits an offence and is liable to a fine at level 5.

8.20 Obligation of registered non-Hong Kong company to keep register of charges

(1) A registered non-Hong Kong company must keep a register of charges and enter in the register –

(*a*) every charge created by the company on property in Hong Kong of the company; and

(*b*) every charge on property in Hong Kong that is acquired by the company.

(2) Subsection (1) does not apply to a charge on property if the property was not in Hong Kong when the charge was created by, or the property was acquired by, the registered non-Hong Kong company.

(3) A register of charges must be kept under subsection (1) –

(*a*) at the registered non-Hong Kong company's principal place of business in Hong Kong; or

(*b*) at a place prescribed by regulations made under section 8.23.

(4) An entry for a charge under subsection (1) must give –

(*a*) the amount secured by the charge;

(*b*) a description of the property charged; and

(*c*) except in the case of securities to bearer, the names of the persons entitled to the charge.

(5) If a registered non-Hong Kong 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.

(6) If an officer of the registered non-Hong Kong company knowingly and wilfully authorizes or permits the omission of an entry required to be made under subsection (1), the officer commits an offence and is liable to a fine at level 5.

8.21 Notification of place where register of charges is kept

(1) A company or registered non-Hong Kong company must –

(*a*) within 14 days after a register of charges is first kept at a place, notify the Registrar of the place; and

(*b*) within 14 days after there is a change in the place where the register is kept, notify the Registrar of the change.

(2) A notification under subsection (1)(*a*) or (*b*) must be in the specified form.

(3) Subsection (1)(*a*) does not require a company or registered non-Hong Kong company to notify the Registrar of the place where the register of charges is kept if –

(*a*) the register has been kept at the company's registered office, or the registered non-Hong Kong company's principal place of business in Hong Kong, at all times since it came into existence; or

(*b*) the register was in existence on 31 August 1984 and has been kept at that registered office or principal place of business at all times since then.

(4) If subsection (1) is contravened, the company or registered non-Hong Kong company, and every responsible person of the company or non-Hong Kong 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.

8.22 Instruments and register open to public inspection

(1) A member or creditor of a company may inspect, without charge –

(*a*) the copies kept by the company under section 8.18(1); and

(*b*) the register of charges kept by the company under section 8.19(1).

(2) A member or creditor of a registered non-Hong Kong company may inspect, without charge –

(*a*) the copies kept by the company under section 8.18(2); and

(*b*) the register of charges kept by the company under section 8.20(1).

(3) Any other person may inspect, on payment of a prescribed fee –

(*a*) the copies kept by a company or registered non-Hong Kong company under section 8.18(1)(*a*) or (2)(*a*); and

(*b*) the register of charges kept by a company or registered non-Hong Kong company under section 8.19(1) or 8.20(1).

8.23 Financial Secretary may make regulations for purposes of this Division

(1) The Financial Secretary may make regulations to –

(*a*) prescribe a place at which –

(i) copies of instruments creating charges are to be kept by a registered non-Hong Kong company under section 8.18; or

(ii) a register of charges is to be kept by a registered non-Hong Kong company under section 8.20;

(*b*) provide for the obligations of a registered non-Hong Kong company to keep the copies and the register available for inspection under section 8.22(2);

(*c*) prescribe the fees for the purposes of section 8.22(3); and

(*d*) prescribe any other thing that is required or permitted to be prescribed under this Division in respect of those copies and that register.

(2) Regulations made under subsection (1)(*a*) may –

(*a*) prescribe a place other than the registered non-Hong Kong company's principal place of business in Hong Kong;

(*b*) prescribe a place –

(i) by reference to the place at which the registered non-Hong Kong company keeps any other records; or

(ii) in any other way;

(*c*) provide that section 8.18 or 8.20 is not complied with by keeping the copies, or the register of charges, at a place prescribed in the regulations unless conditions prescribed in the regulations are met;

(*d*) prescribe more than one place for the purpose specified in subsection (1)(*a*)(i) or (ii); and

(*e*) provide that section 8.18 or 8.20 is not complied with by keeping the copies, or the register of charges, at a place prescribed in the regulations unless both the copies and the register of charges of a registered non-Hong Kong company are kept there.

(3) Regulations made under subsection (1)(*b*) may –

(*a*) make provision as to the time, duration and manner of inspection; and

(*b*) define what may be required of the registered non-Hong Kong company as regards the nature, extent and manner of extracting or presenting any information for the purposes of inspection.

(4) Regulations made under subsection (1) may provide that –

(*a*) if a registered non-Hong Kong company contravenes any of the regulations, 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 the copies and the register of charges;

(*d*) if the copies, or the register of charges, are kept at the office of a person other than the registered non-Hong Kong 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 the copies, or the register of charges, 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 registered non-Hong Kong 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.

PART 9

ACCOUNTS AND AUDIT

Division 1 – Preliminary

9.1 Interpretation

(1) In this Part –

"annual consolidated financial statement" (周年綜合財務報表) means the consolidated statement required to be prepared under section 9.24(2);

"annual financial statement" (周年財務報表) means the statement required to be prepared under section 9.24(1);

"auditor's report" (核數師報告) means the report required to be prepared under section 9.49;

"directors' declaration" (董事聲明) means the declaration required by section 9.28;

"directors' remuneration report" (董事酬金報告) means the report required to be prepared under section 9.34(1) or (2);

"directors' report" (董事報告) means –

(*a*) the report required to be prepared under section 9.29(1); or

(*b*) the consolidated report required to be prepared under section 9.29(2);

"financial statement" (財務報表) means an annual financial statement or annual consolidated financial statement;

"Regulation" (《規例》) means the regulations made under sections 9.95 and 9.96;

"summary financial report" (財務摘要報告) means a financial report prepared under section 9.84.

(2) In this Part, a reference to the reporting documents for a financial year is a reference to all of the following –

(*a*) the company's financial statement for the financial year;

(*b*) the directors' declaration for the financial year;

(*c*) the directors' report for the financial year;

(*d*) if a directors' remuneration report for the financial year is required to be prepared under section 9.34, the directors' remuneration report;

(*e*) the auditor's report on that financial statement and the auditable part of that directors' remuneration report.

Division 2 – Reporting Exemption

9.2 Company falling within reporting exemption

(1) For the purposes of this Part, a company falls within the reporting exemption for a financial year –

(*a*) if –

(i) it is qualified as a small private company for the financial year; and

(ii) it is not a company specified in subsection (5) at any time during the financial year; or

(*b*) if –

(i) it is a private company at all times, and is not a company specified in subsection (5) at any time, during the financial year; and

(ii) the conditions specified in section 9.3(1) are satisfied.

(2) For the purposes of this Part, a company also falls within the reporting exemption for a financial year –

(*a*) if it is qualified as a small guarantee company for the financial year; and

(*b*) if it is not a company specified in subsection (5) at any time during the financial year.

(3) For the purposes of this Part, a company also falls within the reporting exemption for a financial year –

(*a*) if it is a private company at all times, and is not a company specified in subsection (5) at any time, during the financial year;

(*b*) if it is the holding company of a group of companies, of which no member is a company specified in subsection (5) at any time during the financial year; and

(*c*) if –

(i) the group of companies is qualified as a group of small private companies for the financial year; or

(ii) the conditions specified in section 9.3(2) or (3) are satisfied.

(4) For the purposes of this Part, a company also falls within the reporting exemption for a financial year –

(*a*) if it is a company limited by guarantee at all times, and is not a company specified in subsection (5) at any time, during the financial year;

(*b*) if it is the holding company of a group of companies, of which no member is a company specified in subsection (5) at any time during the financial year; and

(*c*) if the group of companies is qualified as a group of small guarantee companies for the financial year.

(5) The company specified for the purposes of subsections (1), (2), (3) and (4) is –

(*a*) one that carries on banking business and holds a valid banking licence granted under the Banking Ordinance (Cap. 155);

(*b*) one that is a corporation licensed under Part V of the Securities and Futures Ordinance (Cap. 571) to carry on a business in any regulated activity within the meaning of that Ordinance; or

(*c*) one that –

(i) carries on any insurance business otherwise than solely as an agent; or

(ii) accepts, by way of trade or business (other than banking business), loans of money at interest or repayable at a premium, otherwise than on terms involving the issue of debentures or other securities.

9.3 Conditions specified for section 9.2(1)(*b*)(ii) and (3)(*c*)(ii)

(1) The conditions specified for the purposes of section 9.2(1)(*b*)(ii) are –

(*a*) subject to subsection (4), a resolution is passed by the members holding at least 75% of the voting rights in the company to the effect that the company is to fall within the reporting exemption for the financial year; and

(*b*) the members holding the remaining voting rights do not vote against the resolution.

(2) If the group of companies is not qualified as a group of small private companies for the financial year by reason only that the condition specified in section 9.8(5) is not satisfied in the relevant financial year or financial years, the conditions specified for the purposes of section 9.2(3)(*c*)(ii) are –

(*a*) subject to subsection (4), a resolution is passed by the members holding at least 75% of the voting rights in each non-small private company to the effect that the company is to fall within the reporting exemption for the financial year; and

(*b*) the members holding the remaining voting rights do not vote against the resolution.

(3) If the group of companies is not qualified as a group of small private companies for the financial year by reason only that any 2 of the conditions specified in section 9.8(7) are not satisfied in the relevant financial year or financial years, the conditions specified for the purposes of section 9.2(3)(*c*)(ii) are –

(*a*) subject to subsection (4), a resolution is passed by the members holding at least 75% of the voting rights in the holding company to the effect that the holding company is to fall within the reporting exemption for the financial year; and

(*b*) the members holding the remaining voting rights do not vote against the resolution.

(4) If –

(*a*) a resolution is passed for the purposes of subsection (1)(*a*), (2)(*a*) or (3)(*a*) to the effect that a company is to fall within the reporting exemption for a financial year;

(*b*) by notice in writing to the company, a member of the company objects to the company falling within that exemption for the financial year; and

(*c*) the notice is given at least 6 months before the end of the financial year to which the objection relates,

the resolution is regarded as not being passed in relation to the financial year to which the objection relates.

(5) Within 14 days after receiving a notice under subsection (4)(*b*), a company must notify its members of the objection.

(6) Special notice is required for a resolution mentioned in subsection (1)(*a*), (2)(*a*) or (3)(*a*).

9.4 Small private company

(1) For the purposes of this Part, if a company is a private company formed and registered under this Ordinance, and any 2 of the conditions specified in section 9.8(1) are satisfied in its first financial year, the company is qualified as a small private company for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4).

(2) For the purposes of this Part, if a company is an existing private company, and any 2 of the conditions specified in section 9.8(1) are satisfied in –

(*a*) its first financial year after the commencement of this section; or

(*b*) the financial year of the company for the purposes of the predecessor Ordinance that immediately precedes that first financial year,

the company is qualified as a small private company for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4).

(3) For the purposes of this Part, if –

(*a*) a company is a private company; and

(*b*) after its first financial year after the commencement of this section, any 2 of the conditions specified in section 9.8(1) are satisfied for 2 consecutive financial years,

the company is also qualified as a small private company for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is disqualified under subsection (4).

(4) For the purposes of this Part, if, after a company is qualified as a small private company under subsection (1), (2) or (3), any 2 of the conditions

specified in section 9.8(2) are not satisfied for 2 consecutive financial years, the company is disqualified as a small private company for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is qualified again under subsection (3).

9.5 Small guarantee company

(1) For the purposes of this Part, if a company is a company limited by guarantee formed and registered under this Ordinance, and the condition specified in section 9.8(3) is satisfied in its first financial year, the company is qualified as a small guarantee company for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4).

(2) For the purposes of this Part, if a company is an existing company limited by guarantee, and the condition specified in section 9.8(3) is satisfied in –

(*a*) its first financial year after the commencement of this section; or

(*b*) the financial year of the company for the purposes of the predecessor Ordinance that immediately precedes that first financial year,

the company is qualified as a small guarantee company for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4).

(3) For the purposes of this Part, if –

(*a*) a company is a company limited by guarantee; and

(*b*) after its first financial year after the commencement of this section, the condition specified in section 9.8(3) is satisfied for 2 consecutive financial years,

the company is also qualified as a small guarantee company for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is disqualified under subsection (4).

(4) For the purposes of this Part, if, after a company is qualified as a small guarantee company under subsection (1), (2) or (3), the condition specified in section 9.8(4) is not satisfied for 2 consecutive financial years, the company is disqualified as a small guarantee company for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is qualified again under subsection (3).

9.6 Group of small private companies

(1) For the purposes of this Part, if –

(*a*) the holding company of a group of companies is formed and registered under this Ordinance; and

(*b*) the condition specified in section 9.8(5), and any 2 of the conditions specified in section 9.8(6), are satisfied in the holding company's first financial year,

the group is qualified as a group of small private companies for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(2) For the purposes of this Part, if –

(*a*) the holding company of a group of companies is an existing company; and

(*b*) the condition specified in section 9.8(5), and any 2 of the conditions specified in section 9.8(6), are satisfied in –

(i) the holding company's first financial year after the commencement of this section; or

(ii) the holding company's financial year for the purposes of the predecessor Ordinance that immediately precedes that first financial year,

the group is qualified as a group of small private companies for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(3) For the purposes of this Part, if, after the first financial year after the commencement of this section of the holding company of a group of companies, the condition specified in section 9.8(5), and any 2 of the conditions specified in section 9.8(6), are satisfied for 2 consecutive financial years of the holding company, the group is also qualified as a group of small private companies for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(4) For the purposes of this Part, if, after a group of companies is qualified as a group of small private companies under subsection (1), (2) or (3), another company becomes a new member of the group in a financial year of the holding company such that either the condition specified in section 9.8(5) is not satisfied, or any 2 of the conditions specified in section 9.8(7) are not satisfied, for the financial year, the group is disqualified as a group of small private companies for the financial year, and every subsequent financial year, until it is qualified again under subsection (3).

(5) For the purposes of this Part, if, after a group of companies is qualified as a group of small private companies under subsection (1), (2) or (3), either the condition specified in section 9.8(5) is not satisfied, or any 2 of the conditions specified in section 9.8(7) are not satisfied, for 2 consecutive financial years of the holding company, the group is also disqualified as a group of small private companies for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is qualified again under subsection (3).

9.7 Group of small guarantee companies

(1) For the purposes of this Part, if –

(*a*) the holding company of a group of companies is formed and registered under this Ordinance; and

(*b*) the conditions specified in section 9.8(8) are satisfied in the holding company's first financial year,

the group is qualified as a group of small guarantee companies for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(2) For the purposes of this Part, if –

(*a*) the holding company of a group of companies is an existing company; and

(*b*) the conditions specified in section 9.8(8) are satisfied in –

(i) the holding company's first financial year after the commencement of this section; or

(ii) the holding company's financial year for the purposes of the predecessor Ordinance that immediately precedes that first financial year,

the group is qualified as a group of small guarantee companies for that first financial year, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(3) For the purposes of this Part, if, after the first financial year after the commencement of this section of the holding company of a group of companies, the conditions specified in section 9.8(8) are satisfied for 2 consecutive financial years of the holding company, the group is also qualified as a group of small guarantee companies for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is disqualified under subsection (4) or (5).

(4) For the purposes of this Part, if, after a group of companies is qualified as a group of small guarantee companies under subsection (1), (2) or (3), another company becomes a new member of the group in a financial year of the holding company such that the conditions specified in section 9.8(9) are not satisfied for the financial year, the group is disqualified as a group of small

guarantee companies for the financial year, and every subsequent financial year, until it is qualified again under subsection (3).

(5) For the purposes of this Part, if, after a group of companies is qualified as a group of small guarantee companies under subsection (1), (2) or (3), the conditions specified in section 9.8(9) are not satisfied for 2 consecutive financial years of the holding company, the group is also disqualified as a group of small guarantee companies for the financial year immediately following those 2 financial years, and every subsequent financial year, until it is qualified again under subsection (3).

9.8 Specified qualifying conditions (for sections 9.4 to 9.7)

(1) The conditions specified for the purposes of section 9.4(1), (2) and (3) are –

(*a*) the amount of the company's total revenue for the financial year, as would be reflected in the company's annual financial statement for the financial year if the company is qualified as a small private company for the financial year, does not exceed $50 million;

(*b*) the amount of the company's total assets at the date of the statement of financial position for the financial year, as would be reflected in the company's annual financial statement for the financial year if the company is qualified as a small private company for the financial year, does not exceed $50 million; and

(*c*) the average number of the company's employees during the financial year does not exceed 50.

(2) The conditions specified for the purposes of section 9.4(4) are –

(*a*) the amount of the company's total revenue for the financial year, as reflected in the company's annual

financial statement for the financial year, does not exceed $50 million;

(*b*) the amount of the company's total assets at the date of the statement of financial position for the financial year, as reflected in the company's annual financial statement for the financial year, does not exceed $50 million; and

(*c*) the average number of the company's employees during the financial year does not exceed 50.

(3) The condition specified for the purposes of section 9.5(1), (2) and (3) is that the amount of the company's total revenue for the financial year, as would be reflected in the company's annual financial statement for the financial year if the company is qualified as a small guarantee company for the financial year, does not exceed $25 million.

(4) The condition specified for the purposes of section 9.5(4) is that the amount of the company's total revenue for the financial year, as reflected in the company's annual financial statement for the financial year, does not exceed $25 million.

(5) The condition specified for the purposes of section 9.6(1), (2), (3), (4) and (5) is that each company in the group is qualified as a small private company for the financial year.

(6) The conditions specified for the purposes of section 9.6(1), (2) and (3) are –

(*a*) the aggregate amount of the group's total revenue for the financial year does not exceed $50 million;

(*b*) the aggregate amount of the group's total assets at the date of the statement of financial position for the financial year does not exceed $50 million; and

(*c*) the aggregate of the average number of employees of each company in the group during the financial year does not exceed 50.

(7) The conditions specified for the purposes of section 9.6(4) and (5) are –

(*a*) the aggregate amount of the group's total revenue for the financial year does not exceed $50 million;

(*b*) the aggregate amount of the group's total assets at the date of the statement of financial position for the financial year does not exceed $50 million; and

(*c*) the aggregate of the average number of employees of each company in the group during the financial year does not exceed 50.

(8) The conditions specified for the purposes of section 9.7(1), (2) and (3) are –

(*a*) each company in the group is qualified as a small guarantee company for the financial year; and

(*b*) the aggregate amount of the group's total revenue for the financial year does not exceed $25 million.

(9) The conditions specified for the purposes of section 9.7(4) and (5) are –

(*a*) each company in the group is qualified as a small guarantee company for the financial year; and

(*b*) the aggregate amount of the group's total revenue for the financial year does not exceed $25 million.

(10) In subsections (1), (3), (5), (6) and (8) –

(*a*) a reference to a financial year of a company for the purposes of section 9.4(2), 9.5(2), 9.6(2) or 9.7(2) includes a financial year of the company for the purposes of the predecessor Ordinance that immediately precedes the company's first financial year after the commencement of this section; and

(*b*) a reference to a company's annual financial statement is, in the case of a financial year of the company for the purposes of the predecessor Ordinance, a reference to the company's accounts for the financial year.

9.9 Provisions supplementary to section 9.8

(1) For the purposes of section 9.8(1)(*a*), (2)(*a*), (3), (4), (6)(*a*), (7)(*a*), (8)(*b*) and (9)(*b*), the amount of total revenue for a financial year that is shorter or longer than 12 months must be calculated on a pro-rata basis as if the length of the financial year were 12 months.

(2) For the purposes of section 9.8(1)(*b*), (2)(*b*), (6)(*b*) and (7)(*b*), the amount of total assets for a financial year that is shorter or longer than 12 months must be calculated on a pro-rata basis as if the length of the financial year were 12 months.

(3) For the purposes of section 9.8(6) and (8)(*b*), the aggregate amount of the group's total revenue or assets –

(*a*) is calculated by aggregating the total revenue or assets (as the case may be) of each company in the group, as would be reflected in the company's annual financial statement or annual consolidated financial statement for the financial year if the group is qualified as a group of small private or guarantee companies (as the case may be); and

(*b*) is calculated on the basis that the set-offs and other adjustments for transactions between companies in the group have been made.

(4) For the purposes of section 9.8(7) and (9)(*b*), the aggregate amount of the group's total revenue or assets –

(*a*) is calculated by aggregating the total revenue or assets (as the case may be) of each company in the group, as reflected in the company's annual financial statement or

annual consolidated financial statement for the financial year; and

(*b*) is calculated on the basis that the set-offs and other adjustments for transactions between companies in the group have been made.

(5) For the purposes of section 9.8(1)(*c*), (2)(*c*), (6)(*c*) and (7)(*c*), the average number of a company's employees during a financial year is calculated by using the following formula –

$$\frac{M}{N}$$

where –

M represents the aggregate of the number of the company's employees as at the end of each month during the financial year;

N represents the number of months in the financial year.

(6) In subsections (3)(*a*) and (4)(*a*), a reference to a company's annual financial statement or annual consolidated financial statement is, in the case of a financial year of the company for the purposes of the predecessor Ordinance mentioned in section 9.8(10)(*a*), a reference to the company's accounts or group accounts for the financial year respectively.

9.10 Financial Secretary may amend sections 9.8 and 9.9

The Financial Secretary may, by order published in the Gazette, amend sections 9.8 and 9.9.

Division 3 – A Company's Financial Year

9.11 Financial year

(1) A company's first financial year after the commencement of this section begins on the first day of its first accounting reference period and ends

on the last day of that period or on any other date, not more than 7 days before or after that last day, that the directors think fit.

(2) Every subsequent financial year of a company begins on the date immediately following the end of the previous financial year and ends on the last day of the accounting reference period immediately following the one by reference to which the previous financial year is determined, or on any other date, not more than 7 days before or after that last day, that the directors think fit.

(3) If an undertaking is not a company, a reference in this Ordinance to its financial year is a reference to a period in respect of which a profit and loss account of the undertaking is required, by its constitution or by the law under which it is established, to be made up, whether or not the period is a year.

(4) A company's directors must secure that the financial year of each of its subsidiary undertakings coincides with the company's financial year unless, in the directors' opinion, there are good reasons against those financial years coinciding with each other.

9.12 Accounting reference period

(1) The first accounting reference period of an existing company begins on the date immediately following its primary accounting reference date and ends on the first anniversary of its primary accounting reference date.

(2) The first accounting reference period of a company formed and registered under this Ordinance begins on the date of its incorporation and ends on its primary accounting reference date.

(3) Every subsequent accounting reference period of a company is a period of 12 months beginning immediately after the end of the previous accounting reference period and ending on its accounting reference date, unless the accounting reference period is shortened or extended, as stated in a directors' resolution under section 9.16(3).

9.13 Primary accounting reference date

(1) Subject to subsection (2), the primary accounting reference date of an existing company that, immediately before the commencement of this section, was required to hold annual general meetings in accordance with section 111(1) of the predecessor Ordinance is –

(*a*) in the case of a public company or a company limited by guarantee –

(i) if the company's accounts have been laid before the company in general meeting after that commencement and before the appointed date, the date up to which the most recent accounts so laid are made; or

(ii) if the company's accounts have not been laid before the company in general meeting after that commencement and before the appointed date, the last day of the month in which the relevant anniversary of its incorporation falls; or

(*b*) in the case of any other company –

(i) if the company's accounts have been laid before the company in general meeting after that commencement, the date up to which the most recent accounts so laid are made; or

(ii) if the company's accounts have not been laid before the company in general meeting after that commencement, the last day of the month in which the relevant anniversary of its incorporation falls.

(2) Where, by virtue of the proviso to section 111(1) of the predecessor Ordinance, an existing company was not required to hold its first

annual general meeting in the year of its incorporation or in the following year, the primary accounting reference date of the company is –

(*a*) in the case of a public company or a company limited by guarantee –

(i) if the company's accounts have been laid before the company in general meeting after the commencement of this section and before the appointed date, the date up to which the most recent accounts so laid are made; or

(ii) if the company's accounts have not been laid before the company in general meeting after the commencement of this section and before the appointed date –

(A) a date specified by the directors for the purposes of this sub-subparagraph; or

(B) in the absence of such a specified date, the last day of the month in which the relevant anniversary of its incorporation falls; or

(*b*) in the case of any other company –

(i) if the company's accounts have been laid before the company in general meeting after the commencement of this section, the date up to which the most recent accounts so laid are made; or

(ii) if the company's accounts have not been laid before the company in general meeting after the commencement of this section –

(A) a date specified by the directors for the purposes of this sub-subparagraph; or

(B) in the absence of such a specified date, the last day of the month in which the relevant anniversary of its incorporation falls.

(3) The primary accounting reference date of an existing company that, immediately before the commencement of this section, was not required to hold annual general meetings in accordance with section 111(1) of the predecessor Ordinance, is the date up to which the most recent accounts provided to a member under section 111(6)(*b*) of the predecessor Ordinance are made.

(4) The primary accounting reference date of a company formed and registered under this Ordinance is –

(*a*) a date specified by the directors for the purposes of this paragraph; or

(*b*) in the absence of such a specified date, the last day of the month in which the relevant anniversary of its incorporation falls.

(5) A date specified for the purposes of subsection (4)(*a*) must fall within 18 months after the date of the incorporation of the company.

(6) In this section –

"appointed date" (指定日期) means the date appointed by the Financial Secretary for the purposes of section 9.14(2);

"relevant anniversary" (有關周年日) means the anniversary that first occurs after this section comes into operation.

9.14 Public company and company limited by guarantee must register its primary accounting reference date

(1) This section applies to a company that is a public company or a company limited by guarantee.

(2) An existing company must deliver a notice of its primary accounting reference date to the Registrar for registration on or before a date to be appointed by the Financial Secretary by notice published in the Gazette.

(3) A company formed and registered under this Ordinance must deliver a notice of its primary accounting reference date to the Registrar for registration –

(*a*) if that date is specified under section 9.13(4)(*a*), within 14 days after the date of the directors' resolution specifying the date; or

(*b*) if that date is determined in accordance with section 9.13(4)(*b*), on or before the first anniversary of its incorporation.

(4) A notice of primary accounting reference date under subsection (2) or (3) must be in the specified form.

(5) 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 3 and, in the case of a continuing offence, to a further fine of $300 for each day during which the offence continues.

9.15 Accounting reference date

Subject to section 9.16, a company's accounting reference date is the anniversary of its primary accounting reference date.

9.16 Alteration of accounting reference date

(1) The directors of a company may specify a new accounting reference date in relation to –

(*a*) the company's current accounting reference period and every subsequent accounting reference period; or

(*b*) the company's previous accounting reference period and every subsequent accounting reference period.

(2) If the directors of a public company or a company limited by guarantee specify a new accounting reference date under subsection (1), the company must, within 14 days after the date of the directors' resolution specifying the new accounting reference date, deliver a notice, in the specified form, of that new date to the Registrar for registration.

(3) A directors' resolution by which a new accounting reference date is specified, and a notice of that new date delivered to the Registrar, must state –

(*a*) whether the current or previous accounting reference period concerned is to be shortened, so as to end on the first occasion on which the new accounting reference date falls or fell after the beginning of that period; or

(*b*) whether the current or previous accounting reference period concerned is to be extended, so as to end on the second occasion on which the new accounting reference date falls or fell after the beginning of that period.

(4) The directors of a company must not specify a new accounting reference date in relation to the previous accounting reference period if –

(*a*) the period for laying before the company in general meeting under section 9.73 a copy of the reporting documents for the financial year determined by reference to that accounting reference period has expired; or

(*b*) the period for sending a copy of the reporting documents for the financial year to the members under section 9.74(3) has expired.

(5) The directors of a company must not specify a new accounting reference date in relation to an accounting reference period so as to extend the period to longer than 18 months.

(6) The directors of a company must not specify a new accounting reference date in relation to the current or previous accounting reference period so as to extend that period if –

(*a*) those directors have specified a new accounting reference date in relation to an earlier accounting reference period so as to extend that earlier period; and

(*b*) the earlier accounting reference period ended less than 5 years ago.

(7) Subsection (6) does not apply if –

(*a*) the new accounting reference date to be specified by the directors coincides with the accounting reference date of a holding company of the company; or

(*b*) the specification is approved by a members' resolution.

(8) 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.

(9) In this section –

"previous accounting reference period" (對上的會計參照期), in relation to a company, means the accounting reference period of the company immediately preceding the company's current accounting reference period.

Division 4 – Preparation of Financial Statement, Reports, etc.

Subdivision 1 – Preliminary

9.17 Interpretation

In this Division –

"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.

Subdivision 2 – Accounting Records

9.18 Company must keep accounting records

(1) A company must keep accounting records that comply with subsections (2) and (3).

(2) The accounting records must be sufficient –

(*a*) to show and explain the company's transactions;

(*b*) to disclose with reasonable accuracy the company's financial position and financial performance; and

(*c*) to enable the directors to ensure that the company's financial statements comply with this Ordinance.

(3) In particular, the accounting records must contain –

(*a*) daily entries of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place; and

(*b*) a record of the company's assets and liabilities.

(4) If subsection (1) does not apply in relation to a subsidiary undertaking of a company, the company must take all reasonable steps to secure that the subsidiary undertaking keeps accounting records that are sufficient to enable the company's directors to ensure that the company's financial statements comply with this Ordinance.

(5) If a company contravenes subsection (1) or (4), every responsible person of the company commits an offence, and each is liable to a fine of $300,000 and to imprisonment for 12 months.

(6) If a person is charged with an offence under subsection (5), it is a defence to establish that –

(*a*) the person acted honestly; and

(*b*) in the circumstances in which the company's business was carried on, it was excusable for the person to authorize or

permit, participate in, or fail to take all reasonable steps to prevent, the company's contravention (as the case may be).

9.19 Where accounting records to be kept

(1) A company's accounting records –

(*a*) must be kept at its registered office or any other place that the directors think fit; and

(*b*) must be open to inspection by the directors at all times without charge.

(2) If a company's accounting records are kept at a place outside Hong Kong, the accounts and returns with respect to the business dealt with in those records –

(*a*) must be sent to, and kept at, a place in Hong Kong; and

(*b*) must be open to inspection by the directors at all times without charge.

(3) Those accounts and returns –

(*a*) must disclose with reasonable accuracy the financial position of the business in question at intervals of not more than 6 months; and

(*b*) must be sufficient to enable the directors to ensure that the company's financial statements comply with this Ordinance.

(4) If subsection (1), (2) or (3) is contravened, every responsible person of the company commits an offence, and each is liable to a fine of $300,000 and to imprisonment for 12 months.

(5) If a person is charged with an offence under subsection (4), it is a defence to establish that –

(*a*) the person acted honestly; and

(*b*) in the circumstances in which the company's business was carried on, it was excusable for the person to authorize or

permit, participate in, or fail to take all reasonable steps to prevent, the company's contravention (as the case may be).

9.20 Director may obtain copies of accounting records during inspection

(1) A company must allow a director of the company to make a copy of its accounting records in the course of inspection.

(2) A company must provide a director of the company with a copy of its accounting records without charge if so requested by the director.

(3) For the purposes of subsection (2) –

(*a*) if the director requests a copy of the company's accounting records in hard copy form, the company must provide such a copy in hard copy form; and

(*b*) if the director requests a copy of the company's accounting records in electronic form, the company must provide such a copy in any electronic form that the company thinks fit.

(4) Subsections (2) and (3) do not require a company to provide a director of the company with a copy of its accounting records in electronic form if it keeps its accounting records by recording the information in hard copy form only.

(5) If any accounting records are kept by a company by recording the information in electronic form, a requirement under this Subdivision for the accounting records to be open to inspection, or for a copy of the accounting records to be provided to a director, is to be regarded as a requirement for a reproduction of the recording in hard copy form to be open to inspection, or for a copy of such a reproduction to be provided to a director (as the case may be).

(6) If a company contravenes subsection (1) or (2), every responsible person of the company commits 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 charged with an offence under subsection (6), it is a defence to establish that –

(*a*) the person acted honestly; and

(*b*) in the circumstances in which the company's business was carried on, it was excusable for the person to authorize or permit, participate in, or fail to take all reasonable steps to prevent, the company's contravention (as the case may be).

9.21 Form of accounting records

(1) The information contained in accounting records must be adequately recorded for future reference.

(2) Subject to subsection (1), accounting records may be –

(*a*) kept in hard copy form or electronic form; and

(*b*) arranged in the manner that the directors think fit.

(3) If a company's accounting records are kept in electronic form, the company must ensure that those records are capable of being reproduced in hard copy form.

(4) If any accounting records are kept by a company otherwise than by making entries in a bound book, the company must take precautions that are adequate –

(*a*) to guard against falsification; and

(*b*) to facilitate the discovery of a falsification.

(5) If subsection (1), (3) or (4) 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.

9.22 How long accounting records to be preserved

(1) This section applies to any accounting records, or any accounts and returns, that are required by section 9.18(1) or 9.19(2) to be kept.

(2) The company must preserve the records, or the accounts and returns, for 7 years after the end of the financial year to which the last entry made or matter recorded in the records, or the accounts and returns, relates.

(3) If a company contravenes subsection (2), every responsible person of the company commits an offence, and each is liable to a fine of $300,000 and to imprisonment for 12 months.

9.23 Court may order accounting records to be inspected on director's behalf

(1) On application by a director of a company, the Court of First Instance may by order authorize a person to inspect the company's accounting records on the director's behalf.

(2) Unless the Court of First Instance otherwise directs, a person so authorized may make copies of the accounting records.

(3) The Court of First Instance may make any or all of the following orders –

(*a*) an order limiting the use that a person so authorized may make of the information obtained during the inspection;

(*b*) an order limiting the right of a person so authorized to make copies in accordance with subsection (2);

(*c*) any other order that it thinks fit.

Subdivision 3 – Financial Statement

9.24 Directors must prepare financial statement

(1) A company's directors must prepare for each financial year a statement that complies with sections 9.25 and 9.27.

(2) Despite subsection (1), if the company is a holding company at the end of the financial year, the directors must instead prepare for the financial year a consolidated statement that complies with sections 9.25, 9.26 and 9.27.

(3) Subsection (2) does not apply –

(*a*) if the company is a wholly owned subsidiary of another body corporate in the financial year; or

(*b*) if –

(i) the company is a partially owned subsidiary of another body corporate in the financial year;

(ii) at least 6 months before the end of the financial year, the directors notify the members in writing of the directors' intention not to prepare a consolidated statement for the financial year, and the notification does not relate to any other financial year; and

(iii) as at a date falling 3 months before the end of the financial year, no member has responded to the notification by giving the directors a written request for preparation of a consolidated statement for the financial year.

(4) If, as respects a financial statement a copy of which is laid before a company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, a director of the company fails to take all reasonable steps to secure compliance with subsection (1) or (2), the director commits an offence and is liable to a fine of $300,000.

(5) If, as respects a financial statement a copy of which is laid before a company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, a director of the company wilfully fails to take all reasonable steps to secure compliance with subsection (1) or (2), the director commits an offence and is liable to a fine of $300,000 and to imprisonment for 12 months.

(6) If a person is charged with an offence under subsection (4), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person –

(*a*) was charged with the duty of ensuring that subsection (1) or (2) (as the case may be) was complied with; and

(*b*) was in a position to discharge that duty.

(7) For the purposes of this section, a body corporate is a wholly owned subsidiary of another body corporate if it has only the following as members –

(*a*) that other body corporate;

(*b*) a wholly owned subsidiary of that other body corporate;

(*c*) a nominee of that other body corporate or such a wholly owned subsidiary.

9.25 Contents of financial statement

(1) An annual financial statement must –

(*a*) give a true and fair view of the financial position of the company as at the end of the financial year; and

(*b*) give a true and fair view of the financial performance of the company for the financial year.

(2) An annual consolidated financial statement must –

(*a*) give a true and fair view of the financial position of the company, and all the subsidiary undertakings, as a whole as at the end of the financial year; and

(*b*) give a true and fair view of the financial performance of the company, and all the subsidiary undertakings, as a whole for the financial year.

(3) A financial statement must comply with –

(*a*) if the company falls within the reporting exemption for the financial year, Part 1 of the Schedule; or

(*b*) if the company does not fall within the reporting exemption for the financial year, Parts 1 and 2 of the Schedule.

(4) A financial statement must also comply with –

(*a*) any other requirements of this Ordinance in relation to the financial statement; and

(*b*) the accounting standards applicable to the financial statement.

(5) If, in relation to a financial statement, compliance with subsections (3) and (4) would be insufficient to give a true and fair view under subsection (1) or (2), the financial statement must contain all additional information necessary for that purpose.

(6) If, in relation to a financial statement, compliance with subsection (3) or (4) would be inconsistent with a requirement to give a true and fair view under subsection (1) or (2), the financial statement must –

(*a*) depart from subsection (3) or (4) (as the case may be) to the extent necessary for it to give a true and fair view; and

(*b*) contain the reasons for, and the particulars and effect of, the departure.

(7) In this section –

(*a*) "accounting standards" (會計標準) means statements of standard accounting practice issued by a body prescribed by the Regulation; and

(*b*) a reference to accounting standards applicable to a company's financial statement is a reference to accounting standards as are, in accordance with their terms, relevant to the company's circumstances and to the financial statement.

(8) The Financial Secretary may, by order published in the Gazette, amend the Schedule.

9.26 Subsidiary undertakings to be included in annual consolidated financial statement

(1) An annual consolidated financial statement must include all the subsidiary undertakings of the company, except a subsidiary undertaking or subsidiary undertakings that may be excluded from the statement under subsection (2) or (3).

(2) One subsidiary undertaking may be excluded from an annual consolidated financial statement if the inclusion of the subsidiary undertaking is not material for the purpose of giving a true and fair view of the financial position, and of the financial performance, mentioned in section 9.25(2)(*a*) and (*b*).

(3) More than one subsidiary undertaking may be excluded from an annual consolidated financial statement if the inclusion of those subsidiary undertakings taken together is not material for the purpose of giving a true and fair view of the financial position, and of the financial performance, mentioned in section 9.25(2)(*a*) and (*b*).

9.27 Notes to financial statement to contain information on directors' emoluments etc.

(1) The financial statement for a financial year must contain, in the notes to it, the information prescribed by the Regulation for the purposes of this subsection about the following –

(*a*) the directors' emoluments;

(*b*) the directors' retirement benefits;

(*c*) compensation to directors for loss of office;

(*d*) loans, quasi-loans and other dealings in favour of directors.

(2) Despite subsection (1)(*d*), the financial statement for a financial year is not required to contain the information prescribed by the Regulation about loans, quasi-loans and other dealings in favour of directors if the company complies with the requirements prescribed by the Regulation for the purposes of this subsection.

(3) Despite subsection (1), if the directors are required by section 9.34(1) or (2) to prepare a directors' remuneration report for a financial year, the financial statement for the financial year is not required to contain, in the notes to it, such information prescribed for the purposes of subsection (1) that is set out in the Regulation.

(4) The notes to a financial statement must also comply with other requirements prescribed by the Regulation.

(5) A person who is, or has been during the preceding 5 years, a director or shadow director of a company must give notice to the company of any matter that –

(*a*) is prescribed by the Regulation;

(*b*) relates to the person; and

(*c*) is necessary for the purposes of subsection (1).

(6) A person who contravenes subsection (5) commits an offence and is liable to a fine at level 5.

9.28 Financial statement to be accompanied by directors' declaration

(1) Every copy of a financial statement laid before a company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, must be accompanied by a copy of a declaration made by the directors that complies with subsections (2) and (3).

(2) The declaration must state whether, in the directors' opinion, the financial statement –

(*a*) in the case of an annual financial statement, gives a true and fair view of the financial position and financial performance of the company as required by section 9.25; or

(*b*) in the case of an annual consolidated financial statement, gives a true and fair view of the financial position and

financial performance of the company and its subsidiary undertakings as required by section 9.25.

(3) The declaration –

(*a*) must be authorized by a resolution of the directors;

(*b*) must specify the date on which it is made;

(*c*) must be signed on the directors' behalf by a director; and

(*d*) must state the signing director's name.

(4) Subsections (5), (6) and (7) apply if any director votes against the resolution authorizing the declaration.

(5) Every copy of the financial statement must be accompanied by a list of the directors who voted against the resolution authorizing the declaration.

(6) If the directors decide that the reasons for voting against the resolution are material and should be disclosed to the members without being requested, every copy of the financial statement must also be accompanied by the details of those reasons.

(7) If the directors decide that the reasons for voting against the resolution are material but should not be disclosed to the members without being requested, or are immaterial, or need not be considered, every copy of the financial statement must also be accompanied by a statement to that effect.

(8) If subsection (1), (5), (6) or (7) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

Subdivision 4 – Directors' Report

9.29 Directors must prepare directors' report

(1) A company's directors must prepare for each financial year a report that –

(*a*) complies with sections 9.30 and 9.31;

(*b*) contains the information prescribed by the Regulation; and

(*c*) complies with other requirements prescribed by the Regulation.

(2) Despite subsection (1), if the company is a holding company in a financial year, and the directors prepare an annual consolidated financial statement for the financial year, the directors must instead prepare for the financial year a consolidated report that –

(*a*) complies with sections 9.30 and 9.31;

(*b*) contains the information prescribed by the Regulation; and

(*c*) complies with other requirements prescribed by the Regulation.

(3) If a company falls within the reporting exemption for a financial year, subsection (1) or (2) does not require the directors' report for the financial year to comply with section 9.31.

(4) A director of a company who fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000.

(5) A director of a company who wilfully fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000 and to imprisonment for 6 months.

(6) If a person is charged with an offence under subsection (4), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person –

(*a*) was charged with the duty of ensuring that subsection (1) or (2) (as the case may be) was complied with; and

(*b*) was in a position to discharge that duty.

9.30 Contents of directors' report: general

(1) A directors' report for a financial year must contain –

(*a*) the name of every person who was a director of the company –

(i) during the financial year; or

(ii) during the period beginning with the end of the financial year and ending on the date of the report; and

(*b*) the principal activities of the company in the course of the financial year.

(2) A directors' report must contain particulars of any other matter –

(*a*) that is material for the members' appreciation of the state of the company's affairs; and

(*b*) the disclosure of which will not, in the directors' opinion, be harmful to the business of the company or any of its subsidiary undertakings.

(3) This section has effect in relation to a directors' report required to be prepared under section 9.29(2) as if a reference to the company were a reference to –

(*a*) the company; and

(*b*) the subsidiary undertakings included in the annual consolidated financial statement for the financial year.

9.31 Contents of directors' report: business review

(1) A directors' report for a financial year must contain a business review that consists of –

(*a*) a fair review of the company's business;

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

(*c*) particulars of important events affecting the company that have occurred since the end of the financial year; and

(*d*) an indication of likely future development in the company's business.

(2) A business review must be a balanced and comprehensive analysis, consistent with the size and complexity of the company's business, of –

(*a*) the development and performance of the company's business during the financial year; and

(*b*) the position of the company's business at the end of the financial year.

(3) To the extent necessary for an understanding of the development, performance or position of the company's business, a business review must include –

(*a*) an analysis using financial key performance indicators;

(*b*) a discussion on –

(i) the company's environmental policies and performance; and

(ii) the company's compliance with the relevant laws and regulations that have a significant impact on the company; and

(*c*) an account of the company's key relationships with its employees, customers and suppliers and others that have a significant impact on the company and on which the company's success depends.

(4) This section does not require the disclosure of any information about impending developments or matters in the course of negotiation if the disclosure would, in the directors' opinion, be seriously prejudicial to the company's interests.

(5) This section has effect in relation to a directors' report required to be prepared under section 9.29(2) as if a reference to the company were a reference to –

(*a*) the company; and

(*b*) the subsidiary undertakings included in the annual consolidated financial statement for the financial year.

(6) In this section –

"key performance indicators" (表現關鍵指標) means factors by reference to which the development, performance or position of the company's business can be measured effectively.

9.32 Directors' report not to contain information or particulars by reference

For the purposes of this Subdivision, a directors' report is regarded as not containing any information or particulars if it merely refers to the information or particulars contained in a financial statement of the company or a document attached to such a statement.

9.33 Directors' report to be approved and signed

(1) A directors' report –

(*a*) must be approved by the directors; and

(*b*) must be signed on the directors' behalf by a director or by the company's secretary.

(2) Every copy of a directors' report laid before a company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, must state the name of the person who signed the report on the directors' behalf.

(3) If subsection (1) or (2) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

Subdivision 5 – Directors' Remuneration Report

9.34 Directors must prepare directors' remuneration report

(1) A listed company's directors must prepare for each financial year a report that complies with subsection (3).

(2) If so requested by the required number of members in accordance with subsection (10), any other company's directors must prepare for the financial year a report that complies with subsection (3).

(3) A directors' remuneration report for a financial year –

(*a*) must contain the information prescribed by the Regulation; and

(*b*) must comply with other requirements prescribed by the Regulation.

(4) A person who is, or has been during the preceding 5 years, a director or shadow director of a company must give notice to the company of any matter that –

(*a*) is prescribed by the Regulation;

(*b*) relates to the person; and

(*c*) is necessary for the purposes of subsection (3)(*a*).

(5) A director of a company who fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000.

(6) A director of a company who wilfully fails to take all reasonable steps to secure compliance with subsection (1) or (2) commits an offence and is liable to a fine of $150,000 and to imprisonment for 6 months.

(7) If a person is charged with an offence under subsection (5), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person –

(*a*) was charged with the duty of ensuring that subsection (1) or (2) (as the case may be) was complied with; and

(*b*) was in a position to discharge that duty.

(8) A person who contravenes subsection (4) commits an offence and is liable to a fine at level 5.

(9) In this section, a reference to the required number of members is a reference to the number of members of the company representing at least 5% of

the voting rights of all the members having a right to vote at the company's general meetings at the date of request.

(10) A request for a directors' remuneration report for a financial year must be made –

(*a*) at or before the annual general meeting at which a copy of the company's financial statement for the previous financial year is laid; or

(*b*) if no such annual general meeting is held, on or before the date on which a copy of the company's financial statement for the previous financial year is sent under section 9.74(3).

9.35 Directors' remuneration report to be approved and signed

(1) A directors' remuneration report –

(*a*) must be approved by the directors; and

(*b*) must be signed on the directors' behalf by a director.

(2) Every copy of a directors' remuneration report laid before the company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, must state the name of the person who signed the report on the directors' behalf.

(3) If subsection (1) or (2) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

Division 5 – Auditor and Auditor's Report

Subdivision 1 – Preliminary

9.36 Interpretation

In this Division –

"appointment period" (委任期), in relation to a financial year, means the period of 28 days beginning on whichever is the earlier of the following –

(*a*) the date on which a copy of the reporting documents for the previous financial year is sent or provided to every member of the company under section 9.74(3) or 12.75(1)(*b*) (as the case may be);

(*b*) the last date on which a copy of the reporting documents for the previous financial year must be sent or provided to every member of the company under section 9.74(3) or 12.75(1)(*b*) (as the case may be);

"auditable part" (可審計部分), in relation to a directors' remuneration report, means the part of the report that contains any prescribed information required by the Regulation to be subject to audit;

"cessation statement" (停任陳述) means a statement given under section 9.66(1), (2) or (3) or 9.67(2)(*a*);

"practice unit" (執業單位) has the meaning given by section 2(1) of the Professional Accountants Ordinance (Cap. 50);

"statement of circumstances" (情況陳述) means a statement given under section 9.68(*a*) or 9.69(1)(*a*).

Subdivision 2 – Appointment of Auditor

9.37 Eligibility for appointment

(1) Only a practice unit is eligible for appointment as auditor of a company under this Subdivision.

(2) The following are disqualified for appointment as auditor of a company under this Subdivision –

(*a*) a person who is an officer or employee of the company;

(*b*) a person who is a partner or employee of a person mentioned in paragraph (*a*);

(*c*) a person who –

(i) is, by virtue of paragraph (*a*) or (*b*), disqualified for appointment as auditor of any other undertaking that is a subsidiary undertaking, or a parent undertaking, of the company or is a subsidiary undertaking of that parent undertaking; or

(ii) would be so disqualified if the undertaking were a company.

(3) In this section, a reference to an officer or employee of a company excludes an auditor of the company.

9.38 Auditor must be appointed for each financial year

(1) An auditor must be appointed for each financial year of a company.

(2) An auditor may be appointed only under this Subdivision.

9.39 Appointment of first auditor by directors

(1) If a company formed and registered under this Ordinance is required to hold an annual general meeting in accordance with section 12.73 in respect of its first financial year, the directors may appoint the auditor of the company for that first financial year at any time before the annual general meeting.

(2) If, by virtue of section 12.75(1) or (2), such a company is not required to hold an annual general meeting in accordance with section 12.73 in respect of its first financial year, the directors may appoint the auditor of the company for that first financial year at any time before the appointment period in relation to the next financial year.

9.40 Appointment of auditor by company members

(1) A company must appoint the auditor of the company for a financial year by a resolution at the annual general meeting in respect of the previous financial year.

(2) Subsection (1) does not apply to a company that, by virtue of section 12.75(2), is not required to hold an annual general meeting in accordance with section 12.73 in respect of the previous financial year.

(3) A company must appoint the auditor of the company for a financial year by a resolution at a general meeting if –

(*a*) by virtue of section 12.75(2), it is not required to hold an annual general meeting in accordance with section 12.73 in respect of the previous financial year; and

(*b*) no person is regarded as being reappointed as auditor of the company for the financial year under section 9.47.

(4) An appointment under subsection (3) must be made before the end of the appointment period in relation to the financial year.

(5) If, at the annual general meeting in respect of the previous financial year, a company has not appointed the auditor of the company for a financial year, the company must make the appointment by a resolution at another general meeting.

(6) A company formed and registered under this Ordinance may, by a resolution at a general meeting, appoint the auditor of the company for its first financial year if the directors have not done so under section 9.39.

9.41 Appointment to fill casual vacancy

(1) The directors may appoint a person to fill a casual vacancy in the office of auditor of the company.

(2) If the directors have not done so within one month after the casual vacancy occurs, the members may, by a resolution at a general meeting, appoint a person to fill the casual vacancy.

9.42 Appointment of auditor by Court

(1) The Court of First Instance may, on application by a member of a company, appoint the auditor of the company for a financial year if –

(*a*) in the case of a company required to hold an annual general meeting in accordance with section 12.73 in respect of the previous financial year –

(i) at the annual general meeting, no person has been appointed as auditor of the company for the financial year; or

(ii) an annual general meeting has not been held in accordance with that section; or

(*b*) in the case of a company not required to hold an annual general meeting in accordance with section 12.73 in respect of the previous financial year by virtue of section 12.75(2) –

(i) at the end of the appointment period in relation to the financial year, no person has been appointed as auditor of the company for the financial year; and

(ii) no person is regarded as being reappointed as auditor of the company for the financial year under section 9.47.

(2) The Court of First Instance may, on application by a member of a company formed and registered under this Ordinance, appoint the auditor of the company for its first financial year if an appointment has not been made under sections 9.39(1) or (2) and 9.40(6).

(3) The Court of First Instance may, on application by a member of a company, appoint a person to fill a casual vacancy in the office of auditor of the company if an appointment has not been made under section 9.41.

9.43 Effect of appointing a firm as auditor

If a firm is appointed, by the firm name, as auditor of a company, the appointment is to be regarded as an appointment of those persons who –

(*a*) are the partners in the firm from time to time during the currency of the appointment; and

(*b*) are eligible, and not disqualified, for appointment as auditor of the company under this Subdivision.

9.44 Special notice required for resolution for appointing auditor in some cases

(1) Special notice is required for –

(*a*) a resolution proposed for the purposes of section 9.40(1), (3) or (5) for appointing a person as auditor in place of a specified incumbent; or

(*b*) a resolution proposed for the purposes of section 9.41(2).

(2) Special notice is also required for a resolution proposed for the purposes of section 9.40(1), (3) or (5) for appointing a specified incumbent as auditor if that incumbent holds office by virtue of an appointment by the directors to fill a casual vacancy under section 9.41(1).

(3) On receipt of a special notice, the company must immediately send a copy of the notice –

(*a*) to the person proposed to be appointed as auditor; and

(*b*) in the case of –

(i) a proposed appointment under section 9.40(1), (3) or (5) of a person in place of a specified incumbent, to that incumbent; or

(ii) a proposed appointment under section 9.40(1), (3) or (5) of a specified incumbent who holds office by virtue of an appointment under section 9.41(1) or (2) to fill a casual vacancy caused by a resignation, to the person who resigned.

(4) In this section –

"specified incumbent" (指明在任人) means –

(*a*) the person who is the last auditor of the company and whose term of office as auditor has expired; or

(*b*) the person whose term of office as auditor will expire –

(i) at the end of the general meeting; or

(ii) at the end of the appointment period in relation to the financial year concerned.

9.45 Copies of written resolution for appointment must be sent to new and old auditors

(1) This section applies if an appointment of auditor specified in subsection (2) is proposed to be effected by a written resolution of the members of a company.

(2) The appointment is –

(*a*) an appointment under section 9.40(1), (3) or (5) of a person in place of a specified incumbent; or

(*b*) an appointment under section 9.40(1), (3) or (5) of a specified incumbent who holds office by virtue of an appointment under section 9.41(1) or (2) to fill a casual vacancy caused by a resignation.

(3) On receipt of a copy of the proposed resolution, the company must send the copy to –

(*a*) the person proposed to be appointed as auditor; and

(*b*) in the case of –

(i) subsection (2)(*a*), the specified incumbent; or

(ii) subsection (2)(*b*), the person who resigned.

(4) If a company contravenes subsection (3), the written resolution is ineffective.

(5) In this section –

"specified incumbent" (指明在任人) means –

(*a*) the person who is the last auditor of the company and whose term of office as auditor has expired; or

(*b*) the person whose term of office as auditor will expire at the end of the appointment period in relation to the financial year concerned.

9.46 Terms of office of auditor

(1) A person appointed as auditor of a company holds office in accordance with the terms of the appointment.

(2) Despite subsection (1) –

(*a*) a person appointed as auditor of a company does not take office until the previous auditor's appointment terminates; and

(*b*) a person appointed as auditor of a company for a financial year under section 9.39, 9.40, 9.41 or 9.42 holds office until –

(i) if the company holds an annual general meeting in accordance with section 12.73 in respect of the financial year, the end of the annual general meeting;

(ii) if, by virtue of section 12.75(1), the company does not hold an annual general meeting in accordance with section 12.73 in respect of the financial year, the date of the written resolution passed for the purposes of section 12.75(1); or

(iii) if, by virtue of section 12.75(2), the company does not hold an annual general meeting in accordance with section 12.73 in respect of the financial year,

the end of the appointment period in relation to the next financial year.

9.47 Person regarded as being reappointed as auditor

(1) If –

(*a*) by virtue of section 12.75(2), a company is not required to hold an annual general meeting in accordance with section 12.73 in respect of a financial year; and

(*b*) at the end of the appointment period in relation to the next financial year, no person has been appointed as auditor of the company for that next financial year,

the person who is the auditor of the company as at the end of that appointment period is to be regarded as being reappointed, at that time, as auditor of the company for that next financial year on the same terms of appointment.

(2) Despite subsection (1), the person is not to be regarded as being reappointed as auditor of the company for the next financial year if –

(*a*) the person was appointed as auditor under section 9.39 or 9.41(1);

(*b*) the company's articles require an actual appointment;

(*c*) before the person is regarded as being reappointed under that subsection, the members have by a resolution at a general meeting resolved that the person should not be reappointed as auditor for that next financial year; or

(*d*) the person declines the reappointment in a written notice sent to the company at least 14 days before the end of the appointment period in relation to that next financial year; or

(*e*) members representing at least the requisite percentage of the voting rights of all the members who would be entitled to vote on a resolution that the person should not be

reappointed give the company a notice complying with subsection (5).

(3) Special notice is required for a resolution proposed for the purposes of subsection (2)(*c*).

(4) On receipt of a special notice, the company must immediately send a copy of the notice to the person proposed not to be reappointed.

(5) A notice for the purposes of subsection (2)(*e*) –

(*a*) must state that the person should not be reappointed;

(*b*) must be authenticated by the member or members giving it;

(*c*) must be delivered to the company in hard copy form or electronic form; and

(*d*) must be received by the company before the end of the accounting reference period immediately preceding the time when the reappointment would have effect.

(6) This section does not affect the operation of Subdivision 6.

(7) In ascertaining the amount of any compensation or damages payable to a person on ceasing to hold office of auditor for any reason, no account is to be taken of any loss of the opportunity of being regarded as reappointed as auditor under this section.

(8) In this section –

"requisite percentage" (所需百分比) means 5%, or a lower percentage specified for the purposes of this section in the company's articles.

9.48 Auditor's remuneration

(1) The remuneration of an auditor of a company appointed by the members may be fixed –

(*a*) by a resolution at a general meeting; or

(*b*) in the manner specified in such a resolution.

(2) The remuneration of an auditor of a company appointed by the directors –

(*a*) may be fixed by the directors when making the appointment; or

(*b*) if it has not been fixed by the directors, may be fixed –

(i) by a resolution at a general meeting; or

(ii) in the manner specified in such a resolution.

(3) The remuneration of an auditor of a company appointed by the Court of First Instance –

(*a*) may be fixed by the Court when making the appointment; or

(*b*) if it has not been fixed by the Court, may be fixed –

(i) by a resolution at a general meeting; or

(ii) in the manner specified in such a resolution.

(4) In this section –

"remuneration" (酬金), in relation to an auditor of a company, includes any sum paid by the company in respect of the expenses of the auditor.

Subdivision 3 – Auditor's Report

9.49 Auditor's duty to report

A company's auditor must prepare a report to the members –

(*a*) on every financial statement of the company, a copy of which is laid before the company in general meeting, or is sent to a member under section 9.74 or otherwise circulated, published or issued by the company, during the auditor's term of office; and

(*b*) if a directors' remuneration report is prepared for the financial year, on the auditable part of the directors' remuneration report.

9.50 Auditor's opinion on financial statement, directors' report, directors' remuneration report, etc.

(1) An auditor's report must state whether, in the auditor's opinion –

(*a*) the financial statement has been properly prepared in accordance with this Ordinance; and

(*b*) the financial statement –

(i) in the case of an annual financial statement, gives a true and fair view of the financial position and financial performance of the company as required by section 9.25; or

(ii) in the case of an annual consolidated financial statement, gives a true and fair view of the financial position and financial performance of the company and all the subsidiary undertakings as required by section 9.25.

(2) If a directors' remuneration report is prepared for the financial year, the auditor's report must also state whether, in the auditor's opinion, the auditable part of the directors' remuneration report has been properly prepared in accordance with this Ordinance.

(3) If a company's auditor is of the opinion that the information in a directors' report, or a directors' remuneration report, for a financial year is not consistent with the financial statement for the financial year, the auditor –

(*a*) must state that opinion in the auditor's report; and

(*b*) may bring that opinion to the members' attention at a general meeting.

9.51 Auditor's opinion on other matters

(1) In preparing an auditor's report, the auditor must carry out an investigation that will enable the auditor to form an opinion as to –

(*a*) whether adequate accounting records have been kept by the company;

(*b*) whether the financial statement is in agreement with the accounting records; and

(*c*) if a directors' remuneration report is prepared for the financial year, whether the auditable part of the directors' remuneration report is in agreement with the accounting records.

(2) A company's auditor must state the auditor's opinion in the auditor's report if the auditor is of the opinion that –

(*a*) adequate accounting records have not been kept by the company;

(*b*) the financial statement is not in agreement with the accounting records; or

(*c*) the auditable part of the directors' remuneration report is not in agreement with the accounting records.

(3) If a company's auditor fails to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary for the purpose of the audit, the auditor must state that fact in the auditor's report.

(4) If –

(*a*) the financial statement does not comply with section 9.27(1); or

(*b*) the directors' remuneration report (if any) does not comply with section 9.34(3)(*a*),

the auditor must include in the auditor's report, so far as the auditor is reasonably able to do so, a statement giving the particulars that are required to be, but have not been, contained in the financial statement or the directors' remuneration report.

9.52 Offences relating to contents of auditor's report

(1) A person specified in subsection (2) commits an offence if the person knowingly or recklessly causes a statement required to be contained in an auditor's report under section 9.51(2)(*b*) or (3) to be omitted from the report.

(2) The person is –

(*a*) if the auditor who prepares the auditor's report is an individual –

(i) the auditor; or

(ii) any employee or agent of the auditor who is eligible for appointment as auditor of the company;

(*b*) if the auditor who prepares the auditor's report is a firm, any member, employee or agent of the auditor who is eligible for appointment as auditor of the company; or

(*c*) if the auditor who prepares the auditor's report is a body corporate, any officer, member, employee or agent of the auditor who is eligible for appointment as auditor of the company.

(3) A person who commits an offence under subsection (1) is liable to a fine of $150,000.

9.53 Auditor's reports to be signed

(1) An auditor's report must be signed –

(*a*) if the auditor is an individual, by the auditor; or

(*b*) if the auditor is a firm or body corporate, by an individual authorized to sign the auditor's name on the auditor's behalf.

(2) An auditor's report must –

(*a*) state the auditor's name; and

(*b*) bear the date on which it is prepared.

(3) Every copy of an auditor's report laid before the company in general meeting, or sent to a member under section 9.74 or otherwise circulated, published or issued by the company, must state the auditor's name.

(4) If subsection (3) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

Subdivision 4 – Auditor's Rights and Privileges, etc.

9.54 Qualified privileges

(1) In the absence of malice, an auditor of a company is not liable to any action for defamation at the suit of any person in respect of any statement made by the auditor in the course of performing duties as auditor of the company.

(2) In the absence of malice, a person is not liable to any action for defamation at the suit of any person in respect of the publication of any document –

(*a*) prepared by an auditor of a company in the course of performing duties as auditor of the company; and

(*b*) required by this Ordinance –

(i) to be delivered to the Registrar; or

(ii) to be sent to any member of the company or any other person.

(3) This section does not limit or affect any other right, privilege or immunity that an auditor of a company, or any other person, has as defendant in an action for defamation.

(4) In this section, a reference to performing duties as auditor of a company includes –

(*a*) making a cessation statement, giving the statement to the company, and requiring the company to comply with section 9.66(5) and (6) in relation to the statement; and

(*b*) making a statement of circumstances, and giving the statement to the company.

9.55 Rights in relation to general meeting

(1) A person appointed as auditor of a company is entitled –

(*a*) to attend any of the company's general meetings; and

(*b*) to be heard, at any of the company's general meetings, on any part of the business of the meeting that concerns the person as auditor of the company.

(2) A person's entitlement under subsection (1)(*a*) or (*b*) is exercisable by an individual authorized by the person to act as the person's representative at the meeting if the person is a firm or body corporate.

9.56 Rights in relation to information

(1) An auditor of a company has a right of access to the company's accounting records.

(2) An auditor of a company may require a person that is a related entity of the company, or was a related entity of the company at the time to which the information or explanation relates, to provide the auditor with any information or explanation that the auditor thinks necessary for the performance of the duties as auditor of the company.

(3) An auditor of a company may require a person that is a related entity of the company to provide the auditor with any assistance that the auditor thinks necessary for the performance of the duties as auditor of the company.

(4) If an auditor has required a person to provide any information, explanation or assistance under subsection (2) or (3), the person must provide the information, explanation or assistance without delay.

(5) If a subsidiary undertaking of a company is not a company incorporated in Hong Kong, an auditor of the company may require the company –

(*a*) to obtain from any of the persons specified in subsection (6) any information or explanation that the auditor reasonably requires for the purpose of the duties as auditor of the company; or

(*b*) to obtain from any of the persons specified in subsection (6)(*a*), (*b*)(i) and (*c*)(i) any assistance that the auditor reasonably requires for the purpose of the duties as auditor of the company.

(6) The persons are –

(*a*) the subsidiary undertaking;

(*b*) a person who –

(i) is an officer, employee or auditor of the subsidiary undertaking; or

(ii) was an officer, employee or auditor of the subsidiary undertaking at the time to which the information or explanation relates; and

(*c*) a person who –

(i) holds or is accountable for any of the subsidiary undertaking's accounting records; or

(ii) held or was accountable for the subsidiary undertaking's accounting records at the time to which the information or explanation relates.

(7) If an auditor has required a company to obtain any information, explanation or assistance from a person under subsection (5), the company must take all reasonable steps to obtain the information, explanation or assistance without delay.

(8) A statement made by a person in response to a requirement under subsection (2), (3) or (5) may not be used in evidence against the person in any criminal proceedings except proceedings for an offence under section 9.57.

(9) This section does not compel a person to disclose information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

(10) In this section –

"related entity" (有關連實體), in relation to a company, means –

(*a*) an officer or employee of the company;

(*b*) a subsidiary undertaking of the company that is a company incorporated in Hong Kong;

(*c*) an officer, employee or auditor of such a subsidiary undertaking; or

(*d*) a person holding or accountable for any of the accounting records of the company or such a subsidiary undertaking.

9.57 Offences relating to section 9.56

(1) A person who contravenes section 9.56(4) commits an offence and 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.

(2) If a person is charged with an offence under subsection (1), it is a defence to establish that it was not reasonably practicable for the person to provide the information, explanation or assistance.

(3) A person commits an offence if –

(*a*) the person makes a statement to an auditor of a company that conveys or purports to convey any information or explanation that the auditor requires, or is entitled to require, under section 9.56(2), (3) or (5); and

(*b*) the statement is misleading, false or deceptive in a material particular.

(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.

(5) If a company contravenes section 9.56(7), 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) This section does not affect an auditor's right to apply for an injunction to enforce any of the auditor's rights under section 9.56.

9.58 Auditor may provide information to incoming auditor without contravening duties

(1) A person who is or has been an auditor of a company does not contravene any duty owed by the person as such auditor in law just because the person gives work-related information to another person –

(*a*) who is an auditor of the company;

(*b*) who has been appointed as auditor of the company but whose term of office has not yet begun; or

(*c*) to whom the company has offered the position as auditor but who has not yet been appointed.

(2) Subsection (1) does not apply unless the person who gives work-related information to another person –

(*a*) does so in good faith; and

(*b*) reasonably believes that the information is relevant to the performance by that other person's duties as auditor of the company.

(3) In this section –

"work-related information" (工作資料), in relation to a person who is or has been an auditor of a company, means information of which the person became aware in the capacity of auditor.

Subdivision 5 – Auditor's Liability

9.59 Avoidance of provisions protecting auditor from liability

(1) This section applies to a provision contained in a company's articles, or in a contract entered into by a company, or otherwise.

(2) If a provision purports to exempt an auditor of the company from any liability that would otherwise attach to the auditor in connection with any negligence, default, breach of duty or breach of trust occurring in the course of performance of the duties of auditor in relation to the company, the provision is void.

(3) If, by a provision, the company directly or indirectly provides an indemnity for an auditor of the company, or an auditor of an associated company of the company, against any liability attaching to the auditor in connection with any negligence, default, breach of duty or breach of trust occurring in the course of performance of the duties of auditor in relation to the company or associated company (as the case may be), the provision is void, except as permitted by subsections (4) and (5).

(4) Subsection (3) does not prevent a company from taking out and keeping in force an insurance for an auditor of the company, or an auditor of an associated company of the company, against –

(*a*) any liability to any person attaching to the auditor in connection with any negligence, default, breach of duty or breach of trust (except for fraud) occurring in the course of performance of the duties of auditor in relation to the company or associated company (as the case may be); or

(*b*) any liability incurred by the auditor in defending any proceedings (whether civil or criminal) taken against the auditor for any negligence, default, breach of duty or breach of trust (including fraud) occurring in the course of

performance of the duties of auditor in relation to the company or associated company (as the case may be).

(5) Subsection (3) does not prevent a company from indemnifying an auditor of the company against any liability incurred by the auditor –

(*a*) in defending any proceedings (whether civil or criminal) in which judgment is given in the auditor's favour or the auditor is acquitted; or

(*b*) in connection with an application under section 20.10 or 20.11 in which relief is granted to the auditor by the Court of First Instance.

(6) In this section, a reference to performance of the duties of auditor includes –

(*a*) making a cessation statement, giving the statement to the company, and requiring the company to comply with section 9.66(5) and (6) in relation to the statement; and

(*b*) making a statement of circumstances, and giving the statement to the company.

Subdivision 6 – Termination of Auditor's Appointment

9.60 When appointment is terminated

(1) A person's appointment as auditor of a company terminates if –

(*a*) the term of office expires;

(*b*) the person resigns from office under section 9.61(1);

(*c*) the person ceases to be auditor under section 9.62;

(*d*) the person is removed from office under section 9.63(1); or

(*e*) a winding up order is made in respect of the company.

(2) Where a firm is appointed, by the firm name, as auditor of a company, the appointment also terminates if every person who is regarded as being appointed as auditor by virtue of section 9.43 –

(*a*) ceases to be a partner in the firm before the term of office expires; or

(*b*) ceases to be eligible, or becomes disqualified, for appointment as auditor of the company under Subdivision 2 before the term of office expires.

(3) Where a body corporate is appointed as auditor of a company, the appointment also terminates if the body corporate is dissolved.

(4) If 2 or more persons are appointed as auditor of a company, and the appointment of any of the persons is terminated, the termination does not affect the appointment of the other person.

9.61 Resignation of auditor

(1) A person may resign from the office of auditor by giving the company a notice in writing that is accompanied by a statement required to be given under section 9.68.

(2) Such a person's term of office expires –

(*a*) at the end of the day on which notice is given to the company under subsection (1); or

(*b*) if the notice specifies a time on a later day for the purpose, at that time.

(3) Within 14 days beginning on the date on which a company receives a notice of resignation, the company must notify the Registrar in the specified form of that fact.

(4) 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 5 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

9.62 Cessation of office

(1) If, while holding office as auditor of a company, a person ceases to be eligible, or becomes disqualified, for appointment as auditor of the company under Subdivision 2, the person –

(*a*) immediately ceases to be auditor of the company; and

(*b*) must notify the company of the cessation immediately.

(2) A person who contravenes subsection (1)(*b*) commits an offence and is liable to a fine at level 4.

(3) If a person is charged with an offence under subsection (2), it is a defence to establish that the person did not know, and had no reason to believe, that the person had ceased to be eligible, or had become disqualified, for appointment as auditor of the company under Subdivision 2.

9.63 Company may remove auditor

(1) A company may by an ordinary resolution at a general meeting remove a person from the office of auditor despite –

(*a*) any agreement between the person and the company; or

(*b*) anything in the company's articles.

(2) Special notice is required for an ordinary resolution proposed for the purposes of subsection (1).

(3) On receipt of a special notice, the company must immediately send a copy of the notice to the person proposed to be removed.

(4) If an ordinary resolution for the removal is passed, the company must deliver a notice in the specified form of that fact to the Registrar within 14 days beginning on the date on which it is passed.

(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.

9.64 Removed auditor not deprived of compensation, damages, etc.

Section 9.63 does not deprive a person of compensation or damages payable to the person in respect of the person ceasing –

(*a*) to hold office as auditor of a company; or

(*b*) to hold any appointment that terminates with the termination of the person's appointment as auditor.

Subdivision 7 – Outgoing Auditor's Right to Requisition Meeting of Company and Make Representation

9.65 Resigning auditor may requisition meeting

(1) If a person gives under section 9.61(1) a notice of resignation that is accompanied by a statement of circumstances given under section 9.68(*a*), the person may, by another notice given to the company with the notice of resignation, require the directors to convene a general meeting of the company for receiving and considering the explanation of the circumstances connected with the resignation that the person places before the meeting.

(2) Within 21 days beginning on the date on which the company receives that other notice, the directors must convene a general meeting for a date falling within 28 days after the date on which the notice convening the meeting is given.

(3) If the directors of a company contravene subsection (2), every director who failed to take all reasonable steps to secure that a general meeting was convened as required by that subsection 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.

9.66 Cessation statement in relation to, and attendance at, general meeting

(1) If a general meeting is convened under section 9.65(2), the person who resigns from the office of auditor –

(*a*) may give the company a statement by the person that sets out in reasonable length the circumstances surrounding the resignation;

(*b*) may require the company to comply with subsections (5) and (6) in relation to the statement; and

(*c*) is entitled –

(i) to be given every notice of, and every other item of communication, relating to the general meeting, that a member of the company is entitled to be given;

(ii) to attend the general meeting; and

(iii) to be heard at the general meeting on any part of the business of the meeting that concerns the person as auditor or former auditor of the company.

(2) If special notice is given under section 9.44(1)(*a*) for a resolution for appointing a person as auditor in place of another person, that other person –

(*a*) may give the company a statement by that other person that sets out in reasonable length the circumstances surrounding the termination of the appointment as auditor;

(*b*) may require the company to comply with subsections (5) and (6) in relation to the statement; and

(*c*) is entitled –

(i) to be given every notice of, and every other item of communication, relating to the general meeting,

that a member of the company is entitled to be given;

(ii) to attend the general meeting; and

(iii) to be heard at the general meeting on any part of the business of the meeting that concerns the person as auditor or former auditor of the company.

(3) If special notice is given under section 9.63(2) for an ordinary resolution for removing a person from the office of auditor, the person –

(*a*) may give the company a statement by the person that sets out in reasonable length the circumstances surrounding the proposed removal; and

(*b*) may require the company to comply with subsections (5) and (6) in relation to the statement.

(4) A person's entitlement under subsection (1)(*c*)(ii) or (iii) or (2)(*c*)(ii) or (iii) is exercisable by an individual authorized by the person to act as the person's representative at the meeting if the person is a firm or body corporate.

(5) Unless the company receives the statement within 2 days before the last day on which notice may be given under section 12.28(1) to call the general meeting, the company –

(*a*) must, in every notice of the meeting given to the members, state that the statement has been made; and

(*b*) must send a copy of the statement to every member to whom a notice of the meeting is or has been given.

(6) The company must ensure that the statement is read out at the meeting if it has not sent a copy of the statement to every member to whom a notice of the meeting is or has been given.

(7) Unless exempted by an order under subsection (8)(*a*), the company must comply with a requirement made under subsection (1)(*b*), (2)(*b*) or (3)(*b*).

(8) On application by the company or by any other person who claims to be aggrieved, the Court of First Instance may, if satisfied that the person who has given a statement and made a requirement under subsection (1)(*a*) and (*b*), (2)(*a*) and (*b*) or (3)(*a*) and (*b*) has abused the right to do so, order –

(*a*) that the company is exempted from complying with the requirement; and

(*b*) that the company's costs on the application are to be paid in whole or in part by the person even though the person is not a party to the application.

(9) If a company contravenes subsection (7), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

9.67 Cessation statement in relation to written resolution

(1) This section applies if a company sends a copy of a written resolution to a person under section 9.45(3)(*b*)(i).

(2) The person may, within 14 days after receiving a copy of the written resolution from the company –

(*a*) give the company a statement by the person that sets out in reasonable length the circumstances surrounding the termination of the appointment as auditor; and

(*b*) require the company to send a copy of the statement to every member at the same time when the written resolution is circulated under section 12.4 or 12.6.

(3) Section 12.7 applies to the circulation of the written resolution as if the reference to 21 days in section 12.7(3) were replaced by a reference to 28 days.

(4) Unless exempted by an order under subsection (5)(*a*), the company must comply with a requirement made under subsection (2)(*b*).

(5) On application by the company or by any other person who claims to be aggrieved, the Court of First Instance may, if satisfied that the person who has given a statement and made a requirement under subsection (2) has abused the right to do so, order –

(*a*) that the company is exempted from complying with the requirement; and

(*b*) that the company's costs on the application are to be paid in whole or in part by the person even though the person is not a party to the application.

(6) If a company contravenes subsection (4), the written resolution is ineffective.

Subdivision 8 – Outgoing Auditor's Statement of Circumstances

9.68 Duty of resigning auditor to give statement

A person who resigns from office under section 9.61(1) must, on the resignation, give the company –

(*a*) if the person considers that there are circumstances connected with the resignation that should be brought to the attention of the company's members or creditors, a statement of those circumstances; or

(*b*) if the person considers that there are no such circumstances, a statement to that effect.

9.69 Duty of auditor who retires or is removed to give statement

(1) Subject to subsection (3), a person whose appointment as auditor is terminated under section 9.60(1)(*a*) or (*d*) must, on the termination, give the company –

(*a*) if the person considers that there are circumstances connected with the termination that should be brought to

the attention of the company's members or creditors, a statement of those circumstances; or

(*b*) if the person considers that there are no such circumstances, a statement to that effect.

(2) Such a person must send a statement mentioned in subsection (1) to the company so that it will be received by the company –

(*a*) where the person's term of office expires because the person is not regarded as being reappointed as auditor under section 9.47(2)(*d*), at least 14 days before the end of the appointment period in relation to the next financial year; or

(*b*) in any other case, within 14 days beginning on the date of termination.

(3) Subsection (1) does not apply if –

(*a*) the person's appointment is terminated under section 9.60(1)(*a*); and

(*b*) the person –

(i) is appointed as auditor of the company for a term immediately following the term of office that expires; or

(ii) is regarded by section 9.47 as being reappointed as auditor of the company for the next financial year.

(4) A person who contravenes subsection (1) or (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.

(5) If a person is charged with an offence under subsection (4), it is a defence to establish that the person took all reasonable steps to secure compliance with subsection (1) or (2) (as the case may be).

9.70 Company's and aggrieved person's responses to statement of circumstances

(1) If a company is given a statement of circumstances, the company must, within 14 days beginning on the date on which it receives the statement –

(*a*) send a copy of the statement to every member of the company; or

(*b*) apply to the Court of First Instance for an order directing that copies of the statement are not to be sent under paragraph (*a*).

(2) If a company makes an application under subsection (1)(*b*), it must give notice of the application to the person who has given the statement of circumstances to the company.

(3) A person who claims to be aggrieved by a statement of circumstances may, within 14 days beginning on the date on which the company receives the statement, apply to the Court of First Instance for an order directing that copies of the statement are not to be sent under subsection (1)(*a*).

(4) If a person makes an application under subsection (3), the person must give notice of the application to –

(*a*) the company; and

(*b*) the person who has given the statement of circumstances to the company.

(5) If –

(*a*) a person gives a company a statement of circumstances; and

(*b*) within 21 days beginning on the date on which the company receives the statement, the person has not received notice of an application under subsection (2) or (4),

the person must within the next 7 days deliver a copy of the statement to the Registrar for registration.

(6) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each 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.

(7) If a person contravenes subsection (5), the person 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.

(8) If a person is charged with an offence under subsection (6) or (7), it is a defence to establish that the person took all reasonable steps to secure compliance with subsection (1) or (5) (as the case may be).

9.71 Court may order statement of circumstances not to be sent

(1) This section applies if an application has been made under section 9.70(1)(*b*) or (3) in relation to a statement of circumstances given by a person to a company.

(2) If the Court of First Instance is satisfied that the person has abused the use of the statement of circumstances, the Court –

(*a*) must direct that copies of the statement are not to be sent under section 9.70(1)(*a*); and

(*b*) may order the person, though not a party to the application, to pay the applicant's costs on the application in whole or in part.

(3) If the Court of First Instance gives directions under subsection (2)(*a*), the company must, within 14 days beginning on the date on which the directions are given –

(*a*) send a notice setting out the effect of the directions to –

(i) every member of the company; and

(ii) unless already named as a party to the proceedings, the person who has given the statement of circumstances to the company; and

(*b*) deliver a copy of the notice to the Registrar for registration.

(4) If the Court of First Instance decides not to grant the application, the company must, within 14 days beginning on the date on which the decision is made or on which the proceedings are discontinued for any reason –

(*a*) give notice of the decision to the person who has given the statement of circumstances to the company; and

(*b*) send a copy of the statement of circumstances to every member of the company and to that person.

(5) Within 7 days beginning on the date on which a person receives a notice under subsection (4)(*a*), the person must deliver a copy of the statement of circumstances to the Registrar for registration.

9.72 Offences relating to section 9.71

(1) If a company contravenes section 9.71(3) or (4), the company, and every responsible person of the company, commit an offence, and each 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.

(2) A person who contravenes section 9.71(5) 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.

(3) If a person is charged with an offence under subsection (1) or (2) for contravening section 9.71(3), (4) or (5), it is a defence to establish that the person took all reasonable steps to secure compliance with that section.

Division 6 – Laying and Publication of Financial Statement and Reports

9.73 Directors must lay financial statement etc. before company in general meeting

(1) A company's directors must, in respect of each financial year, lay before the company in annual general meeting, or in any other general meeting directed by the Court of First Instance, a copy of the reporting documents for the financial year within the period specified in section 9.75.

(2) Subsection (1) does not apply if, by virtue of section 12.75(2), the company is not required to hold an annual general meeting in accordance with section 12.73 in respect of the financial year.

(3) If a directors' remuneration report for the financial year is prepared under section 9.34(2) on a request made within 3 months before the end of the financial year, subsection (1) does not require that report to be laid and that subsection applies as if the reference in it to the reporting documents for the financial year excluded that report.

(4) If a company's directors contravene subsection (1), every person who at the end of the specified period was a director of the company commits an offence and is liable to a fine of $300,000.

(5) If a company's directors wilfully contravene subsection (1), every person who at the end of the specified period was a director of the company commits an offence and is liable to a fine of $300,000 and to imprisonment for 12 months.

(6) If a person is charged with an offence under subsection (4) –

(*a*) it is a defence to establish that the person took all reasonable steps to secure compliance with subsection (1); and

(*b*) it is not a defence to establish that the financial statement, declaration or report was not in fact prepared as required by this Ordinance.

9.74 Company must send copies of financial statement etc. to members before general meeting

(1) If a company is required to hold an annual general meeting in accordance with section 12.73 in respect of a financial year, the company must send a copy of the reporting documents for the financial year to every member at least 21 days before the date of the meeting at which the copy is required by section 9.73 to be laid.

(2) For the purposes of subsection (1), even though a copy of the reporting documents for the financial year is sent to a member less than 21 days before the date of the meeting at which the copy is required by section 9.73 to be laid, the copy is regarded as having been sent to the member at least 21 days before that date if so agreed by all members entitled to attend and vote at that meeting.

(3) If, by virtue of section 12.75(2), a company is not required to hold an annual general meeting in accordance with section 12.73 in respect of a financial year, the company must send a copy of the reporting documents for the financial year to every member within the period specified in section 9.75.

(4) For the purposes of section 18.13(3)(*c*), a notification is to be sent –

(*a*) in the case of subsection (1), within the period beginning at least 21 days before the date of the general meeting at which a copy of the reporting documents is required by section 9.73 to be laid; or

(*b*) in the case of subsection (3), within the period beginning at least 21 days before the date on which a copy of the reporting documents is sent to every member under that subsection.

(5) The period specified for the purposes of section 18.13(3)(*d*)(i) is –

(*a*) in the case of subsection (1), the period beginning at least 21 days before the date of the general meeting at which a copy of the reporting documents is required by section 9.73 to be laid and ending on the date of that meeting; or

(*b*) in the case of subsection (3), the period of 21 days after the date on which a notification under section 18.13(3)(*c*) is sent.

(6) If a copy or copies of the reporting documents are sent under this section over a period of days, the copy or copies are regarded as being sent on the last day of the period for the purpose of a reference in this Ordinance to the day on which the copy or copies are sent under this section.

9.75 Period for laying and publishing financial statement etc.

(1) Subject to subsection (2), the period specified for the purposes of sections 9.73(1) and 9.74(3) is –

(*a*) where the company is a private company described in subsection (3), or a company limited by guarantee, at the end of the accounting reference period by reference to which the financial year is determined –

(i) subject to paragraph (ii), the period of 9 months, or any longer period directed by the Court of First Instance, after the end of that accounting reference period; or

(ii) if that accounting reference period is the company's first accounting reference period and is longer than 12 months, whichever of the periods set out in subsection (4)(*a*) and (*b*) expires last; or

(*b*) where the company is neither a private company described in subsection (3), nor a company limited by guarantee, at the end of that accounting reference period –

(i) subject to paragraph (ii), the period of 6 months, or any longer period directed by the Court of First Instance, after the end of that accounting reference period; or

(ii) if that accounting reference period is the company's first accounting reference period and is longer than 12 months, whichever of the periods set out in subsection (5)(*a*) and (*b*) expires last.

(2) If, after a new accounting reference date is specified under section 9.16(1), the accounting reference period by reference to which the financial year is determined is shortened, the period specified for the purposes of section 9.73 is whichever of the following expires last –

(*a*) the period specified in subsection (1);

(*b*) the period of 3 months after the date of the directors' resolution.

(3) For the purposes of subsection (1)(*a*) or (*b*), the private company is one that is not a subsidiary of a public company at any time during the financial year.

(4) The periods set out for the purposes of subsection (1)(*a*)(ii) are –

(*a*) the period of 9 months, or any longer period directed by the Court of First Instance, after the first anniversary of the company's incorporation; and

(*b*) the period of 3 months after the end of the accounting reference period by reference to which the financial year is determined.

(5) The periods set out for the purposes of subsection (1)(*b*)(ii) are –

(*a*) the period of 6 months, or any longer period directed by the Court of First Instance, after the first anniversary of the company's incorporation; and

(*b*) the period of 3 months after the end of the accounting reference period by reference to which the financial year is determined.

9.76 Exception to section 9.74

(1) Section 9.74 does not require a company to send a copy of any document to a member whose address is unknown to the company.

(2) Section 9.74 does not require a company to send a copy of any document –

(*a*) in the case of joint holders of shares none of whom is entitled to receive notices of the company's general meeting, to more than one of the holders; or

(*b*) in the case of joint holders of shares some of whom is so entitled and some not, to those who are not entitled.

(3) Section 9.74 does not require a company to send a copy of any document to a member if the company has sent the member a copy of the summary financial report for the financial year under section 9.86, or in compliance with a request under section 9.89.

(4) If a company does not have a share capital, section 9.74 does not require the company to send a copy of any document to a member who is not entitled to receive notice of general meeting of the company.

(5) If a directors' remuneration report for the financial year is prepared under section 9.34(2) on a request made within 3 months before the end of the financial year, section 9.74(1) and (3) does not require that report to be sent and section 9.74(1) and (3) applies as if the reference in it to the reporting documents for the financial year excluded that report.

9.77 Company must send to members copy of directors' remuneration report exempted from section 9.73 or 9.74

If a copy of the directors' remuneration report for a financial year –

(*a*) is not required to be laid before the company in general meeting under section 9.73(1) by virtue of section 9.73(3);

(*b*) is not required to be sent to every member under section 9.74(1) by virtue of section 9.76(5); or

(*c*) is not required to be sent to every member under section 9.74(3) by virtue of section 9.76(5),

the company must send a copy of that report to every member within 3 months after the members' request for preparing that report is received by the company.

9.78 Company must send to non-voting members other documents

A company must send to every member who is not entitled to vote at a general meeting of the company –

(*a*) a copy of any document issued by the company and circulated by the company with a copy of the reporting documents under section 9.74; and

(*b*) a copy of any other document intended for the purpose of providing information about the company's affairs that is so circulated.

9.79 Offences relating to section 9.74 or 9.77

(1) If a company contravenes section 9.74(1) or 9.77(*b*), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

(2) If a company contravenes section 9.74(3) or 9.77(*c*), the company, and every responsible person of the company, commit an offence, and each is liable to a fine of $300,000.

(3) If a company wilfully contravenes section 9.74(3) or 9.77(*c*), the company, and every responsible person of the company, commit an offence, and each is liable to a fine of $300,000 and to imprisonment for 12 months.

(4) If a person is charged with an offence under subsection (2) for contravening section 9.74(3) or 9.77(*c*), it is a defence to establish that the person took all reasonable steps to secure compliance with that section.

(5) If a person is charged with an offence under subsection (1) or (2), it is not a defence to establish that the financial statement, declaration or report was not in fact prepared as required by this Ordinance.

9.80 Company must send copies of financial statement etc. to members and others on demand

(1) Within 7 days after a demand is made by a member or a member's personal representative, a company must send to the member or personal representative –

(*a*) one copy of the company's latest financial statement;

(*b*) one copy of the latest directors' declaration;

(*c*) one copy of the latest directors' report;

(*d*) one copy of the latest directors' remuneration report (if any); or

(*e*) one copy of the auditor's report on –

(i) that latest financial statement; and

(ii) the auditable part of that latest directors' remuneration report (if any).

(2) A copy of a document that a person is entitled to be sent under subsection (1) is in addition to any copy of the document that the person is entitled to be sent under section 9.74 or 9.77.

(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 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

9.81 Requirement in connection with publication of financial statements etc.

(1) This section applies if a company –

(*a*) publishes, issues or circulates –

(i) a specified financial statement of the company; or

(ii) any non-statutory accounts of the company; or

(*b*) otherwise makes such a financial statement or accounts available for public inspection in a manner calculated to invite members of the public generally, or any class of them, to read the financial statement or accounts.

(2) The specified financial statement must be accompanied by the auditor's report on that statement.

(3) The non-statutory accounts must be accompanied by a statement indicating –

(*a*) that those accounts are not a specified financial statement of the company;

(*b*) whether the specified financial statement for the financial year with which those accounts purport to deal have been delivered to the Registrar;

(*c*) whether an auditor's report has been prepared on the specified financial statement for the financial year; and

(*d*) whether the auditor's report –

(i) was qualified or otherwise modified;

(ii) referred to any matter to which the auditor drew attention by way of emphasis without qualifying the report; or

(iii) contained a statement under section 9.50(2) or (3) or 9.51(2) or (3).

(4) The non-statutory accounts must not be accompanied by any auditor's report on the accounts.

(5) If subsection (2), (3) or (4) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine of $150,000.

(6) In this section –

"non-statutory accounts" (非法定帳目), in relation to a company, means –

(*a*) any statement of financial position or statement of comprehensive income, otherwise than as part of a financial statement of the company, relating to, or purporting to deal with, a financial year of the company; or

(*b*) accounts in any form, otherwise than as part of a financial statement of the company, purporting to be a statement of financial position or statement of comprehensive income for a group of companies consisting of the company and its subsidiary undertakings relating to, or purporting to deal with, a financial year of the company;

"specified financial statement" (指明財務報表), in relation to a company, means a financial statement of the company –

(*a*) a copy of which is required by section 9.73(1) to be laid before the company in general meeting; or

(*b*) a copy of which is required by section 9.74(3) to be sent to every member or is otherwise circulated, published or issued by the company.

Division 7 – Summary Financial Reports

9.82 Interpretation

In this Division –

"potential member" (潛在成員), in relation to a company, means a person who is entitled, whether conditionally or unconditionally, to become a member of the company.

9.83 Application

This Division applies to a company in relation to a financial year if the company does not fall within the reporting exemption for the financial year.

9.84 Directors may prepare financial report in summary form

(1) The directors of a company may prepare for a financial year a financial report, in summary form, derived from –

(*a*) the reporting documents for the financial year, a copy of which is required to be sent to every member of the company under section 9.74; and

(*b*) if a copy of the directors' remuneration report for the financial year is sent to every member under section 9.77, that directors' remuneration report.

(2) A financial report prepared under subsection (1) –

(*a*) must contain the information prescribed by the Regulation; and

(*b*) must comply with other requirements prescribed by the Regulation.

(3) If subsection (2) is contravened –

(*a*) a director who failed to take all reasonable steps to secure compliance with that subsection commits an offence and is liable to a fine of $300,000; and

(*b*) a director who wilfully failed to take all reasonable steps to secure compliance with that subsection commits an offence and is liable to a fine of $300,000 and to imprisonment for 12 months.

(4) If a person is charged with an offence under subsection (3)(*a*), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person –

(*a*) was charged with the duty of ensuring that subsection (2) was complied with; and

(*b*) was in a position to discharge that duty.

9.85 Summary financial report to be approved and signed

(1) A summary financial report –

(*a*) must be approved by the directors; and

(*b*) must be signed on the directors' behalf by a director.

(2) Every copy of a summary financial report sent to a member under this Division or otherwise circulated, published or issued by the company must state the name of the director who signed the report on the directors' behalf.

(3) If subsection (1) or (2) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

9.86 Company may send copy of summary financial report to member

(1) If a company is required to send a copy of the reporting documents for a financial year to a member under section 9.74, the company may send a copy of the summary financial report for the financial year (if any) to the member instead.

(2) If a company sends a copy of the summary financial report for a financial year to a member under subsection (1), the copy must be sent during the period within which a copy of the reporting documents for the financial year would be required to be sent to the member by the company under section 9.74.

9.87 Company may seek members' intent on receiving summary financial report

(1) A company may notify every member or potential member to give the company a notice of intent under subsection (3).

(2) A notification to a member or potential member –

(*a*) must be given in writing; and

(*b*) must be given in relation to a financial year.

(3) In response to a notification, a member or potential member may give the company a notice of intent to –

(*a*) request –

(i) either a copy of the reporting documents or a copy of the summary financial report; or

(ii) none of those copies; and

(*b*) in the case of paragraph (*a*)(i), request the copy to be sent by the company in hard copy form, in electronic form, or by making it available on a website.

(4) If a notice of intent is received by the company at least 28 days before the first date on which a copy of the reporting documents for the financial year is sent to a member under section 9.74, the notice of intent has effect in relation to that financial year, and every subsequent financial year, until it ceases to have effect by virtue of subsection (6).

(5) If a notice of intent is received by the company less than 28 days before the first date on which a copy of the reporting documents for the financial year is sent to a member under section 9.74 –

(*a*) the notice of intent has effect in relation to every financial year subsequent to that financial year until it ceases to have effect by virtue of subsection (6); and

(*b*) the member or potential member is to be regarded as –

(i) having requested a copy of the summary financial report for the financial year; and

(ii) having requested the summary financial report to be sent by the company in hard copy form.

(6) A notice of intent ceases to have effect if the person who gave the notice –

(*a*) is no longer a member of the company; or

(*b*) revokes the notice by giving the company a written notice of revocation.

(7) If a member or potential member does not give the company a notice of intent in response to a notification before the first date on which a copy of the reporting documents for the financial year is sent to a member under section 9.74, the member or potential member is to be regarded as –

(*a*) having requested a copy of the summary financial report for the financial year and every subsequent financial year; and

(*b*) having requested the summary financial report to be sent by the company in hard copy form.

(8) Subsection (7) ceases to have effect in relation to a person if –

(*a*) the person is no longer a member of the company; or

(*b*) the person gives the company a written notice of cessation of statutory election.

9.88 Notice of revocation and notice of cessation of statutory election

(1) A notice of revocation given by a person for the purposes of section 9.87(6)(*b*) must –

(*a*) state the financial year to which it relates;

(*b*) state that the notice of intent previously given by the person is revoked;

(*c*) state that the person requests –

(i) either a copy of the reporting documents or a copy of the summary financial report; or

(ii) none of those copies; and

(*d*) in the case of paragraph (*c*)(i), state that the person requests the copy to be sent by the company in hard copy form, in electronic form, or by making it available on a website.

(2) The request stated in a notice of revocation under subsection (1)(*c*) must be different from the request stated in the notice of intent revoked by the notice of revocation.

(3) A notice of cessation of statutory election given by a person for the purposes of section 9.87(8)(*b*) must –

(*a*) state the financial year to which it relates;

(*b*) state that the person is no longer regarded as having made the requests mentioned in section 9.87(7);

(*c*) state that the person requests –

(i) either a copy of the reporting documents or a copy of the summary financial report; or

(ii) none of those copies; and

(*d*) in the case of paragraph (*c*)(i), state that the person requests the copy to be sent by the company in hard copy form, in electronic form, or by making it available on a website.

(4) If a notice of revocation, or a notice of cessation of statutory election, is received by the company at least 28 days before the first date on which a copy of the reporting documents for the financial year to which the notice relates is sent to a member under section 9.74, the notice has effect in relation to that financial year, and every subsequent financial year.

(5) If a notice of revocation, or a notice of cessation of statutory election, is received by the company less than 28 days before the first date on which a copy of the reporting documents for the financial year to which the

notice relates is sent to a member under section 9.74, the notice has effect in relation to every financial year subsequent to that financial year.

9.89 Company must comply with members' request in notices of intent etc.

(1) If a person requests a copy of the reporting documents, or a copy of the summary financial report, in a relevant notice, the company must comply with the request to the extent that it is not prohibited from doing so by section 9.91.

(2) The request must be complied with during the period within which a copy of the reporting documents for the financial year concerned would be required to be sent to the person by the company under section 9.74.

(3) Subsection (1) does not require a company to comply with a potential member's request unless the potential member becomes a member of the company at least 28 days before the first date on which a copy of the reporting documents for the financial year is sent to a member under section 9.74(1) or (3).

(4) In this section –

"relevant notice" (有關通知) means –

(*a*) a notice of intent given under section 9.87(3);

(*b*) a notice of revocation given for the purposes of section 9.87(6)(*b*); or

(*c*) a notice of cessation of statutory election given for the purposes of section 9.87(8)(*b*).

9.90 Additional copy of reports etc. to be sent by company

(1) If a company has sent a copy of the summary financial report for a financial year to a person under section 9.86, or in compliance with a request under section 9.89, the company must, at the person's request, send a copy of the

reporting documents for the financial year to the person at the time specified in subsection (3).

(2) If a company has sent a copy of the reporting documents for a financial year to a person under section 9.74, the company must, at the person's request, send a copy of the summary financial report for the financial year to the person at the time specified in subsection (3) to the extent that it is not prohibited from doing so by section 9.91.

(3) The time specified for subsection (1) or (2) is –

(*a*) where a copy of the reporting documents for the financial year is to be laid before the company in general meeting under section 9.73(1), and the company receives the person's request more than 14 days before the date of that meeting, any time falling at least 7 days before the date of that meeting; or

(*b*) in any other case, any time within 14 days after the date on which the company receives the person's request.

(4) Subsection (1) or (2) does not require a company to send a copy of the summary financial report or reporting documents for a financial year to a person if –

(*a*) where a copy of the reporting documents for the financial year is laid before the company in general meeting under section 9.73(1), the person's request is made at least 6 months after the date of that meeting; or

(*b*) where a copy of the reporting documents for the financial year is sent to every member under section 9.74(3), the person's request is made at least 6 months after the date on which those copies are sent.

(5) Subsection (2) does not require a company to send a copy of the summary financial report for a financial year to a person unless –

(*a*) the company has prepared the summary financial report for the financial year; and

(*b*) when the company sent a copy of the reporting documents for the financial year to the person, the company gave the person a right to request a copy of the summary financial report for the financial year.

(6) 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.

(7) If a person is charged with an offence under subsection (6), it is a defence to establish that the person took all reasonable steps to secure compliance with subsection (1) or (2) (as the case may be).

9.91 Company must not send summary financial report under some circumstances

(1) A company must not send a copy of the summary financial report for a financial year to a member if –

(*a*) the company's articles require that a copy of the reporting documents for the financial year must be sent to each member; or

(*b*) the company's articles prohibit the company from sending a copy of the summary financial report for the financial year to a member.

(2) A company must not send a copy of the summary financial report for a financial year to a member if –

(*a*) an auditor's report has not been prepared on the company's financial statement, or the auditable part of the directors' remuneration report, for the financial year;

(*b*) the summary financial report has not been approved by the directors;

(*c*) the summary financial report has not been signed on behalf of the directors;

(*d*) the summary financial report does not comply with section 9.84(2); or

(*e*) the financial statement for the financial year is not accompanied by a directors' declaration.

(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.

Division 8 – Miscellaneous

9.92 Exemption applicable to dormant company

(1) The following provisions do not apply to a company that is a dormant company under section 1.5(1) –

(*a*) Subdivisions 3, 4 and 5 of Division 4;

(*b*) Subdivision 2 of Division 5 (except sections 9.37, 9.43 and 9.46);

(*c*) Subdivision 3 of Division 5;

(*d*) sections 9.55 and 9.56;

(*e*) Subdivisions 6, 7 and 8 of Division 5; and

(*f*) Divisions 6 and 7.

(2) If such a company enters into an accounting transaction –

(*a*) subsection (1) ceases to have effect on and after the date of the accounting transaction; and

(*b*) a member of the company who knew or ought to have known about the accounting transaction and every director of the company, are personally liable for any debt or liability of the company arising out of the accounting transaction.

(3) In this section –

"accounting transaction" (會計交易), in relation to a company, means a transaction that is required by section 9.18 to be entered in the company's accounting records, excluding a transaction arising from the payment of any fee that the company is required to pay by an Ordinance;

"director" (董事) includes a shadow director.

9.93 Voluntary revision of financial statement etc.

(1) If –

(*a*) a copy of a financial statement of a company has been sent under section 9.74 to a member; and

(*b*) it appears to the directors of the company that the financial statement did not comply with this Ordinance,

the directors may cause the financial statement to be revised and make necessary consequential revisions to the summary financial report, directors' report or directors' remuneration report concerned.

(2) Such revision of the financial statement is to be confined to –

(*a*) those aspects of the financial statement that did not comply with this Ordinance; and

(*b*) other necessary consequential revisions.

(3) If –

(*a*) the directors of a company decide to cause a financial statement of the company to be revised under subsection (1); and

(*b*) a copy of the financial statement has been delivered to the Registrar in compliance with section 12.132(3)(*b*),

the company must, within 7 days after the decision, deliver to the Registrar for registration a warning statement, in the specified form, that the financial statement will be so revised.

(4) 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 5 and, in the case of a continuing offence, to a further fine of $1,000 for each day during which the offence continues.

9.94 Financial Secretary may make regulation regarding revision of financial statement etc.

(1) The Financial Secretary may make regulations providing for the application of this Ordinance in relation to a financial statement, summary financial report, directors' report or directors' remuneration report that has been revised under section 9.93.

(2) The regulations may –

(*a*) make different provisions according to whether a financial statement, summary financial report, directors' report or directors' remuneration report has been revised by –

(i) supplementing the financial statement or report with another document that shows the revisions; or

(ii) replacing the financial statement or report;

(*b*) provide for the functions of the auditors of a company in relation to a financial statement, summary financial report, directors' report or directors' remuneration report that has been revised;

(*c*) where –

(i) a financial statement, directors' report or directors' remuneration report, or a copy of such a financial statement or report, has, before the revision, been laid before the company in general meeting under section 9.73, been sent to members under section 9.74 or 9.77, or been delivered to the Registrar in compliance with section 12.132(3)(*b*); or

(ii) a copy of a summary financial report has, before the revision, been sent to a member under section 9.86, or in compliance with a request under section 9.89,

require the company or the directors of the company to take the steps specified in the regulations in relation to the financial statement or report that has been revised;

(*d*) provide for the application of this Ordinance to a financial statement, summary financial report, directors' report or directors' remuneration report that has been revised, subject to such additions, exceptions and modifications as may be specified in the regulations; and

(*e*) provide for incidental, consequential and transitional provisions.

(3) The regulations may provide that any of the following is an offence –

(*a*) a failure to take all reasonable steps to secure compliance as respects a financial statement, summary financial report, directors' report or directors' remuneration report that has 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) The 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 defences to any such offence.

9.95 Financial Secretary may make regulation regarding disclosures of certain information

(1) The Financial Secretary may make regulations prescribing the following requirements for the purposes of section 9.27(2) –

(*a*) a requirement that the company's financial statement for the financial year is to contain a statement showing the particulars of the loans, quasi-loans and other dealings in favour of directors that are specified in the regulations;

(*b*) a requirement that the company is to enter into a register any particulars that would, but for section 9.27(2), be required by section 9.27(1)(*d*) to be contained in the notes to the company's financial statement for the financial year.

(2) The regulations may –

(*a*) provide for –

(i) the maintenance and inspection of such a register;

(ii) the keeping of particulars in the register; and

(iii) the supply of a copy of the register by the company to a member of the company;

(*b*) provide that any of the following is an offence –

(i) a failure to take all reasonable steps to secure compliance with a specified provision of the regulations; or

(ii) a contravention of a specified provision of the regulations;

(*c*) provide that such an offence is punishable –

(i) by a fine not exceeding level 4, or by a term of imprisonment not exceeding 6 months, or by both such fine and imprisonment; and

(ii) in the case of a continuing offence, by a further fine not exceeding $700 for each day during which the offence continues;

(*d*) provide for defences to any such offence; and

(*e*) provide that the Court of First Instance may order –

(i) if an offence is committed for a failure to allow inspection of a register, that the register be opened to inspection; or

(ii) if an offence is committed for a failure to provide a copy of a register to a member, that such a copy be sent to the member.

9.96 Financial Secretary may make other regulations

(1) The Financial Secretary may make regulations prescribing a body for the purposes of section 9.25(7)(*a*).

(2) The Financial Secretary may make regulations –

(*a*) prescribing information that is required to be contained in notes to a financial statement under section 9.27(1);

(*b*) setting out such information prescribed under paragraph (*a*) that is not required to be contained in the notes to a financial statement under section 9.27(3); and

(*c*) prescribing other requirements for notes to a financial statement.

(3) The Financial Secretary may make regulations –

(*a*) prescribing information that is required to be contained in a directors' report under section 9.29(1) and (2); and

(*b*) prescribing other requirements for a directors' report.

(4) The Financial Secretary may make regulations –

(*a*) prescribing information that is required to be contained in a directors' remuneration report under section 9.34(3);

(*b*) requiring any of the prescribed information to be subject to audit; and

(*c*) prescribing other requirements for a directors' remuneration report.

(5) The Financial Secretary may make regulations –

(*a*) prescribing information that is required to be contained in a summary financial report under section 9.84(2); and

(*b*) prescribing other requirements for a summary financial report.

SCHEDULE [s. 9.25]

ACCOUNTING DISCLOSURES

PART 1

DISCLOSURES FOR COMPANIES WHETHER OR NOT FALLING WITHIN REPORTING EXEMPTION

1. **Aggregate amount of authorized loans**

A financial statement for a financial year must contain, under separate headings, the aggregate amount of any outstanding loans made under the authority of sections 5.76 and 5.77 during the financial year.

2. **Statement of financial position to be contained in notes to annual consolidated financial statement**

(1) An annual consolidated financial statement for a financial year must –

(*a*) contain, in the notes to it, the holding company's statement of financial position for the financial year; and

(*b*) include a note disclosing the movement in the holding company's reserves.

(2) Despite section 9.25(4), the holding company's statement of financial position to be contained in the notes to an annual consolidated financial statement for a financial year is not required to contain any notes.

(3) That statement of financial position must be in the format in which that statement would have been prepared if the holding company had not been required to prepare an annual consolidated financial statement for the financial year.

3. **Subsidiary's financial statement must contain particulars of ultimate parent undertaking**

(1) This section applies if, at the end of a financial year, a company is the subsidiary of another undertaking.

(2) The company's financial statement for the financial year must contain, in the notes to it –

(*a*) the name of the undertaking regarded by the directors as being the company's ultimate parent undertaking; and

(*b*) the following information relating to that undertaking as known to the directors –

(i) if that undertaking is a body corporate, the country in which it is incorporated;

(ii) if that undertaking is not a body corporate, the address of its principal place of business.

4. **Compliance with applicable accounting standards**

A financial statement for a financial year must state –

(*a*) whether it has been prepared in accordance with the applicable accounting standards within the meaning of section 9.25; and

(*b*) if it has not been so prepared, the particulars of, and the reasons for, any material departure from those standards.

PART 2

DISCLOSURES FOR COMPANIES NOT FALLING WITHIN REPORTING EXEMPTION

1. **Remuneration of auditor**

(1) A company's financial statement for a financial year must state –

(*a*) the nature of any services provided for the company by an auditor of the company (whether or not in the capacity of such auditor), or an associate of the auditor, during the financial year; and

(*b*) the amount of any remuneration received or receivable by such an auditor, or such an associate, in respect of such services during the financial year.

(2) In this section –

"remuneration" (酬金), in relation to an auditor or an associate of a company, includes any sum paid or payable by the company in respect of the auditor's or associate's expenses.

PART 13

ARRANGEMENTS, AMALGAMATION, AND COMPULSORY SHARE ACQUISITION IN TAKEOVER AND SHARE BUY-BACK

Division 1 – Preliminary

13.1 Interpretation

In this Part –

"offer period" (要約期), in relation to an offer, means the period within which the offer can be accepted.

13.2 Associate

(1) In this Part, a reference to an associate of an offeror or member, is –

(*a*) if the offeror or member is a natural person, a reference to –

(i) the offeror's or member's spouse;

(ii) any other person (whether of a different sex or the same sex) with whom the offeror or member lives as a couple in an enduring family relationship;

(iii) a child, step-child or adopted child of the offeror or member;

(iv) a child, step-child or adopted child of a person falling within subparagraph (ii) who –

(A) is not a child, step-child or adopted child of the offeror or member;

(B) lives with the offeror or member; and

(C) has not attained the age of 18;

(v) a parent of the offeror or member;

(vi) a body corporate in which the offeror or member is substantially interested; or

(vii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member; or

(*b*) if the offeror or member is a body corporate, a reference to –

(i) a body corporate in the same group of companies as the offeror or member;

(ii) a body corporate in which the offeror or member is substantially interested; or

(iii) a person who is a party, or a nominee of a party, to an acquisition agreement with the offeror or member.

(2) For the purposes of subsection (1), an offeror or member is substantially interested in a body corporate if –

(*a*) the body corporate, or its directors or a majority of its directors, are accustomed to act in accordance with the directions or instructions of the offeror or member; or

(*b*) the offeror or member is entitled to exercise, or control the exercise of, more than 30% of the voting power at any general meeting of the body corporate.

(3) For the purposes of subsection (1), an agreement is an acquisition agreement if –

(*a*) it is an agreement for the acquisition of –

(i) the shares to which the takeover offer or general offer relates; or

(ii) an interest in those shares; and

(*b*) it includes provisions imposing obligations or restrictions on any of the parties to it with respect to the use, retention

or disposal of the party's interests in the shares acquired in pursuance of the agreement.

Division 2 – Arrangements and Compromises

13.3 Interpretation

(1) In this Division –

"arrangement" (安排) includes a reorganization of the company's share capital by the consolidation of shares of different classes, or by the division of shares into different classes, or both;

"company" (公司) means a company liable to be wound up under the Companies (Winding Up Provisions) Ordinance (Cap. 32).[1]

(2) In this Division, a reference to a company's articles, in the case of a company not having articles, is to be read as the instrument constituting or defining the constitution of the company.

13.4 Application

This Division applies if an arrangement or compromise is proposed to be entered into by a company with either or both of the following –

(*a*) the creditors, or any class of the creditors, of the company;

(*b*) the members, or any class of the members, of the company.

13.5 Court may order meeting of creditors or members to be summoned

(1) The Court of First Instance may, on application made for the purposes of this subsection, order a meeting specified in subsection (2)(*a*), or a meeting specified in subsection (2)(*b*), or both (as the case may be) to be summoned in any manner that the Court directs.

(2) The meeting is –

[1] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

(*a*) if the arrangement or compromise is proposed to be entered into –

(i) with the creditors of the company, a meeting of those creditors; or

(ii) with a class of the creditors of the company, a meeting of that class of creditors; and

(*b*) if the arrangement or compromise is proposed to be entered into –

(i) with the members of the company, a meeting of those members; or

(ii) with a class of the members of the company, a meeting of that class of members.

(3) Subject to subsection (4), an application for the purposes of subsection (1) may be made only by –

(*a*) in the case of a meeting of creditors, the company or any of the creditors;

(*b*) in the case of a meeting of a class of creditors, the company or any creditor of that class;

(*c*) in the case of a meeting of members, the company or any of the members; or

(*d*) in the case of a meeting of a class of members, the company or any member of that class.

(4) If the company is being wound up, an application for the purposes of subsection (1) may be made only by the liquidator.

(5) An application for the purposes of subsection (1) must be made in a summary way.

13.6 Explanatory statements to be issued or made available to creditors or members

(1) If a meeting is summoned under section 13.5 –

(*a*) every notice summoning the meeting that is sent to a creditor or member must be accompanied by an explanatory statement complying with subsections (3) and (4); and

(*b*) every notice summoning the meeting that is given by advertisement –

(i) must include an explanatory statement complying with subsections (3) and (4); or

(ii) must state where and how a creditor or member entitled to attend the meeting may obtain a copy of the explanatory statement.

(2) If a notice given by advertisement states that a creditor or member entitled to attend the meeting may obtain a copy of an explanatory statement, the company must provide a copy of the statement, free of charge, to a creditor or member applying in the manner specified in the notice.

(3) An explanatory statement –

(*a*) must explain the effect of the arrangement or compromise; and

(*b*) must state –

(i) any material interests of the company's directors, whether as directors or as members or as creditors of the company or otherwise, under the arrangement or compromise; and

(ii) the effect of the arrangement or compromise on those interests, in so far as the effect is different from the effect on the like interests of other persons.

(4) If the arrangement or compromise affects the rights of the company's debenture holders, an explanatory statement must give the like

explanation as respects the trustees of any deed for securing the issue of the debentures as it is required to give as respects the directors.

(5) If subsection (1) or (2) is contravened, all of the following commit an offence –

(*a*) the company;

(*b*) every responsible person of the company;

(*c*) a liquidator of the company who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention;

(*d*) a trustee of a deed for securing the issue of the company's debentures who authorizes or permits, participates in, or fails to take all reasonable steps to prevent, the contravention.

(6) A person who commits an offence under subsection (5) is liable to a fine at level 5.

(7) If a person is charged with an offence under subsection (5) for a contravention of subsection (1), it is a defence to establish that the contravention was due to the refusal of another person, who was a director of the company or a trustee for debenture holders of the company, to supply the necessary particulars of that other person's interests.

13.7 Directors and trustees must notify company of interests under arrangement or compromise etc.

(1) If a meeting is summoned under section 13.5, a director of the company, or a trustee for its debenture holders, must give notice to the company of any matter relating to the director or trustee that may be necessary for the purposes of section 13.6.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 5.

13.8 Court may sanction arrangement or compromise[2]

(1) This section applies if the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into, agree or agrees to the arrangement or compromise.

(2) For the purposes of subsection (1) –

(*a*) the creditors agree to the arrangement or compromise if, at a meeting of the creditors summoned under section 13.5, a majority in number representing at least 75% in value of the creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(*b*) a class of creditors agrees to the arrangement or compromise if, at a meeting of the class of creditors summoned under section 13.5, a majority in number representing at least 75% in value of the class of creditors present and voting, in person or by proxy, agree to the arrangement or compromise;

(*c*) the members agree to the arrangement or compromise if, at a meeting of the members summoned under section 13.5, a majority in number representing at least 75% of the voting rights of the members present and voting, in person or by proxy, agree to the arrangement or compromise; and

(*d*) a class of members agrees to the arrangement or compromise if, at a meeting of the class of members summoned under section 13.5, a majority in number representing at least 75% of the voting rights of the class

[2] The issue of whether an arrangement or compromise has to be approved by a "majority in number" (i.e. the "headcount" test) is being considered in the light of the feedback obtained during the first phase consultation.

of members present and voting, in person or by proxy, agree to the arrangement or compromise.

(3) The Court of First Instance may, on application made for the purposes of this subsection, sanction the arrangement or compromise.

(4) Subject to subsection (5), an application for the purposes of subsection (3) may be made only by –

(*a*) in the case of an arrangement or compromise proposed to be entered into with the creditors of a company, the company or any of the creditors;

(*b*) in the case of an arrangement or compromise proposed to be entered into with a class of creditors of a company, the company or any creditor of that class;

(*c*) in the case of an arrangement or compromise proposed to be entered into with the members of a company, the company or any of the members; or

(*d*) in the case of an arrangement or compromise proposed to be entered into with a class of members of a company, the company or any member of that class.

(5) If the company is being wound up, an application for the purposes of subsection (3) may be made only by the liquidator.

(6) An arrangement or compromise sanctioned by the Court of First Instance under subsection (3) is binding –

(*a*) on the company or, if the company is being wound up, on the liquidator and contributories of the company; and

(*b*) on the creditors or the class of creditors, or the members or the class of members, or both, with whom the arrangement or compromise is proposed to be entered into.

(7) An order made by the Court of First Instance under subsection (3) has no effect until an office copy of the order is registered by the Registrar under Part 2.

(8) If the order of the Court of First Instance amends the company's articles, or any resolution or agreement to which section 12.86 applies, the office copy of that order delivered to the Registrar for registration for the purposes of subsection (7) must be accompanied by those articles, or the resolution or agreement, as amended.

(9) If subsection (8) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

13.9 Court's additional powers to facilitate reconstruction or amalgamation

(1) This section applies if –

(*a*) an application is made for the purposes of section 13.8(3) to sanction the arrangement or compromise; and

(*b*) it is shown to the Court of First Instance that –

(i) the arrangement or compromise is proposed for the purpose of, or in connection with, a scheme for the reconstruction of one or more companies, or for the amalgamation of 2 or more companies; and

(ii) under the scheme, the property or undertaking of any company concerned in the scheme, or any part of that property or undertaking, is to be transferred to another company.

(2) If the Court of First Instance sanctions the arrangement or compromise, it may, by the order or a subsequent order, make provision for any or all of the following –

(*a*) the transfer of the transferor's property, undertaking or liabilities, or any part of it or them, to the transferee;

(*b*) the allotting or appropriation by the transferee of any shares, debentures, policies, or other like interests in the

transferee which, under the arrangement or compromise, are to be allotted or appropriated by the transferee to or for any person;

(*c*) the continuation by or against the transferee of any legal proceedings pending by or against the transferor;

(*d*) the dissolution, without winding up, of the transferor;

(*e*) the provision to be made for any person, who within the time, and in the manner, that the Court directs, dissents from the arrangement or compromise;

(*f*) the transfer or allotting of any interest in property to any person concerned in the arrangement or compromise;

(*g*) any incidental, consequential and supplemental matters that are necessary to ensure that the reconstruction or amalgamation is fully and effectively carried out.

(3) If an order provides for the transfer of property under subsection (2) –

(*a*) the property is, by virtue of the order, transferred to, and vests in, the transferee; and

(*b*) where the order so directs, the property vests freed from any charge that is to cease to have effect by virtue of the arrangement or compromise.

(4) If an order provides for the transfer of liabilities under subsection (2), the liabilities are, by virtue of the order, transferred to, and become liabilities of, the transferee.

(5) If the Court of First Instance, by an order, makes provision for any matter under subsection (2), the order has no effect to the extent to which it purports to make the provision until an office copy of the order is registered by the Registrar under Part 2.

(6) If the order of the Court of First Instance amends the company's articles, or any resolution or agreement to which section 12.86 applies, the office

copy of that order delivered to the Registrar for registration for the purposes of subsection (5) must be accompanied by those articles, or the resolution or agreement, as amended.

(7) If subsection (6) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(8) In this section –

"liabilities" (法律責任) includes –

(*a*) duties of a personal character and incapable of being assigned or performed vicariously under the law; and

(*b*) duties of any other description;

"property" (財產) includes –

(*a*) rights and powers of a personal character and incapable of being assigned or performed vicariously under the law; and

(*b*) rights and powers of any other description;

"transferee" (受讓人), in relation to an arrangement or compromise proposed for the purpose of a scheme of reconstruction or amalgamation, means the company to which another company's property, undertaking or liabilities, or any part of it or them, is to be transferred under the scheme;

"transferor" (出讓人), in relation to an arrangement or compromise proposed for the purpose of a scheme of reconstruction or amalgamation, means the company whose property, undertaking or liabilities, or any part of it or them, is to be transferred to another company under the scheme.

13.10 Company's articles to be accompanied by Court order

(1) Every copy of the company's articles issued by the company after an order is made for the purposes of section 13.8 or 13.9 must be accompanied by a copy of the order, unless the effect of the order, and the effect of the

arrangement or compromise to which the order relates, has been incorporated into the articles by alteration to those articles.

(2) If subsection (1) is contravened, the company, and every responsible person of the company, commits an offence, and each is liable to a fine at level 3.

Division 3 – Amalgamation of Companies within Group

13.11 Interpretation

(1) In this Division, a company is a wholly owned subsidiary of another company if it has no members except –

(*a*) that other company;

(*b*) a nominee of that other company;

(*c*) a wholly owned subsidiary of that other company; or

(*d*) a nominee of that subsidiary.

(2) A cancellation of shares under this Division is not a reduction of share capital for the purposes of Part 5.

(3) For the purposes of this Division, a resolution approving an amalgamation mentioned in section 13.13(1) or 13.14(1) is an amalgamation proposal that has been approved.

13.12 Solvency statement

(1) In this Division, a reference to a solvency statement made by the directors of an amalgamating company is a reference to a statement made before the time specified in subsection (2) that –

(*a*) in the directors' opinion –

(i) as at the date of the statement, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) the amalgamated company will be able to pay its debts as they fall due during the period of 12

months immediately after the date on which the amalgamation is to become effective; and

(*b*) as at the date of the statement, none of the following exists –

(i) any floating charge created by the amalgamating company;

(ii) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached.

(2) The time is –

(*a*) if the amalgamation is to be approved by a resolution passed on a poll at a general meeting, the date of the meeting; or

(*b*) if the amalgamation is to be approved by a written resolution, the time when the resolution is circulated to the members.

(3) In forming an opinion for the purposes of subsection (1)(*a*)(ii), the directors must take into account all the liabilities of the amalgamated company (including contingent and prospective liabilities).

13.13 Vertical amalgamation

(1) A company ("amalgamating holding company"), and one or more of its wholly owned subsidiaries, may amalgamate, and continue, as one company if –

(*a*) the members of the amalgamating holding company approve the amalgamation on the terms specified in subsection (2); and

(*b*) the members of each of the amalgamating subsidiaries approve the amalgamation on the terms specified in subsection (2).

(2) The terms are –

(*a*) that the shares of each of the amalgamating subsidiaries will be cancelled without payment or other consideration;

(*b*) that the articles of the amalgamated company will be the same as the articles of the amalgamating holding company;

(*c*) that the directors of each amalgamating company –

(i) are satisfied that, as at the date of the solvency statement made by them, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) after taking into account all the liabilities of the amalgamated company (including contingent and prospective liabilities), are satisfied that the amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the date on which the amalgamation is to become effective;

(*d*) that the directors of each amalgamating company have confirmed that as at the date of the solvency statement made by them, none of the following exists –

(i) any floating charge created by the amalgamating company;

(ii) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached;

(*e*) that the person or persons named in the resolution will be the director or directors of the amalgamated company.

(3) An approval for the purposes of subsection (1)(*a*) must be obtained by a special resolution of the company passed on a poll at a general meeting but not by a written resolution.

(4) An approval for the purposes of subsection (1)(*b*) must be obtained by a special resolution of the company.

(5) This section does not apply unless each amalgamating company is a company limited by shares.

13.14 Horizontal amalgamation

(1) Two or more of the wholly owned subsidiaries of a company may amalgamate, and continue, as one company if the members of each amalgamating company approve the amalgamation on the terms specified in subsection (2).

(2) The terms are –

(*a*) that the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration;

(*b*) that the articles of the amalgamated company will be the same as the articles of the amalgamating company whose shares are not cancelled;

(*c*) that the directors of each amalgamating company –

(i) are satisfied that, as at the date of the solvency statement made by them, there is no ground on which the amalgamating company could be found to be unable to pay its debts; and

(ii) after taking into account all the liabilities of the amalgamated company (including contingent and prospective liabilities), are satisfied that the amalgamated company will be able to pay its debts as they fall due during the period of 12 months immediately after the date on which the amalgamation is to become effective;

(*d*) that the directors of each amalgamating company have confirmed that as at the date of the solvency statement made by them, none of the following exists –

(i) any floating charge created by the amalgamating company;

(ii) any other security created by the amalgamating company over a class of assets, to any of which the security interest has not attached;

(*e*) that the person named in the resolution will be the director of the amalgamated company.

(3) An approval for the purposes of subsection (1) must be obtained by a special resolution of the amalgamating company.

(4) This section does not apply unless each amalgamating company is a company limited by shares.

13.15 Directors of amalgamating company must notify secured creditors of proposed amalgamation

(1) The directors of each amalgamating company under section 13.13 or 13.14 must comply with subsection (2) –

(*a*) if the amalgamation is to be approved by a resolution passed on a poll at a general meeting, at least 21 days before the date of the meeting; or

(*b*) if the amalgamation is to be approved by a written resolution, at the same time as the resolution is circulated to the members.

(2) Those directors –

(*a*) must give written notice of the proposed amalgamation to every secured creditor of the amalgamating company; and

(*b*) must publish notice of the proposed amalgamation in an English language newspaper, and a Chinese language newspaper, circulating in Hong Kong.

(3) If the directors of an amalgamating company contravene subsection (1), each of them commits an offence and is liable to a fine at level 3.

13.16 Director of amalgamating company must issue certificate on solvency statement

(1) Every director of the amalgamating company who votes in favour of making a solvency statement must issue a certificate –

(*a*) stating –

(i) that, in the director's opinion, the conditions specified in section 13.12(1)(*a*)(i) and (ii) are satisfied; and

(ii) the grounds for that opinion; and

(*b*) stating that the condition specified in section 13.12(1)(*b*) is satisfied.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine at level 4.

(3) A director of the amalgamating company commits an offence if the director votes in favour of making a solvency statement, or otherwise causes a solvency statement to be made, without having reasonable grounds for the opinion and fact expressed in the statement.

(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 6 and to imprisonment for 6 months.

13.17 Registration of amalgamation

(1) For the purpose of effecting an amalgamation, the following documents must be delivered to the Registrar for registration within 14 days after the approval of the amalgamation proposal –

(*a*) the amalgamation proposal that has been approved;

(*b*) every certificate required by section 13.16(1);

(*c*) a certificate issued by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with –

(i) this Division; and

(ii) the articles of the amalgamating company;

(*d*) a notice of appointment of the directors of the amalgamated company;

(*e*) a certificate issued by the directors, or the proposed directors, of the amalgamated company stating that where the proportion of the claims of the amalgamated company's creditors in relation to the value of that company's assets is greater than the proportion of the claims of an amalgamating company's creditors in relation to the value of that company, no creditor will be prejudiced by that fact.

(2) A document mentioned in subsection (1)(*a*), (*b*), (*c*), (*d*) or (*e*) must be in the specified form.

(3) As soon as practicable after the documents mentioned in subsection (1) are registered, the Registrar must issue a certificate of amalgamation.

(4) A certificate of amalgamation may be issued in any form that the Registrar thinks fit.

13.18 Effective date of amalgamation

(1) A certificate of amalgamation issued under section 13.17(3) must specify a date as the effective date of the amalgamation.

(2) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective, and that date is the same as or later than the date on which the Registrar registers the documents mentioned in section 13.17(1), that date must be specified in the certificate of amalgamation as the effective date of the amalgamation.

(3) On the effective date of an amalgamation –

(*a*) the amalgamation takes effect;

(*b*) each amalgamating company ceases to exist as an entity separate from the amalgamated company; and

(*c*) the amalgamated company succeeds to all the property, rights and privileges, and all the liabilities and obligations, of each amalgamating company.

(4) On and after the effective date of an amalgamation –

(*a*) any proceedings pending by or against an amalgamating company may be continued by or against the amalgamated company;

(*b*) any conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and

(*c*) any agreement entered into by an amalgamating company may be enforced by or against the amalgamated company unless otherwise provided in the agreement.

(5) As soon as practicable after the effective date of an amalgamation, the Registrar must make a note of the amalgamation in the Register in relation to each amalgamating company.

13.19 Court may intervene in amalgamation proposal in certain cases

(1) If the Court of First Instance is satisfied that giving effect to an amalgamation proposal would unfairly prejudice a member or creditor of an amalgamating company or a person to whom an amalgamating company is under an obligation, it may, on application by the member, creditor or person made before the date on which the amalgamation becomes effective, make any order it thinks fit in relation to the amalgamation proposal.

(2) Without limiting subsection (1), the Court of First Instance may make an order –

(*a*) directing that effect must not be given to the amalgamation proposal;

(*b*) modifying the amalgamation proposal in the manner specified in the order; or

(*c*) directing the amalgamating company or its directors to reconsider the amalgamation proposal or any part of that proposal.

(3) Without limiting subsection (1), the Court of First Instance may also make an order directing the amalgamated company, or any other party to the proceedings, to purchase shares of a member of an amalgamating company who would be unfairly prejudiced by the amalgamation proposal.

(4) On making an application for the purposes of subsection (1), the applicant must deliver to the Registrar for registration a notice of the application in the specified form.

(5) If the Registrar receives a notice under subsection (4), he or she must withhold registration of the documents mentioned in section 13.17(1) unless the Court of First Instance otherwise directs or the application is dismissed by the Court or is withdrawn.

(6) If an order is made under this section, every company in relation to which the order is made must deliver an office copy of the order to the Registrar for registration within 7 days after the order is made.

(7) If a company contravenes subsection (6), 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.

Division 4 – Compulsory Acquisition after Takeover Offer

Subdivision 1 – Preliminary

13.20 Interpretation

In this Division –

"nominee" (代名人), in relation to a company that is a member of a group of companies, includes a nominee on behalf of another company that is a member of the group.

13.21 Application to convertible securities and debentures

(1) This Division applies in relation to debentures of a company that are convertible into shares in the company, or to securities of a company that are convertible into, or entitle the holder to subscribe for, shares in the company, as if those debentures or securities were shares of a separate class of the company. A reference to a holder of shares, and to shares being allotted, is to be read accordingly.

(2) In this Division, a reference to 90% in number of the shares of any class is –

(*a*) in the case of securities mentioned in subsection (1), a reference to 90% of the number of those securities; and

(*b*) in the case of debentures mentioned in subsection (1), a reference to 90% of the total amount payable on those debentures.

13.22 Takeover offer

(1) For the purposes of this Division, an offer to acquire shares in a company is a takeover offer if –

(*a*) it is an offer to acquire all the shares, or all the shares of any class, in the company, except those that, at the date of the offer, are held by the offeror; and

(*b*) the terms of the offer are the same –

(i) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or

(ii) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates.

(2) In subsection (1) –

"shares" (股份) means shares that have been allotted on the date of the offer.

(3) In subsection (1)(*a*), a reference to shares that are held by an offeror –

(*a*) includes shares that the offeror has contracted, unconditionally or subject to conditions being satisfied, to acquire; and

(*b*) excludes shares that are the subject of a contract –

(i) entered into by the offeror with a holder of shares in the company in order to secure that the holder will accept the offer when it is made; and

(ii) entered into for no consideration and by deed, for consideration of negligible value, or for

consideration consisting of a promise by the offeror to make the offer.

(4) For the purposes of subsection (1)(*b*), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the value of consideration offered for the shares allotted earlier as against the value of consideration offered for those allotted later, the terms of the offer are regarded as the same in relation to all the shares concerned if –

(*a*) shares carry an entitlement to a particular dividend that other shares of the same class, by reason of being allotted at a different time, do not carry;

(*b*) the difference in value of consideration merely reflects that difference in entitlement to dividend; and

(*c*) but for the difference in the value of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(5) For the purposes of subsection (1)(*b*), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the form of consideration offered, the terms of the offer are regarded as the same in relation to all the shares concerned if –

(*a*) the law of a place outside Hong Kong precludes an offer of consideration in the form specified in the terms of the offer, or precludes it except after compliance by the offeror with conditions with which the offeror is unable to comply or that the offeror regards as unduly onerous;

(*b*) consideration in another form is offered to a person to whom an offer of consideration in the specified form is so precluded;

(*c*) the person is able to receive consideration in that other form that is of substantially equivalent value; and

(*d*) but for the difference in the form of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(6) Despite subsection (1), a takeover offer may include, among the shares to which it relates, shares that will be allotted after the date of the offer but before a date specified in the offer.

13.23 Non-communication etc. does not prevent offer from being takeover offer

(1) Even though an offer to acquire shares is not communicated to a holder of shares, that does not prevent the offer from being a takeover offer for the purposes of this Division if –

(*a*) no Hong Kong address for the holder is registered in the company's register of members;

(*b*) the offer was not communicated to the holder in order not to contravene the law of a place outside Hong Kong; and

(*c*) either –

(i) the offer is published in the Gazette; or

(ii) the offer can be inspected, or a copy of it obtained, at a place in Hong Kong or on a website, and a notice is published in the Gazette specifying the address of that place or website.

(2) It is not to be inferred from subsection (1) that an offer that is not communicated to a holder of shares cannot be a takeover offer for the purposes of this Division unless the conditions specified in paragraphs (*a*), (*b*) and (*c*) of that subsection are satisfied.

(3) Even though it is impossible or more difficult for a person, by reason of the law of a place outside Hong Kong, to accept an offer to acquire shares, that does not prevent the offer from being a takeover offer for the purposes of this Division.

(4) It is not to be inferred from subsection (3) that an offer that is impossible, or more difficult, for certain persons to accept cannot be a takeover offer for the purposes of this Division unless the reason for the impossibility or difficulty is the one mentioned in that subsection.

13.24 Shares to which takeover offer relates

(1) For the purposes of this Division, if, after a takeover offer is made but before the end of the offer period, the offeror acquires, or contracts unconditionally to acquire, any of the shares to which the offer relates but does not do so by virtue of acceptances of the offer, those shares are not regarded as shares to which the offer relates. This subsection has effect subject to subsection (2).

(2) For the purposes of this Division, those shares are regarded as shares to which the takeover offer relates, and the offeror is regarded as having acquired or contracted to acquire them by virtue of acceptances of that offer, if –

(*a*) the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, does not exceed the value of the consideration specified in the terms of that offer; or

(*b*) those terms are subsequently revised so that when the revision is announced, the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, no longer exceeds the value of the consideration specified in those terms.

(3) For the purposes of this Division, shares that an associate of the offeror, or a nominee on the offeror's behalf, holds, or has contracted, unconditionally or subject to conditions being satisfied, to acquire, whether at the date of the takeover offer or subsequently, are not regarded as shares to

which that offer relates, even if that offer extends to those shares. This subsection has effect subject to subsection (4).

(4) For the purposes of this Division, where, after a takeover offer is made but before the end of the offer period, an associate of the offeror, or a nominee on the offeror's behalf, acquires, or contracts unconditionally to acquire, any of the shares to which the offer relates, the shares are regarded as shares to which the offer relates if –

(*a*) the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, does not exceed the value of the consideration specified in the terms of the offer; or

(*b*) those terms are subsequently revised so that when the revision is announced, the value of the consideration for which the shares are acquired, or contracted to be acquired, at the time of the acquisition or contract, no longer exceeds the value of the consideration specified in those terms.

13.25 Revised offer not regarded as fresh offer

For the purposes of this Division, a revision of the terms of an offer to acquire shares is not regarded as the making of a fresh offer if –

(*a*) the terms of the offer make provision for –

(i) their revision; and

(ii) acceptances on the previous terms to be treated as acceptances on the revised terms; and

(*b*) the revision is made in accordance with that provision.

Subdivision 2 – "Squeeze-out"

13.26 Offeror may give notice to buy out minority shareholders

(1) If, in the case of a takeover offer that does not relate to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares to which the offer relates, the offeror may give notice to the holder of any other shares to which the offer relates that the offeror desires to acquire those shares.

(2) If, in the case of a takeover offer that relates to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares of any class to which the offer relates, the offeror may give notice to the holder of any other shares of that class to which the offer relates that the offeror desires to acquire those shares.

(3) If, in the case of a takeover offer that does not relate to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, less than 90% in number of the shares to which the offer relates, the offeror may apply to the Court of First Instance for an order authorizing the offeror to give notice to the holder of any other shares to which the offer relates that the offeror desires to acquire those shares.

(4) If, in the case of a takeover offer that relates to shares of different classes, the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, less than 90% in number of the shares of any class to which the offer relates, the offeror may apply to the Court of First Instance for an order authorizing the offeror to give notice to the holder of any other shares of that class to which the offer relates that the offeror desires to acquire those shares.

(5) The Court of First Instance may, on application under subsection (3) or (4), make the order if it is satisfied that –

(*a*) after reasonable enquiry, the offeror has been unable to trace one or more of the persons holding shares to which the takeover offer relates;

(*b*) had the person, or all those persons, accepted the takeover offer, the offeror would have, by virtue of acceptances of that offer, acquired, or contracted unconditionally to acquire, at least 90% in number of the shares, or the shares of any class, to which that offer relates; and

(*c*) the consideration offered is fair and reasonable.

(6) The Court of First Instance must not make the order unless it is satisfied that it is just and equitable to do so having regard to all the circumstances and, in particular, to the number of holders of shares who have been traced but who have not accepted the takeover offer.

(7) If the Court of First Instance makes an order authorizing the offeror to give notice to the holder of any shares, the offeror may give notice to that holder.

13.27 Notice to minority shareholders

(1) A notice to a holder of shares under section 13.26 –

(*a*) must be given in the specified form; and

(*b*) must be given to the holder before whichever is the earlier of the following –

(i) the end of a period of 3 months beginning on the day after the end of the offer period of the takeover offer;

(ii) the end of a period of 6 months beginning on the date of the takeover offer.

(2) The notice must be given to the holder of shares –

(*a*) by delivering it personally to that holder in Hong Kong;

(*b*) by sending it by registered post to that holder to –

(i) an address of that holder in Hong Kong registered in the books of the company; or

(ii) if there is no such address, an address in Hong Kong supplied by that holder to the company for the giving of notice to that holder; or

(*c*) in the manner directed by the Registrar on an application made under subsection (3).

(3) An offeror may apply to the Registrar for directions regarding the manner in which the notice is to be given to a holder of shares if –

(*a*) there is no address of the holder in Hong Kong registered in the books of the company; and

(*b*) the holder has not supplied to the company an address in Hong Kong for the giving of notice to the holder.

(4) If the takeover offer gives the holder of shares a choice of consideration, the notice –

(*a*) must give particulars of the choices;

(*b*) must state that the holder may, within 2 months after the date of the notice, indicate the holder's choice by a letter sent to the offeror at an address specified in the notice; and

(*c*) must state which consideration specified in the offer will apply if the holder does not indicate a choice.

(5) Subsection (4) applies whether or not any time limit or other conditions applicable to the choices under the terms of the takeover offer can still be complied with.

(6) If the takeover offer provides that the holder of shares is to receive shares in or debentures of the offeror, with an option to receive some other consideration to be provided by a third party instead, the offeror may indicate in the notice that the terms of the takeover offer include the option.

(7) If the offeror does not indicate in the notice that the terms of the takeover offer include the option, the offeror may offer in the notice a

corresponding option to receive some other consideration to be provided by the offeror.

(8) For the purposes of subsection (6), consideration is regarded as being provided by a third party if it is made available to the offeror on terms that it is to be used by the offeror as consideration for the takeover offer.

13.28 Offeror's right to buy out minority shareholders

(1) This section applies if a notice is given under section 13.26 to the holder of any shares.

(2) Unless the Court of First Instance makes an order under subsection (3), the offeror is entitled and bound to acquire the shares on the terms of the takeover offer.

(3) The Court of First Instance may, on application by the holder made within 2 months after the date on which the notice was given, order that –

(*a*) the offeror is not entitled and bound to acquire the shares; or

(*b*) the offeror is entitled and bound to acquire the shares on the terms specified in the order.

(4) For the purposes of subsection (2) –

(*a*) if the takeover offer falls within section 13.27(4), the terms of the takeover offer are regarded as including the particulars and statements included in the notice for the purposes of that section;

(*b*) if the takeover offer falls within section 13.27(6), the terms of the takeover offer are regarded as not including the option unless the offeror indicates otherwise in the notice;

(*c*) if, within 2 months after the date of the notice, the holder of the shares, by a letter sent to the offeror at an address specified in the notice, exercises the corresponding option

offered under section 13.27(7), the terms of the takeover offer are regarded as including the corresponding option; and

(*d*) if –

(i) the consideration offered to, or chosen by, the holder of the shares is not cash, and the offeror is no longer able to provide it; or

(ii) the consideration offered to, or chosen by, the holder of the shares was to have been provided by a third party who is no longer bound or able to provide it,

the consideration is regarded as consisting of an amount of cash, payable by the offeror, that, at the date of the notice, is equivalent to the consideration offered or chosen.

13.29 Obligations of offeror with right to buy out minority shareholders

(1) If, by virtue of section 13.28(2), an offeror is entitled and bound to acquire any shares in a company, the offeror must comply with subsection (3) within 2 months after the date of the notice.

(2) If an application for the purposes of section 13.28(3) is pending at the end of those 2 months, the offeror must comply with subsection (3) as soon as practicable after the application has been disposed of, unless the Court of First Instance orders that the offeror is not entitled and bound to acquire the shares.

(3) The offeror must –

(*a*) send to the company –

(i) a copy of the notice under section 13.26; and

(ii) an instrument of transfer of the shares to which the notice relates, executed on behalf of the holder of the shares by a person appointed by the offeror; and

(*b*) pay or transfer to the company the consideration for the shares to which the notice relates.

(4) Subsection (3)(*a*)(ii) does not require the offeror to send to the company an instrument of transfer of any shares for which a share warrant is for the time being outstanding.

13.30 Company must register offeror as shareholder

On receiving an instrument of transfer under section 13.29(3)(*a*)(ii), the company must register the offeror as the holder of the shares.

13.31 Company must hold consideration paid by offeror on trust

(1) On receiving any consideration under section 13.29(3)(*b*) in respect of any shares, the company must hold the consideration on trust for the person who, before the offeror acquired the shares, was entitled to them.

(2) If the consideration consists of any money, the company must deposit the money into a separate interest-bearing bank account.

(3) The company must not pay out or deliver the consideration to any person claiming to be entitled to it unless the person produces to the company –

(*a*) the share certificate or other evidence of title to the shares; or

(*b*) an indemnity to the company's satisfaction.

13.32 Provisions supplementary to section 13.31

(1) This section applies if –

(*a*) the person entitled to the consideration held on trust under section 13.31(1) cannot be found;

(*b*) the company has made reasonable enquiries at reasonable intervals to find that person; and

(*c*) 12 years have elapsed since the consideration was received, or the company is wound up.

(2) The company, or if the company is wound up, the liquidator, must sell –

(*a*) any consideration other than cash; and

(*b*) any benefit other than cash that has accrued from the consideration.

(3) The company, or if the company is wound up, the liquidator, must pay into court a sum representing –

(*a*) the consideration so far as it is cash;

(*b*) the proceeds of any sale under subsection (2); and

(*c*) any interest, dividend or other benefit that has accrued from the consideration.

(4) The trust terminates on the payment being made under subsection (3).

(5) The expenses of the following may be paid out of the consideration held on trust –

(*a*) the enquiries mentioned in subsection (1)(*b*);

(*b*) the sale mentioned in subsection (2);

(*c*) the proceedings relating to the payment into court mentioned in subsection (3).

Subdivision 3 – "Sell-out"

13.33 Offeror may be required to buy out minority shareholders

(1) If, in the case of a takeover offer that does not relate to shares of different classes –

(*a*) the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, some but not all of the shares to which the offer relates; and

(*b*) at any time before the end of the offer period, the shares in the company controlled by the offeror represent at least 90% in number of the shares in the company,

the holder of any shares to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the offeror, require the offeror to acquire those shares.

(2) If, in the case of a takeover offer that relates to shares of different classes –

(*a*) the offeror has, by virtue of acceptances of the offer, acquired, or contracted unconditionally to acquire, some but not all of the shares of any class to which the offer relates; and

(*b*) at any time before the end of the offer period, the shares in the company controlled by the offeror represent at least 90% in number of the shares of that class,

the holder of any shares of that class to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the offeror, require the offeror to acquire those shares.

(3) Rights given to the holder of any shares by this section to require an offeror to acquire the shares are only exercisable within 3 months after whichever is the later of the following –

(*a*) the end of the offer period;

(*b*) the date of the notice given to the holder under section 13.35.

(4) If the takeover offer gives the holder of shares a choice of consideration, that holder may indicate the holder's choice in the letter requiring the offeror to acquire the shares.

(5) In this section, a reference to shares controlled by an offeror is a reference to –

(*a*) shares that are held by the offeror, by an associate of the offeror or by a nominee on the offeror's behalf;

(*b*) shares that the offeror has, by virtue of acceptances of the takeover offer, acquired or contracted unconditionally to acquire; or

(*c*) other shares that the offeror, an associate of the offeror, or a nominee on the offeror's behalf, has acquired, or has contracted, unconditionally or subject to conditions being satisfied, to acquire.

13.34 Shareholder regarded as not having exercised the right to be bought out in certain circumstances

(1) This section applies if –

(*a*) the holder of any shares exercises rights given by section 13.33 to require an offeror to acquire the shares;

(*b*) at the time when those rights are exercised, there are shares in the company –

(i) that the offeror has contracted to acquire subject to conditions being satisfied; and

(ii) in relation to which the contract has not become unconditional; and

(*c*) the requirement imposed by section 13.33(1)(*b*) or (2)(*b*), (as the case may be) would not be satisfied if those shares were not taken into account.

(2) For the purposes of section 13.37, the holder of shares is regarded as not having exercised the rights to require the offeror to acquire the shares unless, at any time before the end of the period during which those rights are exercisable –

(*a*) in the case of a takeover offer that does not relate to shares of different classes, the shares that the offeror has, by

virtue of acceptances of the offer, acquired or contracted unconditionally to acquire, with or without any other shares in the company that the offeror has acquired, or has contracted unconditionally to acquire, represent at least 90% in number of the shares in the company; or

(*b*) in the case of a takeover offer that relates to shares of different classes, the shares of any class that the offeror has, by virtue of acceptances of the offer, acquired or contracted unconditionally to acquire, with or without any other shares of that class that the offeror has acquired, or has contracted unconditionally to acquire, represent at least 90% in number of the shares of that class.

13.35 Offeror must notify minority shareholders of right to be bought out

(1) If the holder of any shares is entitled under section 13.33 to require an offeror to acquire the shares, the offeror must give notice to the holder of –

(*a*) the holder's rights under that section; and

(*b*) the period within which those rights are exercisable.

(2) Subsection (1) does not apply if the offeror has given the holder a notice under section 13.26 that the offeror desires to acquire the shares.

(3) An offeror who contravenes subsection (1) commits an offence and is liable to a fine at level 5.

13.36 Notice to minority shareholders

(1) A notice to a holder of shares under section 13.35 –

(*a*) must be given in the specified form; and

(*b*) must be given to the holder within one month after the first day on which the holder of the shares is entitled under section 13.33 to require the offeror to acquire those shares.

(2) If the notice is given before the end of the offer period of the takeover offer, it must state that the offer is still open for acceptance.

(3) The notice must be given to the holder of shares –

(*a*) by delivering it personally to that holder in Hong Kong;

(*b*) by sending it by registered post to that holder to –

(i) an address of that holder in Hong Kong registered in the books of the company; or

(ii) if there is no such address, an address in Hong Kong supplied by that holder to the company for the giving of notice to that holder; or

(*c*) in the manner directed by the Registrar on an application made under subsection (4).

(4) An offeror may apply to the Registrar for directions regarding the manner in which the notice is to be given to a holder of shares if –

(*a*) there is no address of the holder in Hong Kong registered in the books of the company; and

(*b*) the holder has not supplied to the company an address in Hong Kong for the giving of notice to the holder.

(5) If the takeover offer gives the holder of shares a choice of consideration, the notice –

(*a*) must give particulars of the choices;

(*b*) must state that the holder may indicate the holder's choice in the letter requiring the offeror to acquire any shares under section 13.33; and

(*c*) must state which consideration specified in the offer will apply if the holder does not indicate a choice.

(6) Subsection (5) applies whether or not any time limit or other conditions applicable to the choices under the terms of the takeover offer can still be complied with.

(7) If subsection (1), (2), (3) or (5) is contravened, the offeror commits an offence and is liable to a fine at level 4.

(8) If the takeover offer provides that the holder of shares is to receive shares in or debentures of the offeror, with an option to receive some other considerations to be provided by a third party instead, the offeror may indicate in the notice that the terms of the takeover offer include the option.

(9) If the offeror does not indicate in the notice that the terms of the takeover offer include the option, the offeror may offer in the notice a corresponding option to receive some other consideration to be provided by the offeror.

(10) For the purposes of subsection (8), consideration is regarded as being provided by a third party if it is made available to the offeror on terms that it is to be used by the offeror as consideration for the takeover offer.

13.37 Minority shareholders' right to be bought out by offeror

(1) This section applies if the holder of any shares requires the offeror to acquire the shares under section 13.33.

(2) Unless the Court of First Instance makes an order under subsection (3), the offeror is entitled and bound to acquire the shares on the terms of the takeover offer or on other terms as agreed between that holder and the offeror.

(3) The Court of First Instance may, on application by the holder or offeror, order that the offeror is entitled and bound to acquire the shares on the terms specified in the order.

(4) For the purposes of subsection (2) –

(*a*) if the takeover offer falls within section 13.36(5), the terms of the takeover offer are regarded as including the particulars and statements included in the notice for the purposes of that section;

(*b*) if the takeover offer falls within section 13.36(8), the terms of the takeover offer are regarded as not including

the option unless the offeror indicates otherwise in the notice under section 13.35;

(*c*) if, when requiring the offeror to acquire the shares, the holder of the shares exercises the corresponding option offered under section 13.36(9), the terms of the takeover offer are regarded as including the corresponding option; and

(*d*) if –

(i) the consideration offered to, or chosen by, the holder of the shares is not cash, and the offeror is no longer able to provide it; or

(ii) the consideration offered to, or chosen by, the holder of the shares was to have been provided by a third party who is no longer bound or able to provide it,

the consideration is regarded as consisting of an amount of cash, payable by the offeror, that, at the date when that holder requires the offeror to acquire the shares under section 13.33, is equivalent to the consideration offered or chosen.

Division 5 – Compulsory Acquisition after General Offer for Share Buy-back

Note: Further provisions on share acquisition after a general offer for share buy-back are contained in Division 4 of Part 5.

Subdivision 1 – Preliminary

13.38 Interpretation

(1) In this Division –

"nominee" (代名人), in relation to a company that is a member of a group of companies, includes a nominee on behalf of another company that is a member of the group;

"non-tendering member" (不售股成員), in relation to a general offer, means a member who gives notice under section 13.44(1) that the member will not tender any shares to be bought back by the repurchasing company under the offer;

"repurchasing company" (回購公司), in relation to a general offer, means the listed company that makes the offer.

(2) In this Division, a reference to shares that are held by a non-tendering member includes –

(*a*) shares that are held by an associate of the non-tendering member or by a nominee on the non-tendering member's behalf; and

(*b*) shares that the non-tendering member, an associate of the non-tendering member, or a nominee on the non-tendering member's behalf, has contracted, unconditionally or subject to conditions being satisfied, to acquire.

13.39 Application to convertible securities and debentures

(1) This Division applies in relation to debentures of a repurchasing company that are convertible into shares in the company, or to securities of a repurchasing company that are convertible into, or entitle the holder to subscribe for, shares in the company, as if those debentures or securities were shares of a separate class of the company. A reference to a holder of shares, and to shares being allotted, is to be read accordingly.

(2) In this Division, a reference to 90% in number of the shares of any class is –

(*a*) in the case of securities mentioned in subsection (1), a reference to 90% of the number of those securities; and

(*b*) in the case of debentures mentioned in subsection (1), a reference to 90% of the total amount payable on those debentures.

13.40 General offer

(1) For the purposes of this Division, a listed company's offer to buy back shares in the company is a general offer if –

(*a*) it is an offer to buy back all the shares, or all the shares of any class, in the company, except –

(i) those that, at the date of the offer, are held by a member residing in a place where such an offer is contrary to the law of the place; and

(ii) those that, at the date of the offer, are held by the repurchasing company; and

(*b*) the terms of the offer are the same –

(i) where the offer does not relate to shares of different classes, in relation to all the shares to which the offer relates; or

(ii) where the offer relates to shares of different classes, in relation to all the shares of each class to which the offer relates.

(2) In subsection (1) –

"shares" (股份) means shares that have been allotted on the date of the offer.

(3) In subsection (1)(*a*)(ii), a reference to shares that are held by the repurchasing company –

(*a*) is a reference to shares that the repurchasing company has contracted, unconditionally or subject to conditions being satisfied, to acquire; and

(*b*) excludes shares that are the subject of a contract –

(i) entered into by the repurchasing company with a holder of shares in that company in order to secure that the holder will accept the offer when it is made; and

(ii) entered into for no consideration and by deed, for consideration of negligible value, or for consideration consisting of a promise by the repurchasing company to make the offer.

(4) For the purposes of subsection (1)(*b*), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the value of consideration offered for the shares allotted earlier as against the value of consideration offered for those allotted later, the terms of the offer are regarded as the same in relation to all the shares concerned if –

(*a*) shares carry an entitlement to a particular dividend that other shares of the same class, by reason of being allotted at a different time, do not carry;

(*b*) the difference in value of consideration merely reflects that difference in entitlement to dividend; and

(*c*) but for the difference in the value of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(5) For the purposes of subsection (1)(*b*), even though, in relation to all the shares, or all the shares of a class of shares, to which an offer relates, there is a difference in the form of consideration offered, the terms of the offer are regarded as the same in relation to all the shares concerned if –

(*a*) the law of a place outside Hong Kong precludes an offer of consideration in the form specified in the terms of the offer, or precludes it except after compliance by the

repurchasing company with conditions with which the repurchasing company is unable to comply or that the repurchasing company regards as unduly onerous;

(*b*) consideration in another form is offered to a person to whom an offer of consideration in the specified form is so precluded;

(*c*) the person is able to receive consideration in that other form that is of substantially equivalent value; and

(*d*) but for the difference in the form of consideration, the terms of the offer would be the same in relation to all the shares concerned.

(6) Despite subsection (1), a general offer may include, among the shares to which it relates, shares that will be allotted after the date of the offer but before a date specified in the offer.

13.41 Non-communication etc. does not prevent offer from being general offer

(1) Even though an offer to buy back shares is not communicated to a holder of shares, that does not prevent the offer from being a general offer for the purposes of this Division if –

(*a*) no Hong Kong address for the holder is registered in the repurchasing company's register of members;

(*b*) the offer was not communicated to the holder in order not to contravene the law of a place outside Hong Kong; and

(*c*) either –

(i) the offer is published in the Gazette; or

(ii) the offer can be inspected, or a copy of it obtained, at a place in Hong Kong or on a website, and a notice is published in the Gazette specifying the address of that place or website.

(2) It is not to be inferred from subsection (1) that an offer that is not communicated to a holder of shares cannot be a general offer for the purposes of this Division unless the conditions specified in paragraphs (*a*), (*b*) and (*c*) of that subsection are satisfied.

(3) Even though it is impossible or more difficult for a person, by reason of the law of a place outside Hong Kong, to accept an offer to buy back shares, that does not prevent the offer from being a general offer for the purposes of this Division.

(4) It is not to be inferred from subsection (3) that an offer that is impossible, or more difficult, for certain persons to accept cannot be a general offer for the purposes of this Division unless the reason for the impossibility or difficulty is the one mentioned in that subsection.

13.42 Shares to which general offer relates

(1) For the purposes of this Division, if, after a general offer is made but before the end of the offer period, the repurchasing company buys back, or contracts unconditionally to buy back, any of the shares to which the offer relates but does not do so by virtue of acceptances of the offer, those shares are not regarded as shares to which the offer relates. This subsection has effect subject to subsection (2).

(2) For the purposes of this Division, those shares are regarded as shares to which the general offer relates, and the repurchasing company is regarded as having bought them back or contracted to buy them back by virtue of acceptances of that offer, if –

(*a*) the value of the consideration for which the shares are bought back, or contracted to be bought back, at the time of the buy-back or contract, does not exceed the value of the consideration specified in the terms of that offer; or

(*b*) those terms are subsequently revised so that when the revision is announced, the value of the consideration for

which the shares are bought back, or contracted to be bought back, at the time of the buy-back or contract, no longer exceeds the value of the consideration specified in those terms.

(3) For the purposes of this Division, shares that an associate of the repurchasing company, or a nominee on the repurchasing company's behalf, holds, or has contracted, unconditionally or subject to conditions being satisfied, to buy back, whether at the date of the general offer or subsequently, are not regarded as shares to which that offer relates, even if that offer extends to those shares. This subsection has effect subject to subsection (4).

(4) For the purposes of this Division, where, after a general offer is made but before the end of the offer period, an associate of the repurchasing company, or a nominee on the repurchasing company's behalf, buys back, or contracts unconditionally to buy back, any of the shares to which the offer relates, the shares are regarded as shares to which the offer relates if –

(*a*) the value of the consideration for which the shares are bought back, or contracted to be bought back, at the time of the buy-back or contract, does not exceed the value of the consideration specified in the terms of the offer; or

(*b*) those terms are subsequently revised so that when the revision is announced, the value of the consideration for which the shares are bought back, or contracted to be bought back, at the time of the buy-back or contract, no longer exceeds the value of the consideration specified in those terms.

(5) For the purposes of this Division, the shares held by a non-tendering member are not regarded as shares to which the general offer relates, even if that offer extends to those shares.

13.43 Revised offer not regarded as fresh offer

For the purposes of this Division, a revision of the terms of an offer to buy back shares is not regarded as the making of a fresh offer if –

(*a*) the terms of the offer make provision for –

(i) their revision; and

(ii) acceptances on the previous terms to be treated as acceptances on the revised terms; and

(*b*) the revision is made in accordance with that provision.

13.44 Member may give notice that member will not tender shares for buy-back under general offer

(1) A member of a repurchasing company may, on or before the date on which notice of an authorizing meeting of the company is given, give notice to every other member of the company that the member will not tender any shares held by the member to be bought back by the company under the general offer.

(2) A non-tendering member is not entitled to tender any shares held by the member to be bought back by the repurchasing company under the general offer even if that offer extends to those shares.

(3) In this section –

"authorizing meeting" (授權會議), in relation to a repurchasing company, means a meeting of the company called for the purpose of authorizing a general offer that the company intends to make.

Subdivision 2 – "Squeeze-out"

13.45 Repurchasing company may give notice to buy out minority shareholders

(1) This section applies if a member or members of the repurchasing company has or have given notice under section 13.44 that the member or

members will not tender any shares to be bought back by that company under a general offer.

(2) If, in the case of a general offer that does not relate to shares of different classes, the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, at least 90% in number of the shares to which the offer relates, the repurchasing company may give notice to the holder of any other shares to which the offer relates that it desires to buy back those shares.

(3) If, in the case of a general offer that relates to shares of different classes, the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, at least 90% in number of the shares of any class to which the offer relates, the repurchasing company may give notice to the holder of any other shares of that class to which the offer relates that it desires to buy back those shares.

(4) If, in the case of a general offer that does not relate to shares of different classes, the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, less than 90% in number of the shares to which the offer relates, the repurchasing company may apply to the Court of First Instance for an order authorizing it to give notice to the holder of any other shares to which the offer relates that it desires to buy back those shares.

(5) If, in the case of a general offer that relates to shares of different classes, the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, less than 90% in number of the shares of any class to which the offer relates, the repurchasing company may apply to the Court of First Instance for an order authorizing it to give notice to the holder of any other shares of that class to which the offer relates that it desires to buy back those shares.

(6) The Court of First Instance may, on application under subsection (4) or (5), make the order if it is satisfied that –

(*a*) after reasonable enquiry, the repurchasing company has been unable to trace one or more of the persons holding shares to which the general offer relates;

(*b*) had the person, or all those persons, accepted the general offer, the repurchasing company would have, by virtue of acceptances of that offer, bought back, or contracted unconditionally to buy back, at least 90% in number of the shares, or the shares of any class, to which that offer relates; and

(*c*) the consideration offered is fair and reasonable.

(7) The Court of First Instance must not make the order unless it is satisfied that it is just and equitable to do so having regard to all the circumstances and, in particular, to the number of holders of shares who have been traced but who have not accepted the general offer.

(8) If the Court of First Instance makes an order authorizing the repurchasing company to give notice to the holder of any shares, the repurchasing company may give notice to that holder.

13.46 Notice to minority shareholders

(1) A notice to a holder of shares under section 13.45 –

(*a*) must be given in the specified form; and

(*b*) must be given to the holder before whichever is the earlier of the following –

(i) the end of a period of 3 months beginning on the day after the end of the offer period of the general offer;

(ii) the end of a period of 6 months beginning on the date of the general offer.

(2) The notice must be given to the holder of shares –

(*a*) by delivering it personally to that holder in Hong Kong;

(*b*) by sending it by registered post to that holder to –

(i) an address of that holder in Hong Kong registered in the books of the company; or

(ii) if there is no such address, an address in Hong Kong supplied by that holder to the company for the giving of notice to that holder; or

(*c*) in the manner directed by the Registrar on an application made under subsection (3).

(3) An offeror may apply to the Registrar for directions regarding the manner in which the notice is to be given to a holder of shares if –

(*a*) there is no address of the holder in Hong Kong registered in the books of the company; and

(*b*) the holder has not supplied to the company an address in Hong Kong for the giving of notice to the holder.

(4) If the general offer gives the holder of shares a choice of consideration, the notice –

(*a*) must give particulars of the choices;

(*b*) must state that the holder may, within 2 months after the date of the notice, indicate the holder's choice by a letter sent to the repurchasing company at an address specified in the notice; and

(*c*) must state which consideration specified in the offer will apply if the holder does not indicate a choice.

(5) Subsection (4) applies whether or not any time limit or other conditions applicable to the choices under the terms of the general offer can still be complied with.

13.47 Repurchasing company's right to buy out minority shareholders

(1) This section applies if a notice is given under section 13.45 to the holder of any shares.

(2) Unless the Court of First Instance makes an order under subsection (3), the repurchasing company is entitled and bound to buy back the shares on the terms of the general offer.

(3) The Court of First Instance may, on application by the holder made within 2 months after the date on which the notice was given, order that –

(*a*) the repurchasing company is not entitled and bound to buy back the shares; or

(*b*) the repurchasing company is entitled and bound to buy back the shares on the terms specified in the order.

(4) For the purposes of subsection (2) –

(*a*) if the general offer falls within section 13.46(4), the terms of the general offer are regarded as including the particulars and statements included in the notice for the purposes of that section; and

(*b*) if –

(i) the consideration offered to, or chosen by, the holder of the shares is not cash, and the repurchasing company is no longer able to provide it; or

(ii) the consideration offered to, or chosen by, the holder of the shares was to have been provided by a third party who is no longer bound or able to provide it,

the consideration is regarded as consisting of an amount of cash, payable by the repurchasing company, that, at the date of the notice, is equivalent to the consideration offered or chosen.

13.48 Obligations of repurchasing company with right to buy out minority shareholders

(1) If, by virtue of section 13.47(2), a repurchasing company is entitled and bound to buy back any shares in the company, the company must comply with section 13.49 within 2 months after the date of the notice.

(2) If an application for the purposes of section 13.47(3) is pending at the end of those 2 months, the repurchasing company must comply with section 13.49 as soon as practicable after the application has been disposed of.

13.49 Repurchasing company must pay for shares to which notice relates

(1) The repurchasing company must pay the consideration for any shares to which the notice under section 13.45 relates to the holder of the shares if that holder produces to the repurchasing company –

(*a*) the share certificate or other evidence of title to the shares; or

(*b*) an indemnity to the repurchasing company's satisfaction.

(2) The repurchasing company must cancel any other shares to which the notice under section 13.45 relates and deposit the consideration for those shares into a separate interest-bearing bank account.

(3) The repurchasing company must hold any consideration deposited into a bank account under subsection (2) on trust for the person who, before the company bought back the shares, was entitled to them.

(4) The repurchasing company must not pay out or deliver the consideration to any person claiming to be entitled to it unless the person produces to the repurchasing company –

(*a*) the share certificate or other evidence of title to the shares; or

(*b*) an indemnity to the repurchasing company's satisfaction.

13.50 Provisions supplementary to section 13.49

(1) This section applies if –

(*a*) the person entitled to the consideration held on trust under section 13.49(3) cannot be found;

(*b*) the repurchasing company has made reasonable enquiries at reasonable intervals to find that person; and

(*c*) 12 years have elapsed since the consideration was received, or the repurchasing company is wound up.

(2) The repurchasing company, or if the repurchasing company is wound up, the liquidator, must sell –

(*a*) any consideration other than cash; and

(*b*) any benefit other than cash that has accrued from the consideration.

(3) The repurchasing company, or if the repurchasing company is wound up, the liquidator, must pay into court a sum representing –

(*a*) the consideration so far as it is cash;

(*b*) the proceeds of any sale under subsection (2); and

(*c*) any interest, dividend or other benefit that has accrued from the consideration.

(4) The trust terminates on the payment being made under subsection (3).

(5) The expenses of the following may be paid out of the consideration held on trust –

(*a*) the enquiries mentioned in subsection (1)(*b*);

(*b*) the sale mentioned in subsection (2);

(*c*) the proceedings relating to the payment into court mentioned in subsection (3).

Subdivision 3 – "Sell-out"

13.51 Repurchasing company may be required to buy out minority

(1) This section applies if a member or members of the repurchasing company has or have given notice under section 13.44 that the member or members will not tender any shares to be bought back by that company under a general offer.

(2) If, in the case of a general offer that does not relate to shares of different classes –

(*a*) the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, some but not all of the shares to which the offer relates; and

(*b*) at any time before the end of the offer period, the shares in the repurchasing company controlled by that company, with or without the shares in the repurchasing company held by the non-tendering member, represent at least 90% in number of the shares in the repurchasing company,

the holder of any shares to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the repurchasing company, require that company to buy back those shares.

(3) If, in the case of a general offer that relates to shares of different classes –

(*a*) the repurchasing company has, by virtue of acceptances of the offer, bought back, or contracted unconditionally to buy back, some but not all of the shares of any class to which the offer relates; and

(*b*) at any time before the end of the offer period, the shares of that class controlled by the repurchasing company, with or without the shares of that class held by the non-tendering

member, represent at least 90% in number of the shares of that class,

the holder of any shares of that class to which the offer relates who has not accepted the offer before the end of that period may, by a letter addressed to the repurchasing company, require that company to buy back those shares.

(4) Rights given to the holder of any shares by this section to require a repurchasing company to buy back the shares are only exercisable within 3 months after whichever is the later of the following –

(*a*) the end of the offer period;

(*b*) the date of the notice given to the holder under section 13.52.

(5) If the general offer gives the holder of shares a choice of consideration, that holder may indicate the holder's choice in the letter requiring the repurchasing company to buy back the shares.

(6) In this section, a reference to shares controlled by a repurchasing company is a reference to –

(*a*) shares that are held by an associate of the repurchasing company or by a nominee on the repurchasing company's behalf;

(*b*) shares that the repurchasing company has, by virtue of acceptances of the general offer, acquired or contracted unconditionally to acquire; or

(*c*) other shares that the repurchasing company, an associate of the repurchasing company, or a nominee on the repurchasing company's behalf, has acquired, or has contracted, unconditionally or subject to conditions being satisfied, to acquire.

13.52 Repurchasing company must notify minority shareholders of right to be bought out

(1) If the holder of any shares is entitled under section 13.51 to require a repurchasing company to buy back the shares, the repurchasing company must give notice to the holder of –

(*a*) the holder's rights under that section; and

(*b*) the period within which those rights are exercisable.

(2) Subsection (1) does not apply if the repurchasing company has given the holder a notice under section 13.45 that it desires to buy back the shares.

(3) A repurchasing company that contravenes subsection (1) commits an offence and is liable to a fine at level 5.

13.53 Notice to minority shareholders

(1) A notice to a holder of shares under section 13.52 –

(*a*) must be given in the specified form; and

(*b*) must be given to the holder within one month after the first day on which the holder of the shares is entitled under section 13.51 to require the repurchasing company to buy back those shares.

(2) If the notice is given before the end of the offer period of the general offer, it must state that the offer is still open for acceptance.

(3) The notice must be given to the holder of shares –

(*a*) by delivering it personally to that holder in Hong Kong;

(*b*) by sending it by registered post to that holder to –

(i) an address of that holder in Hong Kong registered in the books of the company; or

(ii) if there is no such address, an address in Hong Kong supplied by that holder to the company for the giving of notice to that holder; or

(*c*) in the manner directed by the Registrar on an application made under subsection (4).

(4) A repurchasing company may apply to the Registrar for directions regarding the manner in which the notice is to be given to a holder of shares if –

(*a*) there is no address of the holder in Hong Kong registered in the books of the company; and

(*b*) the holder has not supplied to the company an address in Hong Kong for the giving of notice to the holder.

(5) If the general offer gives the holder of shares a choice of consideration, the notice –

(*a*) must give particulars of the choices;

(*b*) must state that the holder may indicate the holder's choice in the letter requiring the repurchasing company to buy back any shares under section 13.51; and

(*c*) must state which consideration specified in the offer will apply if the holder does not indicate a choice.

(6) Subsection (5) applies whether or not any time limit or other conditions applicable to the choices under the terms of the general offer can still be complied with.

(7) If subsection (1), (2), (3) or (5) is contravened, the repurchasing company commits an offence and is liable to a fine at level 4.

13.54 Minority shareholders' right to be bought out by repurchasing company

(1) This section applies if the holder of any shares requires the repurchasing company to buy back the shares under section 13.51.

(2) Unless the Court of First Instance makes an order under subsection (3), the repurchasing company is entitled and bound to buy back the shares on the terms of the general offer or on other terms as agreed between that holder and the repurchasing company.

(3) The Court of First Instance may, on application by the holder or repurchasing company, order that the repurchasing company is entitled and bound to buy back the shares on the terms specified in the order.

(4) For the purposes of subsection (2) –

(*a*) if the general offer falls within section 13.53(5), the terms of the general offer are regarded as including the particulars and statements included in the notice for the purposes of that section; and

(*b*) if –

(i) the consideration offered to, or chosen by, the holder of the shares is not cash, and the repurchasing company is no longer able to provide it; or

(ii) the consideration offered to, or chosen by, the holder of the shares was to have been provided by a third party who is no longer bound or able to provide it,

the consideration is regarded as consisting of an amount of cash, payable by the repurchasing company, that, at the date when that holder requires the repurchasing company to buy back the shares under section 13.51, is equivalent to the consideration offered or chosen.

Division 6 – Miscellaneous

13.55 Transitional and saving provisions relating to Divisions 4 and 5

(1) Despite the repeal of sections 166, 166A and 167 of the predecessor Ordinance, those provisions continue to apply to an arrangement or compromise if, before the repeal, an application was made to the Court of First

Instance under section 166 of the predecessor Ordinance for the sanctioning of the arrangement or compromise.

(2) Despite the repeal of section 168(1), (2) and (3) of, and the Ninth Schedule to, the predecessor Ordinance, those provisions continue to apply to an acquisition offer –

(*a*) that was made before Division 4 comes into operation; and

(*b*) in relation to which those provisions applied immediately before the repeal.

(3) Despite the repeal of section 168B of, and the Thirteenth Schedule to, the predecessor Ordinance, those provisions continue to apply to a purchase offer –

(*a*) that was made before Division 5 comes into operation; and

(*b*) in relation to which those provisions applied immediately before the repeal.

PART 19

INVESTIGATIONS AND ENQUIRIES

Division 1 – Preliminary

19.1 Interpretation

(1) In this Part –

"agent" (代理人), in relation to a company, includes –

(*a*) a banker or solicitor of the company; and

(*b*) a person, whether an officer of the company or not, who is engaged as an auditor of the company;

"authorized institution" (認可機構) has the meaning given by section 2(1) of the Banking Ordinance (Cap. 155);

"books" (簿冊) includes accounts and accounting information, however compiled or stored, and whether or not recorded in a legible form;

"delegate" (獲轉授人) –

(*a*) in relation to an inspector, means a person to whom the inspector has delegated any power under section 19.13(1);

(*b*) in relation to the Financial Secretary, means a person to whom the Financial Secretary has delegated any power under section 19.33;

(*c*) in relation to the Registrar, means a public officer to whom the Registrar has delegated any power under section 19.37;

"document" (文件) means –

(*a*) any register, books and tape recording;

(*b*) any input or output, in whatever form, into or from an information system; and

(*c*) any other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means);

"information" (資料) includes –

(*a*) data, text, images, sound codes, computer programmes, software and databases; and

(*b*) any combination of the things mentioned in paragraph (*a*);

"inspector" (審查員) means –

(*a*) a person appointed under section 19.3 or 19.4 to investigate a company's affairs; or

(*b*) a person appointed under section 19.16 to continue an investigation;

"officer" (高級人員), in relation to a body corporate, means a director, manager or secretary of, or any other person involved in the management of, the body corporate;

"record" (紀錄) means any record of information (however compiled or stored) and includes –

(*a*) any books, deed, contract, agreement, voucher and receipt;

(*b*) any document or other material used with or produced by an information system;

(*c*) any information that is recorded otherwise than in a legible form but is capable of being reproduced in a legible form;

(*d*) any document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being reproduced; and

(*e*) any film (including a microfilm), disc, tape or other device in which visual images are embodied so as to be capable

(with or without the aid of other equipment) of being reproduced.

(2) For the purposes of this Part, a body corporate is an associated body corporate of a company if –

(*a*) the body corporate and the company are members of the same group of companies; or

(*b*) the body corporate and the company are substantially controlled by the same person.

Division 2 – Investigation of Company's Affairs by Inspectors

Subdivision 1 – Preliminary

19.2 Interpretation

In this Division –

"company" (公司) –

(*a*) in section 19.3, includes a registered non-Hong Kong company;

(*b*) in section 19.4, includes –

(i) a non-Hong Kong company;

(ii) a company incorporated outside Hong Kong that –

(A) does business in Hong Kong; but

(B) does not have a place of business in Hong Kong; or

(iii) a company within a group of companies of which a company as defined by section 1.2(1) or described in subparagraph (i) or (ii) is a member, wherever incorporated;

"final report" (最終報告) means the final report mentioned in section 19.19;

"interim report" (中期報告) means the interim report mentioned in section 19.18;

"investigation" (調查) means an investigation into a company's affairs under section 19.3 or 19.4.

Subdivision 2 – Appointment by Financial Secretary of Inspectors to Investigate Company's Affairs

19.3 Appointment of inspector on application by company or members

(1) The Financial Secretary may, on application by a company, appoint a person to investigate the company's affairs if the company has by special resolution declared that the company's affairs ought to be so investigated.

(2) The Financial Secretary may also appoint a person to investigate a company's affairs –

(*a*) in the case of a company having a share capital, on application by –

(i) at least 100 members; or

(ii) members holding at least 10% of the shares issued; or

(*b*) in the case of a company not having a share capital, on application by at least 10% in number of the persons on the company's register of members.

(3) An application for the purposes of subsection (1) or (2) must be supported by the evidence required by the Financial Secretary to show that the applicant has good reason for requesting the investigation.

(4) The Financial Secretary must not appoint a person under subsection (1) or (2) to investigate a company's affairs unless the Financial Secretary is satisfied that it is in the public interest to do so.

(5) The Financial Secretary may, before making an appointment under subsection (1) or (2), require an applicant for an appointment under subsection (1) or (2) to give security for the payment of the expenses of the investigation, in an amount specified by the Financial Secretary.

19.4 Appointment of inspector on Court's or Financial Secretary's initiative

(1) The Financial Secretary must appoint a person to investigate a company's affairs if the Court of First Instance by order declares that the company's affairs ought to be so investigated.

(2) The Financial Secretary may appoint a person to investigate a company's affairs if it appears to the Financial Secretary that there are circumstances suggesting that –

(*a*) the company was formed for a fraudulent or unlawful purpose;

(*b*) the company's affairs are being or have been conducted –

(i) in a manner unfairly prejudicial to the interests of its members generally or of one or more members;

(ii) with intent to defraud its creditors or the creditors of any other person; or

(iii) for any other fraudulent or unlawful purpose; or

(*c*) the persons concerned with the formation of the company or the management of its affairs have, in relation to the formation or management, engaged in fraud, misfeasance or other misconduct towards it, its members or its creditors.

(3) The Financial Secretary must not appoint a person under subsection (2) to investigate a company's affairs unless the Financial Secretary is satisfied that it is in the public interest to do so.

(4) The Financial Secretary may appoint a person under subsection (2) to investigate a company's affairs even though the company is in the course of being wound up voluntarily.

19.5 Notice of appointment as inspector to be delivered to Registrar

(1) A person who is appointed as an inspector under section 19.3 or 19.4 must deliver a notice of the appointment to the Registrar.

(2) The notice must be delivered to the Registrar within a reasonable time after the appointment and must be in the specified form.

Subdivision 3 – Financial Secretary's Powers to Give Directions to Inspectors

19.6 General power of Financial Secretary to give directions regarding investigation

(1) The Financial Secretary may give directions to an inspector regarding an investigation.

(2) The Financial Secretary may give directions under this section –

(*a*) on the Financial Secretary's own initiative; or

(*b*) at the request of the inspector.

(3) The Financial Secretary may vary or revoke any directions given under this section.

19.7 Financial Secretary may give directions regarding subject matter of investigation etc.

(1) Without limiting section 19.6, the Financial Secretary may give directions to an inspector with respect to any or all of the following –

(*a*) the terms or subject matter of the investigation (whether by reference to a specified area of a company's operation, a specified transaction, a specified period of time or otherwise);

(*b*) the matters the inspector must take into account or must not take into account in conducting the investigation;

(*c*) the steps the inspector must take or must not take in conducting the investigation.

(2) Without limiting section 19.6, the Financial Secretary may also give directions to an inspector to require that the interim report or final report of the investigation –

(*a*) is to include the inspector's opinion with respect to a specified matter;

(*b*) is not to make reference to a specified matter;

(*c*) is to be made in a specified form or manner; or

(*d*) is to be completed by a specified date.

(3) In this section –

"specified" (指明) means specified in directions given under this section.

19.8 Financial Secretary may give directions to terminate or suspend investigation

(1) Without limiting section 19.6, the Financial Secretary may at any time before the completion of an investigation, direct the inspector –

(*a*) to terminate the investigation; or

(*b*) to suspend the investigation for a period as specified by the Financial Secretary.

(2) If the inspector is appointed under section 19.4(1), the Financial Secretary must not give directions under subsection (1)(*a*) unless it appears to the Financial Secretary that –

(*a*) matters have come to light in the course of the investigation which suggest that a criminal offence under the laws of Hong Kong has been committed; and

(*b*) those matters have been referred to a law enforcement agency.

(3) If the Financial Secretary gives directions under subsection (1)(*a*), any directions given under section 19.7(2) or 19.18(1)(*a*) in relation to an interim report cease to have effect.

Subdivision 4 – Inspectors' Powers

19.9 Inspector may require production of records and documents etc.

(1) An inspector appointed to investigate a company's affairs may, by notice in writing, require any of the persons specified in subsection (2) to do any or all of the following –

(*a*) produce, within the time and at the place specified in the notice, any record or document specified in the notice that –

(i) is or may be relevant to the investigation; and

(ii) is in the person's custody or power;

(*b*) take all reasonable steps to preserve the record or document before it is produced to the inspector;

(*c*) attend before the inspector at the time and place specified in the notice, and answer any question, whether on oath or otherwise, relating to any matter under investigation that the inspector may raise with the person;

(*d*) answer any question relating to any matter under investigation that is specified in the notice;

(*e*) give the inspector all other assistance in connection with the investigation that the person is reasonably able to give.

(2) The persons are –

(*a*) the company;

(*b*) an officer or former officer of the company;

(*c*) an agent or former agent of the company;

(*d*) a person whom the inspector has reasonable grounds to believe –

(i) to be in possession of any record or document that contains, or is likely to contain, information relevant to the investigation; or

(ii) otherwise to be in possession of that information.

(3) An inspector must not require an authorized institution to produce any record or document, or disclose any information, relating to the affairs of a customer of the institution under subsection (1) unless –

(*a*) the inspector has reasonable grounds to believe that the customer may be able to provide information relevant to the investigation; and

(*b*) the inspector is satisfied that the production or disclosure is necessary for the purposes of the investigation and so certifies in writing.

(4) In subsection (1)(*b*), a reference to preserving a record or document includes preventing a person from –

(*a*) removing, disposing of or destroying the record or document;

(*b*) erasing, adding to or altering in any other manner an entry or other particulars contained in the record or document; or

(*c*) interfering in any other manner with, or causing or permitting any other person to interfere with, the record or document.

(5) An inspector may administer an oath to any person for the purposes of subsection (1)(*c*).

19.10 Inspector may require production of director's accounts

(1) If an inspector appointed to investigate a company's affairs has reasonable grounds to believe that a director or former director of the company maintains or has maintained an account specified in subsection (2), the inspector may, by notice in writing, require the director or former director to produce to the inspector all documents relating to the account that are in the possession, or under the control, of the director or former director.

(2) The account is one of whatever description maintained by the director or former director (whether alone or jointly with any other person) with a bank, deposit-taking company or similar financial institution (whether in Hong Kong or elsewhere), into or out of which there has been paid –

(*a*) any emolument, retirement benefit or compensation in respect of the directorship, particulars of which are not contained in the notes to the financial statement of the company for any financial year, contrary to section 9.27;

(*b*) any loan or quasi-loan in favour of the director or former director, or any money that has resulted from, or has been used in the financing of any dealing in favour of the director or former director, particulars of which are not contained in the notes to the financial statement of the company for any financial year, contrary to section 9.27; or

(*c*) any money that has been in any way connected with any misconduct of the director or former director (whether fraudulent or not) towards the company, or its members.

19.11 Provisions supplementary to sections 19.9 and 19.10: powers to require explanation etc.

(1) If a person produces a record or document pursuant to a requirement imposed under section 19.9 or 19.10, the inspector may –

(*a*) make copies, or otherwise record the details, of the record or document; and

(*b*) by notice in writing, require the person to provide any information or explanation in respect of the record or document.

(2) If a person gives any answer, or provides any information or explanation, pursuant to a requirement imposed under section 19.9 or subsection (1), the inspector may, by notice in writing, further require the person to verify, within the time specified in that further requirement, the answer, information or explanation by a statutory declaration.

(3) If a person does not give any answer, or provide any information or explanation, pursuant to a requirement imposed under section 19.9 or

subsection (1) for the reason that the answer, information or explanation is not within the person's knowledge or in the person's possession, the inspector may, by notice in writing, further require the person to verify, within the time specified in that further requirement, that reason and fact by a statutory declaration.

(4) A statutory declaration mentioned in subsection (2) or (3) may be taken by the inspector.

19.12 Inspector may exercise powers in relation to associated body corporate

If an inspector appointed to investigate a company's affairs considers it necessary for the purposes of the investigation, the inspector may also exercise any of the powers under sections 19.9, 19.10 and 19.11 in relation to an associated body corporate of the company, as if the references to a company in those sections were references to an associated body corporate.

19.13 Delegation of powers by inspector

(1) An inspector appointed to investigate a company's affairs may delegate in writing any or all of the powers conferred under sections 19.9, 19.10 and 19.11 to another person.

(2) An inspector may delegate powers under subsection (1) in relation to the company or an associated body corporate of the company.

(3) If 2 or more inspectors are appointed to investigate a company's affairs, the power under subsection (1) is exercisable by each of them.

Subdivision 5 – Resignation, Removal and Replacement of Inspectors

19.14 Resignation of inspector

An inspector may resign by notice in writing to the Financial Secretary.

19.15 Revocation of appointment of inspector by Financial Secretary

The Financial Secretary may revoke the appointment of an inspector by notice in writing to the inspector.

19.16 Appointment of replacement inspector

(1) If an inspector dies or resigns, or an inspector's appointment is revoked, the Financial Secretary may appoint another person to continue the investigation.

(2) For the purposes of this Division (except this section), a person appointed to continue an investigation under subsection (1) –

(*a*) is to be regarded as having been appointed under the provisions of this Division under which the former inspector was appointed; and

(*b*) is subject to any directions given to the former inspector under this Division that have not been revoked.

19.17 Former inspector must hand over documents etc.

(1) This section applies to –

(*a*) an inspector to whom the Financial Secretary has given a direction to terminate the investigation under section 19.8(1)(*a*); or

(*b*) a person –

(i) who has resigned as an inspector; or

(ii) whose appointment as an inspector has been revoked.

(2) The inspector or person must produce any document that the inspector or person has obtained or generated during the course of the investigation to –

(*a*) the Financial Secretary; or

(*b*) if directed by the Financial Secretary –

(i) a person appointed to continue the investigation under section 19.16(1); or

(ii) a person referred to in section 19.44(2)(*a*) and (*b*).

(3) The inspector or person must also, if directed by the Financial Secretary, inform –

(*a*) the Financial Secretary;

(*b*) a person appointed to continue the investigation under section 19.16(1); or

(*c*) a person referred to in section 19.44(2)(*a*) and (*b*),

of any matter that came to the inspector's or person's knowledge as a result of the investigation.

(4) A document mentioned in subsection (2) must be produced in a form as directed by the Financial Secretary.

Subdivision 6 – Reports by Inspectors

19.18 Interim report to be made by inspector etc.

(1) An inspector –

(*a*) must, if directed by the Financial Secretary, prepare an interim report on the investigation; and

(*b*) may at any time prepare an interim report on the investigation if the inspector considers it appropriate to do so.

(2) An interim report must be delivered to the Financial Secretary within the time directed by the Financial Secretary or, in the absence of directions, within a reasonable time after it is prepared.

(3) An inspector must, within a reasonable time after the delivery of an interim report to the Financial Secretary, deliver to the Registrar a notice of that fact in the specified form.

(4) Irrespective of whether an interim report has been or will be prepared, an inspector –

(*a*) may, at any time in the course of the investigation, inform the Financial Secretary of any matter that comes to the inspector's knowledge as a result of the investigation; and

(*b*) must inform the Financial Secretary of any matter that comes to the inspector's knowledge as a result of the investigation, if directed to do so by the Financial Secretary.

19.19 Final report to be made by inspector etc.

(1) An inspector must, on the completion of the investigation, prepare a final report on the investigation.

(2) An inspector who is directed under section 19.8(1)(*a*) to terminate an investigation must prepare a final report on the investigation if directed to do so –

(*a*) where the inspector is appointed under section 19.3(1) or (2) or 19.4(2), by the Financial Secretary; or

(*b*) where the inspector is appointed under section 19.4(1), by the Court of First Instance.

(3) A final report must be delivered to the Financial Secretary within the time directed by the Financial Secretary or, in the absence of directions, within a reasonable time after it is prepared.

(4) An inspector must, within a reasonable time after the delivery of a final report to the Financial Secretary, deliver to the Registrar a notice of that fact in the specified form.

19.20 Interim report or final report may cover affairs of associated body corporate

If an inspector appointed to investigate a company's affairs or a delegate of the inspector has exercised any of the powers under sections 19.9, 19.10 and

19.11 in relation to an associated body corporate of the company, the inspector must also report on the affairs of that body corporate in the interim report or final report, so far as the inspector considers that the affairs of that body corporate are relevant to the investigation.

19.21 Inspector must send report to affected persons etc.

(1) If, in the opinion of an inspector appointed to investigate a company's affairs, any person named in an interim report or final report on the investigation would in the event of a publication or other disclosure of the report, or any part of the report, be adversely affected by the publication or disclosure, the inspector must, before delivering the report to the Financial Secretary –

(*a*) send the draft report or that part of the draft report to the person; and

(*b*) give the person a reasonable opportunity to be heard.

(2) Before an inspector sends a draft interim report or final report, or part of the draft report, to a person under subsection (1), the inspector may –

(*a*) cause any passages in the draft report or that part of the draft report to be concealed from view or to be obliterated; and

(*b*) require the person to keep the draft report or that part of the draft report confidential.

19.22 Financial Secretary to file copies of inspector's report with Court

(1) As soon as practicable after receiving an interim report or final report from an inspector appointed under section 19.4(1), the Financial Secretary must file a copy of the report with the Court of First Instance.

(2) The Financial Secretary may, before filing a copy of an interim report or final report with the Court of First Instance under subsection (1), specify the period and manner in which access to the report is to be restricted.

19.23 Financial Secretary may send copies of inspector's report to applicants of investigation etc.

(1) After receiving an interim report or final report from an inspector appointed to investigate a company's affairs, the Financial Secretary may –

(*a*) send a copy of the report to the company at its registered office; or

(*b*) on request and on receipt of payment of a fee which is charged on the same scale as that set out in the Schedule referred to in section 2.4(1), send a copy of the report to –

(i) a member of the company or a member of its associated body corporate the affairs of which are reported in the report under section 19.20;

(ii) the auditors of the company or body corporate;

(iii) a person whose conduct is mentioned in the report;

(iv) the applicant for the investigation; or

(v) any other person whose financial interest appears to the Financial Secretary to be affected by the matters dealt with in the report, whether as a creditor of the company or body corporate, or a possible investor or otherwise.

(2) Before sending a copy of an interim report or final report to any person under subsection (1), the Financial Secretary may –

(*a*) cause any passages in the report to be concealed from view or to be obliterated; and

(*b*) require the person to keep the copy of the report confidential.

19.24 Publication of inspector's report

(1) The Financial Secretary may publish, either in whole or in part, any interim report or final report delivered to the Financial Secretary under this Division.

(2) The Financial Secretary must deliver to the Registrar a copy of any interim report or final report, or any part of an interim report or final report, that is published under subsection (1) as soon as practicable after it is published.

(3) In this section –

"publish" (發布) includes distribute, make available and disseminate.

19.25 Inspector's report to be evidence

In any civil proceedings before a court (including proceedings for the disqualification of a director) –

(*a*) a document purporting to be a copy of an interim report or final report prepared by an inspector, or a part of such a report, and purporting to be certified by the inspector or the Financial Secretary as a true copy of the report or part, is admissible in evidence on its production without further proof; and

(*b*) on being admitted in evidence under paragraph (*a*), the document is evidence of the facts stated in the report or that part of the report.

Subdivision 7 – Miscellaneous

19.26 Offences for failing to comply with requirements under Subdivision 4 etc.

(1) A person commits an offence if the person, without reasonable excuse, fails to comply with any requirement imposed on the person under Subdivision 4.

(2) A person commits an offence if the person, with intent to defraud, fails to comply with any requirement imposed on the person under Subdivision 4.

(3) An officer or employee of a company or body corporate on which a requirement is imposed under Subdivision 4 commits an offence if the officer or employee, with intent to defraud, causes or allows the company or body corporate to fail to comply with the requirement.

(4) A person commits an offence if the person –

(*a*) in purported compliance with a requirement imposed on the person under Subdivision 4 –

(i) produces any record or document that is false or misleading in a material particular;

(ii) provides any information or explanation that is false or misleading in a material particular; or

(iii) says or states anything that is false or misleading in a material particular; and

(*b*) knows that, or is reckless as to whether or not, the record or document, the information or explanation, or the thing said or stated, is false or misleading in a material particular.

(5) A person commits an offence if the person, with intent to defraud, in purported compliance with a requirement imposed on the person under Subdivision 4 –

(*a*) produces any record or document that is false or misleading in a material particular;

(*b*) provides any information or explanation that is false or misleading in a material particular; or

(*c*) says or states anything that is false or misleading in a material particular.

(6) An officer or employee of a company or body corporate on which a requirement is imposed under Subdivision 4 commits an offence if the officer or employee, with intent to defraud, causes or allows the company or body corporate to, in purported compliance with the requirement –

(*a*) produce any record or document that is false or misleading in a material particular;

(*b*) provide any information or explanation that is false or misleading in a material particular; or

(*c*) say or state anything that is false or misleading in a material particular.

(7) A person is not excused from complying with a requirement imposed on the person under Subdivision 4 only on the ground that to do so might tend to incriminate the person.

(8) Despite anything in this Ordinance, no criminal proceedings may be instituted against a person under subsection (1), (2), (3), (4), (5) or (6) in respect of any conduct if –

(*a*) proceedings have previously been instituted against the person for the purposes of section 19.27(2)(*b*) in respect of the same conduct; and

(*b*) those proceedings remain pending, or by reason of the previous institution of those proceedings, no proceedings may again be lawfully instituted against the person for the purposes of section 19.27(2)(*b*) in respect of the same conduct.

(9) A person who commits an offence under subsection (1) is liable –

(*a*) on conviction on indictment to a fine of $200,000 and to imprisonment for one year; or

(*b*) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(10) A person who commits an offence under subsection (2), (3), (5) or (6) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 7 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(11) A person who commits an offence under subsection (4) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

19.27 Inspector may apply to Court to inquire into failure to comply with requirements under Subdivision 4

(1) If a person fails to comply with a requirement imposed on the person under Subdivision 4, the inspector may, by originating summons, apply to the Court of First Instance for an inquiry into the failure.

(2) The Court of First Instance may, if it is satisfied that the person has without reasonable excuse failed to comply with the requirement, do any or all of the following –

(*a*) order the person to comply with the requirement within the period specified by the Court;

(*b*) punish the person, and any other person knowingly involved in the failure, in the same manner as if the person and, if applicable, that other person had been guilty of contempt of court.

(3) Despite anything in this Ordinance, no proceedings may be instituted against a person for the purposes of subsection (2)(*b*) in respect of any conduct if –

(*a*) criminal proceedings have previously been instituted against the person under section 19.26(1), (2), (3), (4), (5) or (6) in respect of the same conduct; and

(*b*) those criminal proceedings remain pending, or by reason of the previous institution of those criminal proceedings,

no criminal proceedings may again be lawfully instituted against the person under section 19.26(1), (2), (3), (4), (5) or (6) in respect of the same conduct.

19.28 Use of incriminating evidence in proceedings

(1) If an inspector or a delegate of an inspector requires a person, under Subdivision 4, to give an answer to any question, or to provide any information or explanation in respect of any record or document produced, the inspector or delegate must ensure that the person has first been informed or reminded of the limitations imposed by subsection (2) on the admissibility in evidence of the inspector's or delegate's requirement and question (if applicable), and of the answer given, or information or explanation provided, by the person.

(2) Despite anything in this Ordinance, if the conditions specified in subsection (3) are satisfied, the inspector's or delegate's requirement and question (if applicable), and the answer given, or information or explanation provided by the person, are not admissible in evidence against the person in criminal proceedings other than those in which the person is charged with an offence in respect of the answer, information or explanation –

(*a*) under section 19.26(4), (5) or (6);

(*b*) under Part V of the Crimes Ordinance (Cap. 200); or

(*c*) for perjury.

(3) The conditions specified for the purposes of subsection (2) are –

(*a*) the answer, information or explanation might tend to incriminate the person; and

(*b*) the person so claims before giving the answer, or providing the information or explanation.

19.29 Expenses of investigation

(1) The expenses of an investigation are to defrayed in the first instance out of the general revenue but the persons mentioned in subsection (2)

are liable to repay the expenses to the Government to the extent mentioned in that subsection.

(2) Those persons and the extent of their liability are as follows –

(*a*) if, on a prosecution for an offence instituted as a result of the investigation, a person is convicted of the offence by the court, the person is liable to repay the expenses to the Government to the extent ordered by the court;

(*b*) if the inspector who conducted the investigation was appointed under section 19.3 or 19.4(1), any body corporate dealt with by the interim report or final report is liable to repay the expenses to the Government to the extent directed by the Financial Secretary;

(*c*) if the inspector who conducted the investigation was appointed under section 19.3 on application by a company or members of a company, the company or any of those members who made the application are liable to repay the expenses to the Government to the extent directed by the Financial Secretary.

(3) When making an order or giving directions under a paragraph of subsection (2), the court or the Financial Secretary (as the case may be) may order or direct that 2 or more persons liable under that paragraph are to be jointly liable or jointly and severally liable for any of the expenses ordered or directed to be repaid to the Government.

(4) On making an order on the extent of a person's liability under paragraph (*a*) of subsection (2), the court may further order that the person is also liable to indemnify another person against any liability to which that other person may be subject under paragraph (*b*) or (*c*) of that subsection.

(5) If the inspector who conducted the investigation was appointed under section 19.3 or 19.4(1), the interim report or final report of the investigation may, if the inspector thinks fit, include a recommendation as to the

extent to which the expenses of the investigation should be repaid by a person referred to in paragraph (*a*), (*b*) or (*c*) of subsection (2).

(6) An inspector must include a recommendation mentioned in subsection (5) in the interim report or final report of the investigation if so directed by the Financial Secretary.

(7) The recommendation of an inspector under subsection (5) or (6) –

(*a*) in relation to a person referred to in paragraph (*a*) of subsection (2) –

(i) must not be disclosed to the court until after the person has been convicted; and

(ii) does not bind the court; and

(*b*) in relation to a person referred to in paragraph (*b*) or (*c*) of subsection (2), does not bind the Financial Secretary.

(8) For the purposes of this section, the expenses of an investigation include –

(*a*) expenses incidental to the investigation; and

(*b*) such reasonable sums for general staff costs and overhead expenses of the Government, and for the cost of insurance for the inspector as determined by the Financial Secretary.

(9) An amount that is repayable to the Government under subsection (2) is recoverable as a civil debt due to the Government.

Division 3 – Enquiry into Company's Affairs by Financial Secretary

19.30 Interpretation

In this Division –

"company" (公司) –

(*a*) in section 19.31(*a*), includes a registered non-Hong Kong company;

(*b*) in section 19.31(*b*), includes –

(i) a non-Hong Kong company;

(ii) a company incorporated outside Hong Kong that –

(A) does business in Hong Kong; but

(B) does not have a place of business in Hong Kong; or

(iii) a company within a group of companies of which a company as defined by section 1.2(1) or described in subparagraph (i) or (ii) is a member, wherever incorporated.

19.31 Circumstances under which Financial Secretary may enquire into company's affairs

The Financial Secretary may enquire into a company's affairs if –

(*a*) the Financial Secretary considers that doing so would assist the Financial Secretary in deciding whether to appoint an inspector under section 19.3(2); or

(*b*) it appears to the Financial Secretary that there is a good reason for doing so.

19.32 Financial Secretary may require production of records and documents etc.

(1) For the purpose of enquiring into a company's affairs under section 19.31, if the Financial Secretary considers that a record or document is or may be relevant to the enquiry, the Financial Secretary may, by notice in writing, require –

(*a*) the company; or

(*b*) any other person who appears to the Financial Secretary to be in possession of the record or document,

to produce the record or document within the time and at the place specified in the notice.

(2) If a company or a person produces a record or document pursuant to a requirement imposed under subsection (1), the Financial Secretary may –

(*a*) make copies, or otherwise record the details, of the record or document; and

(*b*) by notice in writing, require an officer or former officer of the company or the person to provide any information or explanation in respect of the record or document.

(3) The Financial Secretary must not require an authorized institution to produce any record or document, or disclose any information, relating to the affairs of a customer of the institution under subsection (1) or (2) unless –

(*a*) the Financial Secretary has reasonable grounds to believe that the customer may be able to provide information relevant to the enquiry; and

(*b*) the Financial Secretary is satisfied that the production or disclosure is necessary for the purposes of the enquiry and so certifies in writing.

(4) If an authorized institution produces a record or document relating to the affairs of its customer pursuant to a requirement imposed under subsection (1), the Financial Secretary may also require that customer to provide any information or explanation in respect of the record or document.

(5) If a company or a person does not produce a record or document pursuant to a requirement imposed under subsection (1), the Financial Secretary may, by notice in writing, require the company or person to state, to the best of the company's or person's knowledge and belief, where the record or document is.

19.33 Financial Secretary may delegate powers under section 19.32

The Financial Secretary may delegate in writing any or all of the powers conferred under section 19.32 to another person.

19.34 Offences for failing to comply with requirements under section 19.32 etc.

(1) A person commits an offence if the person, without reasonable excuse, fails to comply with any requirement imposed on the person under section 19.32.

(2) A person commits an offence if the person, with intent to defraud, fails to comply with any requirement imposed on the person under section 19.32.

(3) An officer or employee of a company on which a requirement is imposed under section 19.32 commits an offence if the officer or employee, with intent to defraud, causes or allows the company to fail to comply with the requirement.

(4) A person commits an offence if the person –

(*a*) in purported compliance with a requirement imposed on the person under section 19.32 –

(i) produces any record or document that is false or misleading in a material particular; or

(ii) provides any information or explanation that is false or misleading in a material particular; and

(*b*) knows that, or is reckless as to whether or not, the record or document, or the information or explanation, is false or misleading in a material particular.

(5) A person commits an offence if the person, with intent to defraud, in purported compliance with a requirement imposed on the person under section 19.32 –

(*a*) produces any record or document that is false or misleading in a material particular; or

(*b*) provides any information or explanation that is false or misleading in a material particular.

(6) An officer or employee of a company on which a requirement is imposed under section 19.32 commits an offence if the officer or employee, with

intent to defraud, causes or allows the company to, in purported compliance with the requirement –

(*a*) produce any record or document that is false or misleading in a material particular; or

(*b*) provide any information or explanation that is false or misleading in a material particular.

(7) A person is not excused from complying with a requirement imposed on the person under section 19.32 only on the ground that to do so might tend to incriminate the person.

(8) A person who commits an offence under subsection (1) is liable –

(*a*) on conviction on indictment to a fine of $200,000 and to imprisonment for one year; or

(*b*) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(9) A person who commits an offence under subsection (2), (3), (5) or (6) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 7 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(10) A person who commits an offence under subsection (4) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

19.35 Use of incriminating evidence in proceedings

(1) If the Financial Secretary or a delegate of the Financial Secretary requires a person, under section 19.32, to provide any information or explanation in respect of any record or document produced, the Financial Secretary or

delegate must ensure that the person has first been informed or reminded of the limitations imposed by subsection (2) on the admissibility in evidence of the Financial Secretary's or delegate's requirement and of the information or explanation provided by the person.

(2) Despite anything in this Ordinance, if the conditions specified in subsection (3) are satisfied, the Financial Secretary's or delegate's requirement, as well as the information or explanation provided by the person, are not admissible in evidence against the person in criminal proceedings other than those in which the person is charged with an offence in respect of the information or explanation –

(*a*) under section 19.34(4), (5) or (6);

(*b*) under Part V of the Crimes Ordinance (Cap. 200); or

(*c*) for perjury.

(3) The conditions specified for the purposes of subsection (2) are –

(*a*) the information or explanation might tend to incriminate the person; and

(*b*) the person so claims before providing the information or explanation.

Division 4 – Enquiry by Registrar

19.36 Registrar may require production of records and documents etc.

(1) For the purpose of enquiring into whether any specified act has been done, if each of the conditions specified in subsection (2) is satisfied, the Registrar may, by notice in writing, require a person –

(*a*) to produce, within the time and at the place specified in the notice, any record or document specified in the notice; and

(*b*) if the record or document is produced, to provide any information or explanation in respect of the record or document.

(2) Subject to subsection (3), the conditions are –

(*a*) the Registrar has reason to believe that –

(i) a specified act has been done;

(ii) the record, document, information or explanation is relevant to the enquiry; and

(iii) the person is in possession of the record or document; and

(*b*) it is so certified in writing by the Registrar.

(3) Subsection (2)(*a*)(iii) does not apply if the person who is to be required to produce the record or document is –

(*a*) the body corporate to which the act relates; or

(*b*) an officer of that body corporate.

(4) The Registrar must not require an authorized institution to produce any record or document, or disclose any information, relating to the affairs of a customer of the institution under subsection (1) unless –

(*a*) the Registrar has reasonable grounds to believe that the customer may be able to provide information relevant to the enquiry; and

(*b*) the Registrar is satisfied that the production or disclosure is necessary for the purposes of the enquiry and so certifies in writing.

(5) If an authorized institution produces a record or document relating to the affairs of its customer pursuant to a requirement imposed under subsection (1), the Registrar may also require that customer to provide any information or explanation in respect of the record or document.

(6) If a person produces a record or document pursuant to a requirement imposed under subsection (1), the Registrar may make copies, or otherwise record the details, of the record or document.

(7) The Financial Secretary may, by notice published in the Gazette, amend subsection (8).

(8) In this section –

"specified act" (指明作為) means an act that would constitute an offence under section 15.7(7) or 20.1(1).

19.37 Registrar may delegate powers under section 19.36

The Registrar may delegate in writing any or all of the powers conferred under section 19.36 to any public officer.

19.38 Offences for failing to comply with requirements under section 19.36 etc.

(1) A person commits an offence if the person, without reasonable excuse, fails to comply with any requirement imposed on the person under section 19.36.

(2) A person commits an offence if the person, with intent to defraud, fails to comply with any requirement imposed on the person under section 19.36.

(3) An officer or employee of a body corporate on which a requirement is imposed under section 19.36 commits an offence if the officer or employee, with intent to defraud, causes or allows the body corporate to fail to comply with the requirement.

(4) A person commits an offence if the person –

(*a*) in purported compliance with a requirement imposed on the person under section 19.36 –

(i) produces any record or document that is false or misleading in a material particular; or

(ii) provides any information or explanation that is false or misleading in a material particular; and

(*b*) knows that, or is reckless as to whether or not, the record or document, or the information or explanation, is false or misleading in a material particular.

(5) A person commits an offence if the person, with intent to defraud, in purported compliance with a requirement imposed on the person under section 19.36 –

(*a*) produces any record or document that is false or misleading in a material particular; or

(*b*) provides any information or explanation that is false or misleading in a material particular.

(6) An officer or employee of a body corporate on which a requirement is imposed under section 19.36 commits an offence if the officer or employee, with intent to defraud, causes or allows the body corporate to, in purported compliance with the requirement –

(*a*) produce any record or document that is false or misleading in a material particular; or

(*b*) provide any information or explanation that is false or misleading in a material particular.

(7) A person is not excused from complying with a requirement imposed on the person under section 19.36 only on the ground that to do so might tend to incriminate the person.

(8) A person who commits an offence under subsection (1) is liable –

(*a*) on conviction on indictment to a fine of $150,000 and to imprisonment for one year; or

(*b*) on summary conviction to a fine at level 5 and to imprisonment for 6 months.

(9) A person who commits an offence under subsection (2), (3), (5) or (6) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 3 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(10) A person who commits an offence under subsection (4) 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.

19.39 Use of incriminating evidence in proceedings

(1) If the Registrar or a delegate of the Registrar requires a person, under section 19.36, to provide any information or explanation in respect of any record or document produced, the Registrar or delegate must ensure that the person has first been informed or reminded of the limitations imposed by subsection (2) on the admissibility in evidence of the Registrar's or delegate's requirement and of the information or explanation provided by the person.

(2) Despite anything in this Ordinance, if the conditions specified in subsection (3) are satisfied, the Registrar's or delegate's requirement, as well as the information or explanation provided by the person, are not admissible in evidence against the person in criminal proceedings other than those in which the person is charged with an offence in respect of the information or explanation –

(*a*) under section 19.38(4), (5) or (6);

(*b*) under Part V of the Crimes Ordinance (Cap. 200); or

(*c*) for perjury.

(3) The conditions specified for the purposes of subsection (2) are –

(*a*) the information or explanation might tend to incriminate the person; and

(*b*) the person so claims before providing the information or explanation.

Division 5 – Supplementary Provisions to Divisions 2, 3 and 4

Subdivision 1 – Supplementary Provisions Applicable to Divisions 2 and 3

19.40 Magistrate's warrants

(1) If a magistrate is satisfied on information on oath laid by –

(*a*) in relation to an investigation under Division 2, an inspector; or

(*b*) in relation to an enquiry under Division 3, the Financial Secretary or a delegate of the Financial Secretary,

that there are reasonable grounds to suspect that there is, or is likely to be, on premises specified in the information any record or document that may be required to be produced under the Division, the magistrate may issue a warrant in respect of the premises.

(2) A warrant issued under subsection (1) authorizes a person specified in it, and such other persons as may be necessary to assist in its execution, to –

(*a*) enter the premises, if necessary by force, at any time within the period of 7 days beginning with the date of the warrant; and

(*b*) search for, seize and remove, any record or document that the person so specified has reasonable grounds to believe may be required to be produced under Division 2 or 3 (as the case may be).

(3) If an authorized person has reasonable grounds to believe that another person on the premises is employed or engaged to provide a service in connection with a business that is or has been conducted on the premises, the

authorized person may require that other person to produce for examination any record or document that –

(*a*) is in the possession of that other person; and

(*b*) the authorized person has reasonable grounds to believe may be required to be produced under Division 2 or 3 (as the case may be).

(4) An authorized person may, in relation to any record or document required to be produced under subsection (3) –

(*a*) prohibit any person found on the premises from –

(i) removing the record or document from the premises;

(ii) erasing anything from, adding anything to, or otherwise altering anything in, the record or document; or

(iii) otherwise interfering in any manner with, or causing or permitting any other person to interfere with, the record or document; and

(*b*) take any other steps that appear to the authorized person to be necessary for –

(i) preserving the record or document; or

(ii) preventing interference with the record or document.

(5) Any record or document removed by an authorized person may be retained for –

(*a*) a period not exceeding 6 months beginning with the day of its removal; or

(*b*) if the record or document is or may be required for the purposes of any criminal proceedings, or any proceedings under this Ordinance, such longer period as may be necessary for the purposes of those proceedings.

(6) If an authorized person removes any record or document under this section, the person –

(*a*) must as soon as practicable after the removal give a receipt for the record or document; and

(*b*) may permit any other person who, but for the removal, would be entitled to inspect the record or document, at all reasonable times –

(i) to inspect it; and

(ii) to make copies or otherwise record details of it.

(7) Section 102 of the Criminal Procedure Ordinance (Cap. 221) applies to any property that has, by virtue of this section, come into the possession of an inspector, the Financial Secretary or a delegate of the Financial Secretary, as it applies to property that has come into the possession of the police.

(8) A person commits an offence if the person –

(*a*) without reasonable excuse, fails to comply with a requirement or prohibition under subsection (3) or (4); or

(*b*) obstructs an authorized person in the exercise of a power conferred by subsection (2), (3) or (4).

(9) A person who commits an offence under subsection (8) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

(10) In this section –

"authorized person" (獲授權人) means a person authorized by a warrant issued under subsection (1) to carry out the acts set out in paragraphs (*a*) and (*b*) of subsection (2).

19.41 Officers must give assistance in prosecution instituted as a result of investigation etc.

(1) If –

(*a*) an investigation under Division 2 or an enquiry under Division 3 has been carried out; and

(*b*) a prosecution for an offence is instituted as a result of the investigation or enquiry,

every officer or former officer, employee or former employee, or agent or former agent of any body corporate the affairs of which have been investigated or enquired into in that investigation or enquiry must give the Secretary for Justice all assistance in connection with the prosecution that the officer, employee or agent is reasonably able to give.

(2) Subsection (1) does not require a person to give any assistance in connection with the prosecution if the person is a defendant in the proceedings.

19.42 Proceedings on specified materials

(1) If it appears to the Financial Secretary from any specified materials that it is expedient in the public interest that a body corporate which may be wound up under the Companies (Winding Up Provisions) Ordinance (Cap. 32) [1] should be wound up, the Financial Secretary may present a petition for it to be wound up.

(2) On a petition by the Financial Secretary under subsection (1), the Court of First Instance may make a winding up order if the Court thinks it just and equitable for the body corporate to be wound up.

(3) If it appears to the Financial Secretary from any specified materials that –

(*a*) a company's or non-Hong Kong company's affairs are being or have been conducted in a manner unfairly

[1] Provisional title of Cap. 32 after it is consequentially amended by the new Companies Ordinance. It is subject to change.

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 or non-Hong Kong company (including one done or made on its behalf) is or would be so prejudicial,

the Financial Secretary may, whether or not a petition has been presented under subsection (1), present to the Court of First Instance a petition for an order to be made under section 14.4(1)(*b*) or (2).

(4) If it appears to the Financial Secretary from any specified materials that, in relation to a company or non-Hong Kong company, a person –

(*a*) has engaged, is engaging or is proposing to engage in any conduct specified in section 14.8(1)(*a*); or

(*b*) before the commencement of section 14.8, had engaged, was engaging or was proposing to engage in any conduct specified in section 14.8(2)(*a*), and the engagement or proposal still subsists,

the Financial Secretary may apply to the Court of First Instance for the remedies under section 14.9(1).

(5) If it appears to the Financial Secretary from any specified materials that, in relation to a company or non-Hong Kong company, a person –

(*a*) has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing specified in section 14.8(1)(*b*); or

(*b*) before the commencement of section 14.8, had refused or failed, was refusing or failing, or was proposing to refuse or fail, to do an act or thing that the person was required by the predecessor Ordinance and is required by this Ordinance to do, and the refusal, failure or proposal still subsists,

the Financial Secretary may apply to the Court of First Instance for the remedies under section 14.9(1).

(6) If it appears to the Financial Secretary from any specified materials that it is expedient in the public interest that a person be prohibited from taking part in the management of –

(*a*) a company as defined by section 1.2(1); or

(*b*) a company, wherever incorporated, that –

(i) is carrying on business in Hong Kong, or has carried on business in Hong Kong; and

(ii) may be wound up under the Companies (Winding Up Provisions) Ordinance (Cap. 32),

the Financial Secretary may apply to the Court of First Instance for an order specified in subsection (7).

(7) The order is one requiring that the person must not, for the period specified in the order, without the leave of the Court –

(*a*) be, or continue to be, a director, liquidator, or receiver or manager of the property or business, of the company or any other company; or

(*b*) in any way, whether directly or indirectly, be concerned, or take part, in the management of the company or any other company.

(8) The period specified in an order of the Court of First Instance under subsection (7) must not exceed 15 years.

(9) In this section –

"specified materials" (指明材料) means –

(*a*) any report made, or any record, document or information obtained, by an inspector or a delegate of an inspector in an investigation under Division 2; or

(*b*) any record, document or information obtained by the Financial Secretary, or a delegate of the Financial Secretary, in an enquiry under Division 3.

19.43 Preservation of secrecy

(1) Except in the performance of any function under this Ordinance, or for carrying into effect the provisions of this Ordinance, a person specified in subsection (3) –

(*a*) must not permit any person to have access to any matter relating to the affairs of any person that comes to the specified person's knowledge in an investigation under Division 2 or an enquiry under Division 3, or otherwise in connection with the investigation or enquiry; and

(*b*) must not communicate any such matter to any person other than the person to whom the matter relates.

(2) Subsection (1) has effect subject to section 19.44(1) and (2).

(3) The persons specified for the purposes of subsection (1) are –

(*a*) a public officer;

(*b*) an inspector or a delegate of an inspector or of the Financial Secretary, or an employee, agent, consultant or adviser of the inspector or delegate;

(*c*) an employee, agent, consultant or adviser who is employed or appointed for the purposes of an investigation under Division 2 or an enquiry under Division 3;

(*d*) a person who performs or has performed any function in an investigation under Division 2 or an enquiry under Division 3;

(*e*) a person who has assisted any other person in the performance of any function in an investigation under Division 2 or an enquiry under Division 3; and

(*f*) a person who has been sent, under section 19.21(1) or 19.23(1), a report (including a draft of the report), or part of the report, on an investigation, and has been required to keep the report or that part of the report confidential under section 19.21(2) or 19.23(2).

19.44 Permitted disclosure and restrictions

(1) A person specified in section 19.43(3) may –

(*a*) disclose information that has already been made available to the public;

(*b*) disclose information for the purpose of any criminal proceedings in Hong Kong or any investigation conducted by a law enforcement agency with a view to bringing any such proceedings;

(*c*) disclose information for the purpose of seeking advice from, or giving advice by, counsel, or a solicitor, or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;

(*d*) disclose information in connection with any judicial or other proceedings to which the specified person is a party; and

(*e*) disclose information in accordance with an order of a court or tribunal, or in accordance with a law or a requirement made under a law.

(2) The Financial Secretary may –

(*a*) subject to subsection (3), disclose information to –

(i) the Chief Executive;

(ii) the Secretary for Justice;

(iii) the Secretary for Financial Services and the Treasury;

(iv) the Commissioner of Police of Hong Kong;

(v) the Commissioner of the Independent Commission Against Corruption;

(vi) the Commissioner of Inland Revenue;

(vii) the Registrar;

(viii) the Official Receiver in a capacity other than that of a liquidator or provisional liquidator appointed under, or holding such office by virtue of, the Companies (Winding Up Provisions) Ordinance (Cap. 32);

(ix) the Monetary Authority;

(x) the Securities and Futures Commission;

(xi) the Financial Reporting Council;

(xii) the Market Misconduct Tribunal;

(xiii) the Insurance Authority;

(xiv) the Mandatory Provident Fund Schemes Authority;

(xv) an inspector;

(xvi) a person authorized to exercise the powers of the Financial Secretary under section 19.33;

(xvii) a company recognized as an exchange company under section 19(2) of the Securities and Futures Ordinance (Cap. 571);

(xviii) the Privacy Commissioner for Personal Data;

(xix) the Ombudsman; or

(xx) a public officer authorized by the Financial Secretary under subsection (7);

(*b*) subject to subsection (3), disclose information in respect of a company whose affairs are or have been investigated under section 19.3 or 19.4, or enquired into under section 19.32, to –

(i) the Official Receiver in the capacity of a liquidator or provisional liquidator of the company appointed under, or holding such office by virtue of, the Companies (Winding Up Provisions) Ordinance (Cap. 32); or

(ii) any other person who –

(A) is a liquidator or provisional liquidator of the company appointed under that Ordinance; or

(B) acts in a similar capacity in relation to the company under any law of a place outside Hong Kong;

(*c*) disclose information with the consent of –

(i) the person from whom the information was obtained or received; and

(ii) if the information does not relate to such person, the person to whom it relates; and

(*d*) disclose information in summary form that is so framed as to prevent particulars relating to any person from being ascertained from it.

(3) The Financial Secretary must not disclose information under subsection (2)(*a*) or (*b*) unless the Financial Secretary is of the opinion that –

(*a*) the disclosure will enable or assist the recipient of the information to perform the recipient's functions; and

(*b*) it is not contrary to the public interest that the information be so disclosed.

(4) Subject to subsection (5), if information is disclosed under section 19.43(1) or subsection (1) or (2) (other than subsection (1)(*a*) or (2)(*d*)) –

(*a*) the person to whom the information is so disclosed; and

(*b*) any other person who obtains or receives the information from that person,

must not disclose the information to any other person.

(5) Subsection (4) does not prohibit a person mentioned in paragraph (*a*) or (*b*) of that subsection from disclosing the information to any other person if –

(*a*) the Financial Secretary consents to the disclosure;

(*b*) the information has already been made available to the public;

(*c*) the disclosure is for the purpose of seeking advice from, or giving advice by, counsel, or a solicitor, or other professional adviser, acting or proposing to act in a professional capacity in connection with any matter arising under this Ordinance;

(*d*) the disclosure is in connection with any judicial or other proceedings to which the person so referred to is a party; or

(*e*) the disclosure is in accordance with an order of a court or tribunal, or in accordance with a law or a requirement made under a law.

(6) The Financial Secretary may attach such conditions as the Financial Secretary considers appropriate to –

(*a*) a disclosure of information made under subsection (2); or

(*b*) a consent granted pursuant to subsection (5)(*a*).

(7) The Financial Secretary may authorize any public officer as a person to whom information may be disclosed under subsection (2)(*a*)(xx).

19.45 Offences on breach of secrecy

(1) A person who contravenes section 19.43(1) commits an offence.

(2) A person commits an offence if –

(*a*) the person discloses any information in contravention of section 19.44(4); and

(*b*) at the time of the disclosure –

(i) the person knew, or ought to have known, that the information was previously disclosed to the person pursuant to section 19.43(1) or 19.44(1) or (2) (other than section 19.44(1)(*a*) or (2)(*d*)); and

(ii) the person had no reasonable grounds to believe that the person was not prohibited from disclosing the information by virtue of section 19.44(5).

(3) A person who commits an offence under subsection (1) or (2) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

Subdivision 2 – Supplementary Provisions Applicable to Divisions 2, 3 and 4

19.46 Interpretation

In this Subdivision –

"specified officer" (指明人員) –

(*a*) in relation to an investigation under Division 2, means an inspector or a delegate of an inspector;

(*b*) in relation to an enquiry under Division 3, means the Financial Secretary or a delegate of the Financial Secretary;

(*c*) in relation to an enquiry under Division 4, means the Registrar or a delegate of the Registrar.

19.47 Protection in relation to certain disclosures

(1) If –

(*a*) a person makes a disclosure to a specified officer otherwise than in compliance with a requirement made by the officer under Division 2, 3 or 4 (as the case may be); and

(*b*) the disclosure satisfies each of the conditions specified in subsection (2),

the person is not liable in any proceedings relating to a breach of duty of confidentiality by reason only of the disclosure.

(2) The conditions are –

(*a*) the disclosure is of a kind that the person could be required to make in pursuance of a requirement made by the specified officer under Division 2, 3 or 4 (as the case may be);

(*b*) the person makes the disclosure in good faith and in the reasonable belief that the disclosure is capable of assisting the specified officer in the investigation under Division 2 or enquiry under Division 3 or 4;

(*c*) the information disclosed is not more than is reasonably necessary for the purpose of assisting the specified officer in the investigation under Division 2 or enquiry under Division 3 or 4;

(*d*) the disclosure is not prohibited by virtue of any enactment.

(3) Subsection (1) does not apply to a disclosure made by a person in the capacity as a banker or lawyer in respect of information to which the person owes a duty of confidentiality in that capacity.

19.48 Protection of informers etc.

(1) Any information concerning the identity of a protected person is not admissible in evidence in any proceedings before a court or tribunal.

(2) In such proceedings, a witness is not obliged –

(*a*) to disclose the name or address of a protected person who is not a witness in those proceedings; or

(*b*) to state any matter that would lead, or would tend to lead, to discovery of the name or address of a protected person who is not a witness in those proceedings.

(3) If a book, document or paper that is in evidence, or liable to inspection, in such proceedings contains an entry –

(*a*) in which a protected person is named or described; or

(*b*) that might lead to discovery of a protected person,

the court or tribunal (as the case may be) must cause all such entries to be concealed from view, or to be obliterated, so far as may be necessary to protect the identity of the protected person from discovery.

(4) In such proceedings, the court or tribunal may, despite subsection (1), (2) or (3), permit inquiry, and require full disclosure, concerning a protected person if –

(*a*) it is of the opinion that justice cannot be fully done between the parties to the proceedings without disclosure of the name of the protected person; or

(*b*) it is satisfied that the protected person made a material statement that the person –

(i) knew or believed to be false; or

(ii) did not believe to be true.

(5) This section has effect despite the preparation or publication of any interim report or final report of an investigation under Division 2.

(6) In this section –

"protected person" (受保障人士) means –

(*a*) an informer who has given information to a specified officer with respect to an investigation under Division 2 or an enquiry under Division 3 or 4; or

(*b*) a person who has assisted a specified officer with respect to such an investigation or enquiry.

19.49 Legal professional privilege

(1) Subject to subsection (2), this Part does not affect any claims, rights or entitlements that would, apart from this Part, arise on the ground of legal professional privilege.

(2) Subsection (1) does not affect any requirement under Division 2, 3 or 4 to disclose the name and address of a client of a legal practitioner (whether or not the legal practitioner is qualified in Hong Kong to practise as counsel or to act as a solicitor).

19.50 Immunity

(1) A person who complies with a requirement imposed by a specified officer under Subdivision 4 of Division 2 or section 19.32 or 19.36 does not incur any civil liability by reason only of that compliance.

(2) A person does not incur any civil liability in respect of anything done, or omitted to be done, by the person in good faith in the performance, or purported performance, of any function under this Part.

19.51 Production of information in information systems etc.

(1) If –

(*a*) a specified officer requires any record or document to be produced under Subdivision 4 of Division 2 or section 19.32 or 19.36; and

(*b*) any information or matter contained in the record or document is recorded otherwise than in a legible form but is capable of being reproduced in a legible form,

the officer may require the production of a reproduction of the recording of the information or matter, or the relevant part of the recording, in a legible form.

(2) If –

(*a*) a specified officer requires any record or document to be produced under Subdivision 4 of Division 2 or section 19.32 or 19.36; and

(*b*) any information or matter contained in the record or document is recorded in an information system,

the officer may require the production of a reproduction of the recording of the information or matter, or the relevant part of the recording, in a form that enables the information or matter to be reproduced in a legible form.

19.52 Lien claimed on records or documents

If a person claims a lien on any record or document in the person's possession that is required to be produced under Subdivision 4 of Division 2 or section 19.32 or 19.36 –

(*a*) the lien does not affect the requirement to produce the record or document;

(*b*) no fee is payable for or in respect of the production; and

(*c*) the production does not affect the lien.

19.53 Destruction of documents

(1) A person commits an offence if –

(*a*) the person destroys, falsifies, conceals or otherwise disposes of, or causes or permits the destruction, falsification, concealment or disposal of, any record or document that is required to be produced under Subdivision 4 of Division 2 or section 19.32 or 19.36; and

(*b*) the person does so with intent to conceal, from the specified officer by whom the requirement was imposed,

facts or matters capable of being disclosed by the record or document.

(2) A person who commits an offence under subsection (1) is liable –

(*a*) on conviction on indictment to a fine of $1,000,000 and to imprisonment for 2 years; or

(*b*) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

19.54 Inspection of records or documents seized etc.

(1) This section applies if a specified officer has taken possession of any record or document under this Part.

(2) The specified officer must, subject to any reasonable conditions the officer may impose as to security or otherwise, permit any person who would be entitled to inspect the record or document had the officer not taken possession of it, at all reasonable times –

(*a*) to inspect it; and

(*b*) to make copies or otherwise record details of it.

Division 6 – Investigation of Company's Affairs by Persons Appointed by Company

19.55 Appointment of person by company to investigate its affairs

(1) A company may, by special resolution, appoint a person to investigate its affairs.

(2) For the purpose of investigating the company's affairs, the appointed person may, by notice in writing, require any officer or agent of the company to do any or all of the following –

(*a*) produce to the appointed person any record or document relating to any matter under investigation that is in the officer's or agent's custody or power;

(*b*) attend before the appointed person at the time and place specified in the notice, and answer any question, whether on oath or otherwise, relating to any matter under investigation that the appointed person may raise with the officer or agent;

(*c*) answer any question relating to any matter under investigation that is specified in the notice.

(3) The appointed person may administer an oath to any person for the purposes of subsection (2)(*b*).

19.56 Court may inquire into failure of officer or agent to attend before appointed person etc.

(1) If an officer or agent of a company fails to comply with a requirement imposed on the officer or agent under section 19.55(2), the appointed person may apply to the Court of First Instance for an inquiry into the failure.

(2) The Court of First Instance may, if it is satisfied that the officer or agent has without any reasonable excuse failed to comply with the requirement, punish the officer or agent (as the case may be) in the same manner as if the officer or agent had been guilty of contempt of court.

19.57 Report by appointed person

(1) A person appointed to investigate a company's affairs under section 19.55(1) must, on the conclusion of the investigation, report on the investigation in any manner as that company in general meeting may direct.

(2) In any proceedings before a court –

(*a*) a document purporting to be a copy of the report, and purporting to be signed by the appointed person and the company, 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 any opinion of the appointed person expressed in the report.

PART 20

MISCELLANEOUS

Division 1 – Miscellaneous Offences

20.1 Offence for false statement

(1) A person commits an offence if, in any return, report, financial statement, certificate or other document, required by or for the purposes of any provision of this Ordinance, the person knowingly or recklessly makes a statement that is misleading, false or deceptive in any material particular.

(2) A person who commits an offence under subsection (1) 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.

(3) This section does not affect the operation of –

(*a*) Part V of the Crimes Ordinance (Cap. 200); or

(*b*) section 19, 20 or 21 of the Theft Ordinance (Cap. 210).

20.2 Offence for improper use of "Limited", "Corporation" or "Incorporated"

(1) A person commits an offence if the person –

(*a*) is not incorporated with limited liability; and

(*b*) uses, trades or carries on business under a name or title of which –

(i) the word "Limited", or a contraction or imitation of that word, is the last word;

(ii) the Chinese version of the word "Limited", or of a contraction or imitation of that word, is the last word; or

(iii) the Chinese characters “有限公司” form part.

(2) A person commits an offence if the person –

(*a*) is not incorporated; and

(*b*) uses, trades or carries on business under a name or title of which –

(i) the word “Corporation” or “Incorporated”, or a contraction or imitation of that word, is the last word;

(ii) the Chinese version of the word “Corporation” or “Incorporated”, or of a contraction or imitation of that word, is the last word; or

(iii) the Chinese characters “註冊公司” or “法人團體” form part.

(3) A person who commits an offence under subsection (1) or (2) 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.

Division 2 – Miscellaneous Provisions Relating to Investigation or Enforcement Measures

20.3 Court may order inspection or production of documents if offence suspected

(1) The Court of First Instance may, on application by the Secretary for Justice, make an order under subsection (2) or (3) if it is satisfied that –

(*a*) there is reasonable cause to believe that any person has, while an officer of a company, committed an offence in connection with the management of the company’s affairs; and

(*b*) evidence of the commission of the offence is to be found in –

(i) any books or papers of, or under the control of, the company; or

(ii) any books or papers of a person carrying on a banking business, which relate to the company's affairs.

(2) The Court of First Instance may, in the case of books or papers mentioned in subsection (1)(*b*)(i), make an order –

(*a*) authorizing a person named in the order to inspect the books or papers, or any of them, for the purpose of investigating and obtaining evidence of the offence; or

(*b*) requiring the secretary of the company, or any other officer of the company named in the order, to produce the books or papers, or any of them, to a person, and at a place, named in the order.

(3) The Court of First Instance may, in the case of books or papers mentioned in subsection (1)(*b*)(ii), make an order authorizing a person named in the order to inspect the books or papers, or any of them, for the purpose of investigating and obtaining evidence of the offence.

20.4 Enforcement of requirements by order of Court

(1) This section applies if a company or an officer of a company contravenes a requirement of this Ordinance –

(*a*) to deliver a document to the Registrar; or

(*b*) to give notice to the Registrar of any matter.

(2) The Registrar, or a member or creditor of the company, may serve a notice on the company or officer requiring the company or officer to comply with the requirement.

(3) If the company or officer fails to make good the contravention within 14 days after service of the notice, the Court of First Instance may, on

application by the Registrar, or by a member or creditor of the company, make an order –

(*a*) in the case of a contravention by the company, directing the company and any officer of the company to make good the contravention within the time specified in the order; or

(*b*) in the case of a contravention by the officer, directing the officer to make good the contravention within the time specified in the order.

(4) An order may provide that all costs of and incidental to the application are to be borne –

(*a*) in the case of a contravention by the company, by the company or by any officer of the company responsible for the contravention; or

(*b*) in the case of a contravention by the officer, by that officer.

(5) This section does not affect the operation of any Ordinance imposing penalties on a company or any officer of a company in respect of the contravention.

20.5 Registrar may give notice to suspected offender about not instituting proceedings under certain conditions

(1) If the Registrar has reason to believe that a person has committed an offence specified in the Schedule,[1] the Registrar may give the person a notice in writing that –

(*a*) alleges that the person has committed an offence specified in the Schedule, and contains the particulars of the offence;

(*b*) contains the terms of the notice by reference to subsection (5) or (6);

[1] There will be a Schedule for the applicable offences in the Bill.

(*c*) specifies the period and amount for the purposes of that subsection; and

(*d*) contains any other information that the Registrar thinks fit.

(2) A notice may be given only before the proceedings on the offence commence.

(3) The Registrar may, by a further notice in writing, extend the period specified under subsection (1)(*c*). This power is exercisable within, or after the end of, that period.

(4) A notice under subsection (1) may not be withdrawn within the period specified in the notice or that period as extended under subsection (3).

(5) Where the offence is an offence constituted by a failure to do an act or thing –

(*a*) no proceedings will be instituted against the person in respect of that offence if, within the period specified in a notice under subsection (1) or that period as extended under subsection (3), the person pays to the Registrar the amount specified in the notice and does the act or thing; or

(*b*) proceedings may be instituted against the person in respect of that offence if, within the period specified in a notice under subsection (1) or that period as extended under subsection (3), the person has not paid to the Registrar the amount specified in the notice or has not done the act or thing.

(6) Where the offence is not an offence constituted by a failure to do an act or thing –

(*a*) no proceedings will be instituted against the person in respect of that offence if, within the period specified in a notice under subsection (1) or that period as extended under subsection (3), the person pays to the Registrar the amount specified in the notice; or

(*b*) proceedings may be instituted against the person in respect of that offence if, within the period specified in a notice under subsection (1) or that period as extended under subsection (3), the person has not paid to the Registrar the amount specified in the notice.

(7) The payment of an amount specified in a notice given to a person under subsection (1) is not to be regarded as an admission by the person of any liability for the offence alleged in the notice to have been committed by the person.

(8) The Financial Secretary may, by notice published in the Gazette, amend the Schedule.

20.6 Limitation on commencement of proceedings

(1) Despite section 26 of the Magistrates Ordinance (Cap. 227), an information or complaint relating to an offence under this Ordinance may be tried if it is laid before or made to a magistrate –

(*a*) within 3 years after the commission of the offence; and

(*b*) within 12 months after the date on which the supporting evidence came to the Secretary for Justice's knowledge.

(2) For the purposes of this section, a certificate of the Secretary for Justice as to the date on which the supporting evidence came to the Secretary's knowledge is conclusive evidence of that date.

(3) This section does not apply to –

(*a*) an indictable offence; or

(*b*) an offence triable either on indictment or summarily.

(4) In this section –

"supporting evidence" (助控證據) means evidence sufficient, in the Secretary for Justice's opinion, to justify the proceedings.

20.7 Application of fines

(1) When imposing a fine under this Ordinance, the court or magistrate may direct that the whole or any part of the fine is to be applied –

(*a*) in or towards payment of the costs of the proceedings; or

(*b*) in or towards rewarding the person on whose information, or at whose suit, the fine is recovered.

(2) Subject to a direction under subsection (1), a fine under this Ordinance must be paid into the general revenue.

(3) Subsection (2) has effect despite anything in any other Ordinance.

(4) In this section –

"court" (法院) means the Court of First Instance or the District Court.

Division 3 – Other Miscellaneous Provisions

20.8 Interpretation

In this Division –

"misconduct" (不當行為) means negligence, default, breach of duty or breach of trust;

"specified person" (指明人士) means –

(*a*) an officer of a company; or

(*b*) a person employed by a company as an auditor.

20.9 Court may require costs in action by company etc.

(1) This section applies where –

(*a*) a company is a plaintiff in an action or other legal proceedings; and

(*b*) it appears, by credible testimony, to the court having jurisdiction in the matter that there is reason to believe the company will be unable to pay the defendant's costs if the defendant succeeds in the defence.

(2) That court may –

(*a*) require sufficient security to be given for those costs; and

(*b*) stay all proceedings until the security is given.

(3) In this section –

"company" (公司) means –

(*a*) a limited company; or

(*b*) a company incorporated outside Hong Kong.

20.10 Court may grant company officer etc. relief in proceedings for misconduct

(1) This section applies if, in any proceedings for any misconduct against a specified person, it appears to the Court of First Instance that the person –

(*a*) is or may be liable for the misconduct;

(*b*) has acted honestly and reasonably; and

(*c*) ought fairly to be excused for the misconduct, having regard to all the circumstances of the case (including those connected with the person's appointment).

(2) The Court of First Instance may relieve the specified person, either wholly or partly, from the liability on the terms that the Court thinks fit.

(3) If the case is tried by a judge with a jury, the judge may –

(*a*) withdraw the case in whole or in part from the jury; and

(*b*) direct judgment to be entered for the specified person on the terms as to costs or otherwise that the judge thinks fit.

20.11 Court may grant company officer etc. relief for misconduct on officer's application

(1) A specified person may apply to the Court of First Instance for relief if the person has reason to apprehend that a claim will or might be made against the person for any misconduct.

(2) On an application, the Court of First Instance may relieve the specified person, either wholly or partly, from the liability on the terms that the Court thinks fit if it appears to the Court that the person –

(*a*) is or may be liable for the misconduct;

(*b*) has acted honestly and reasonably; and

(*c*) ought fairly to be excused for the misconduct, having regard to all the circumstances of the case (including those connected with the person's appointment).

20.12 Saving as to private prosecution

Nothing in this Ordinance relating to the institution of criminal proceedings by the Secretary for Justice precludes any person from instituting or carrying on any such proceedings.

20.13 Saving for privileged communication

If proceedings are instituted under this Ordinance against any person by the Secretary for Justice, nothing in this Ordinance is regarded as requiring any person to disclose any information that the person is entitled to refuse to disclose on grounds of legal professional privilege.

20.14 Power to make regulations

The Financial Secretary may make regulations for any matter required or permitted to be prescribed by the Financial Secretary under this Ordinance.