

Bills Committee on Companies Bill

Comparison Table for Part 20 – Miscellaneous

PURPOSE

To facilitate clause-by-clause examination of Part 20 (Investigations and Enquiries) of the Companies Bill (“CB”), this paper provides a comparison table, at **Annex**, on the provisions in Part 20 and relevant provisions in the Companies Ordinance (Cap. 32) (“CO”) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 20 are set out in section 141 of Schedule 10.

PART 20 OF THE CB

2. The major proposals and policy issues concerning Part 20 are set out in Annex A to LegCo Paper No. CB(1)2636/10-11(03), which was considered by Members at the meeting on 8 July 2011. Members did not raise any specific issues for the Administration to follow up.

ADVICE SOUGHT

3. Members are invited to note the contents of the paper and provide their views.

**Financial Services and the Treasury Bureau
Companies Registry
13 February 2012**

Comparison Table for Part 20

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (CO) of the clause concerned in the Companies Bill (CB), where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wording may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows –

ACA: Australia Corporations Act 2001

CE in C: Chief Executive in Council

CO: Companies Ordinance (Cap 32)

FS: Financial Secretary

SJ: Secretary for Justice

UKCA 2006: United Kingdom Companies Act 2006

Clause	Contents	Derivation	Position in CO	Position in CB
Division 1: Miscellaneous Offences				
883	Offence for false statement	CO s.349 c.f. UKCA 2006 s.1112(1)	It provides for an offence where any person wilfully makes a statement in any document required by or for the purpose of the CO, which is false in any material particular,	Existing law, with the following modifications – (i) the offence is redefined to cover “a statement that is misleading, false or deceptive in any material particular” and the mental element now covers acts committed “knowingly or

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			knowing it to be false.	recklessly” and no longer requires proof of wilful intent (clause 883(1)); and (ii) the offence is also triable on indictment, subject to a maximum fine of \$300,000 and imprisonment for 2 years (clause 883(2)(a)).
884	Offence for improper use of “Limited” or “有限公司” etc.	CO s.350	It provides that it is an offence to use the words “Limited” or “Corporation” or “Incorporated” or any contraction or imitation of these or “有限公司” or “註冊公司” or “法人團體” to form part of the name or title unless the person or persons are duly incorporated with limited liability.	Existing law, with the following modifications – (i) the offence in respect of the improper use of (a) “Limited” or the like; and (b) “Corporation”, “Incorporated” or the like, are split into two distinct offences; and (ii) the anomaly of punishing an unlimited company, a non-Hong Kong company or any other body corporate not having any limit on the liability of its members if it uses “Corporation”, “Incorporated”, or the like as the last word of or in its names is removed.
Division 2: Miscellaneous Provisions relating to Investigation or enforcement Measures				
885	Court may order inspection or production of documents if offence	CO s.351B	(i) It empowers the court on an application by the Secretary for Justice (SJ) to make orders for inspection of books or papers under the control of the	Existing law, except that section 351B(3) of the CO is not re-enacted.

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	suspected		<p>company or to order production of the books etc. where there is reasonable cause to believe that an offence in connection with the management of the company has been committed.</p> <p>(ii) The decision of the court shall be final (section 351B(3)).</p>	
886	Enforcement of requirements by order of Court	CO s.306 c.f. UKCA 2006 s.1113(1)	It provides that the court may on application of the Registrar of Companies (the Registrar), any member or creditor of a company make an order requiring a company or officer to make good its default in complying with any requirement of the CO.	Existing law, with modifications to clarify the types of default covered by the provision, namely, any default in complying with a requirement under the CB to (i) deliver a document to the Registrar; or (ii) give notice to the Registrar of any matter (clause 886(1)).
887	Registrar may give notice to suspected offender about not instituting proceedings under certain conditions	c.f. ACA s.1313	No corresponding provision in the CO.	To empower the Registrar to compound specified offences set out in Schedule 7 under certain conditions by giving a written notice to suspected offenders about not instituting proceedings, containing terms that require the person to pay a specified amount and to do the act that he has failed to do (where appropriate) within a specified period.

Clause	Contents	Derivation	Position in CO	Position in CB
888	Limitation on commencement of proceedings	CO s.351A	It provides that proceedings for an offence under the CO must be brought within 3 years of the commission of the offence and within 12 months after the date on which the SJ forms an opinion that there is sufficient evidence to justify prosecution.	<p>(i) Existing law, except that section 351A(3) of the CO (which excludes offences committed before the Companies (Amendment) Ordinance 1972 commenced operation on 1 March 1973) is not re-enacted as its effect is spent.</p> <p>(ii) Clarifications are also made to ensure that (a) the time limitation does not apply to an indictable offence or an offence that is triable either on indictment or summarily; and (b) the limitation only applies to prosecutions made in the Magistrates' Courts.</p>
889	Application of fines	CO s.352	It provides for fines to be paid to general revenue but gives the court or magistrate imposing the fine discretion to order that all or part of the fine be applied towards the costs of the proceedings or to reward a person on whose information or at whose suit the fine is recovered.	Existing law, except that the power is extended to the District Court.
Division 3: Miscellaneous Provisions relating to Misconduct by Officer or Auditor of Company				
890	Interpretation	CO s.358(1),	Section 358(4) provides that section 358 applies to officers and auditors	Existing law. The term "misconduct" is used under this clause instead of the expression

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		(2) and (4)	of a company.	“negligence, default, breach of duty or breach of trust” in section 358(1) and (2) of the CO. This is a change in terminology but the substance remains the same.
891	Court may grant company officer etc. relief in proceedings for misconduct	CO s.358(1) and (3)	It provides for the court’s power, during the course of legal proceedings against an officer or auditor, to relieve him in part or in whole from his liability for misconduct and to order that judgment be entered for the defendant. The court will exercise its power if the officer or auditor has acted honestly and reasonably in the circumstances of the case.	Existing law.
892	Court may grant company officer etc. relief for misconduct on officer’s application	CO s.358(2)	It empowers the court to relieve an officer or auditor, upon his application, from any potential liability for misconduct. The court will exercise its power if the officer or auditor has acted honestly and reasonably in the circumstances of the case.	Existing law.

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Division 4: Other Miscellaneous Provisions				
893	Costs in action by company etc.	CO s.357	It empowers the court to require a Hong Kong incorporated limited company as a plaintiff to provide security for costs of the defendant in the event the defendant is successful in its defence.	Existing law, with modification that the provisions are extended to all types of companies incorporated outside Hong Kong, irrespective of whether the company is a limited or an unlimited company (clause 893(3)(b)).
894	Saving as to private prosecution	CO s.354	It provides that institution of criminal prosecutions by the SJ under the CO does not preclude the bringing of private prosecution.	Existing law.
895	Saving for privileged communication	CO s.355 c.f. UKCA 2006 s.1129	It provides that in prosecution proceedings commenced under CO, nothing shall require a solicitor of any defendant to disclose privileged communication made to him in his capacity as solicitor.	Existing law, with modification that the provisions on offences under the CB are not to be construed as requiring any person, not just solicitors, to disclose information that is protected by legal professional privilege.
896	Paperless holding and transfer of shares and debentures		No corresponding provision in the CO.	(i) To provide for the inclusion in Schedule 8 of amendments relating to paperless holding and transfer of shares and debentures. (ii) Schedule 8 re-enacts the relevant provisions enacted under Part 7 of the Companies

Clause	Contents	Derivation	Position in CO	Position in CB
				(Amendment) Ordinance 2010. Commencement of Schedule 8 will be subject to the passage of a separate bill on proposals for a scripless securities market and the final provisions therein.
897	Power to make regulations	CO s.359A(1)	It provides that the Chief Executive in Council (CE in C) may make regulations in respect of any matter required or permitted to be prescribed by the CE in C under the CO.	<u>Subclause (1)</u> : Existing law, with the modification that the Financial Secretary (FS) (instead of the CE in C) is empowered to make regulations for any matter required or permitted to be prescribed under the CB.
			No corresponding provision in the CO.	<u>Subclause (2)</u> : New provision to clarify that the power in subclause (1) does not apply if there is a specific empowering provision in other Parts of the CB.
		CO s.360(3A) and (4)	It provides that the FS may, by order published in the Gazette, amend the table of fees (the Eighth and Fourteenth Schedules).	<u>Subclauses (3) and (4)</u> : Existing law. As the Eighth and Fourteenth Schedules to the CO will be moved to regulations made under the CB, express power is conferred on the FS to prescribe the capital duty currently set out in the Eighth Schedule (but to be based on issued capital instead of nominal capital following abolition of nominal capital).

Clause	Contents	Derivation	Position in CO	Position in CB
898	Supplementary provisions for regulations made under this Ordinance	CO s.49Q(3)(b) and (c) c.f. UKCA 2006 s.1292(1)	No corresponding provision in the CO.	<p>(i) Modelled on CO s.49Q(3)(b) and (c), for application to subsidiary legislation made by the CE in C or the FS under the CB.</p> <p>(ii) In line with the approach in s.1292(1) of the UKCA 2006 in respect of regulations, clause 898 provides that the regulations may make different provisions for different cases or classes of cases; and contain any consequential, transitional, saving, incidental or supplementary provisions.</p>
899	Financial Secretary and Registrar may amend Schedules	CO s.360(5)	It empowers the FS to amend the Sixteenth and Twenty-third Schedules.	<p>(i) Existing law to empower the FS to amend Schedule 1 (which re-enacts the Twenty-third Schedule to the CO), with modifications to also empower the FS to amend Schedules 1 to 5 and 7 (clause 899(1)), and the Registrar to amend Schedule 6 (clause 899(2)).</p> <p>(ii) The Sixteenth Schedule to the CO has been moved to the main body of the CB in clauses 5 and 737.</p>
Schedule 7: Offences in respect of which Proceedings not Instituted under Certain Conditions				
Sections 1 to 5				New provisions to provide for specified offences which the Registrar is empowered not to institute

Clause	Contents	Derivation	Position in CO	Position in CB
				legal proceedings pursuant to clause 887 (“Registrar may give notice to suspected offender about not instituting proceedings under certain conditions”).
Schedule 8: Amendments relating to Paperless Holding and Transfer of Shares and Debentures				
Sections 1 to 14		Part 7 of the Companies (Amendment) Ordinance 2010 (<i>note: Part 7 has yet to commence</i>)		<p>(i) Re-enactment of the relevant provisions under Part 7 (“Amendments relating to Paperless Holding and Transfer of Shares and Debentures”) of the Companies (Amendment) Ordinance 2010. Part 7 of the said Amendment Ordinance has not yet commenced.</p> <p>(ii) Commencement of Schedule 8 will be subject to the passage of a separate bill on proposals for a scripless securities market and the final provisions therein.</p>
Schedule 10: Transitional and Saving Provisions				
Section 141	Inspection and production of documents if offence suspected			New provision to provide for transitional and saving arrangement such that where an application has been made before the commencement of clause 885 (“Court may order inspection or production of documents if offence suspected”), section 351B of

Clause	Contents	Derivation	Position in CO	Position in CB
				the CO (“Production and inspection of books where offence suspected”) will continue to apply in relation to that application.

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