

## **Bills Committee on Companies Bill**

### **Follow-up actions for the meeting held on 16 March 2012 relating to alignment of penalties for offences under the Companies Bill**

#### **Purpose**

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meeting on 16 March 2012 relating to alignment of penalties for offences under the Companies Bill (CB).

#### **Administration's response**

##### Concerns over the impact of daily default fine on SMEs for Level 3 fine offences

2. Members were concerned that the imposition of a daily default fine of \$300 for Level 3 fine offences would impose undue burden on some small and medium enterprises (SMEs) especially if a company is not aware of the breach while the daily default fine incessantly accumulates. Members also considered that a daily default fine of \$300 is not proportionate to the severity of the Level 3 fine offences which are mostly minor regulatory offences.

3. In the light of Members' concerns, the Administration agrees that the daily default fine for non-filing offences with a Level 3 fine level could be removed (see **Annex A**). For non-filing offences, it is noted that the group of persons affected by any non-compliance is usually confined to the members of the company and in the event of default, very often there are remedial measures which may be adopted by the affected parties. Hence, the impact of any delay in compliance may be ameliorated by subsequent rectification. Such non-filing offences include a company's failure to keep documents at prescribed place for members' inspection<sup>1</sup>, failure to reproduce in hard copy form the company records that are kept in electronic form<sup>2</sup>, etc.

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<sup>1</sup> Clause 462(5) (company failing to retain and keep for members' inspection copy of permitted indemnity provision or memorandum thereof for at least one year after the date of termination or expiry of the permitted indemnity provision).

<sup>2</sup> Clause 646(5) (company failing to ensure that the company records that are kept in electronic form are capable of being reproduced in hard copy form).

4. On the other hand, we consider that the imposition of daily default fine is justifiable for offences involving filing obligations (see **Annex B**) for the reason that timely compliance allows for timely disclosure of company information to the general public, which is essential to protect the interests of those dealing with a company and the integrity of the register. It is also noted that filing obligations are commonly discharged by company secretaries and professionals and the number of accidental omissions should be low. Offences in respect of such filing obligations include a company's failure to file a notice relating to a company's change of status<sup>3</sup>, failure to file an office copy of Court order to confirm or cancel a proposed reduction of share capital<sup>4</sup>, etc.

#### Review of the amounts of fines corresponding to the fine levels

5. Members enquired about the mechanism for review of the amount of fines corresponding to the different fine levels. According to legal advice, the current Level 1 to Level 6 fines were introduced by the Criminal Procedure (Amendment) Ordinance (No. 58 of 1994) and are applicable to ordinances which adopt the regime of levels of fines in Schedule 8 to the Criminal Procedure Ordinance (Cap 221) (CPO) by providing for a fine for an offence by reference to a level. Under section 113B of the CPO, the amounts of fines corresponding to the different levels of fines set out in the Eighth Schedule may be amended with reference to the effect of inflation on the value of the amounts.

#### Prosecution of offences under the Companies Ordinance (Cap 32) (CO)

6. Members enquired about the Companies Registry's general policies in taking out prosecution for offences under the CO.

7. The Registrar of Companies (the Registrar) has delegated authority from the Director of Public Prosecutions on behalf of the Secretary for Justice to prosecute offences under the CO by way of summary proceedings in the Magistrates' Courts. The Registrar therefore follows the DoJ's prosecution policy and practice in the conduct of criminal proceedings.

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<sup>3</sup> Clause 89(3) (company failing to deliver to the Registrar of Companies (the Registrar) for registration, following alteration of a private company's articles such that the company ceases to be a private company, a notice of the change of the company's status in the specified form within the prescribed time).

<sup>4</sup> Clause 218(2) (company failing to deliver an office copy of an order (to confirm or cancel a proposed reduction of share capital) to the Registrar for registration within the prescribed time).

8. In deciding whether to prosecute, the Registrar acts in accordance with the DoJ's "*Prosecution Code for Prosecutors*" as set out in "*The Statement of Prosecution Policy and Practice*" published by the DoJ<sup>5</sup>. The issues to be considered in deciding whether to prosecute are whether or not there is sufficient evidence to secure a conviction, and if so, whether or not it is in the public interest to pursue a prosecution.

9. The majority of summonses issued by the Registrar relate to the non-filing of annual returns, however, other offences are prosecuted, for example:

- (a) failure to change a company name on the direction of the Registrar (section 22(6) of the CO);
- (b) failure to file notice of change of registered office (section 92(3) ) or failing to affix the name of the company outside the registered office (section 93(1)(a));
- (c) late filing of a notification of change of a director or secretary (section 158(4) for local companies and section 340 for non-Hong Kong companies);
- (d) late filing of a return of allotments and notice of increase of capital (sections 45(3) and 55(3)); and
- (e) giving false or misleading information in connection with an application for deregistration (section 291AA).

10. Members also enquired about the penalties imposed upon conviction for offences punishable by different daily default fines under the CO. The relevant figures in the past 3 years are in **Annex C**.

11. It should be noted that the actual penalties imposed vary depending on the circumstances of individual cases. Some Magistrates impose a basic fine plus a daily default fine, but other Magistrates may resort to a global approach in sentencing, that is, the fine imposed already reflects the length of the default in question and no daily default fine is imposed.

**Financial Services and the Treasury Bureau**  
**Companies Registry**  
**30 March 2012**

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<sup>5</sup> Published by DoJ and available at DoJ's website (<http://www.doj.gov.hk/eng/public/pubsoppaptoc.htm>).

**Proposed deletion of daily default fine****List of non-filing offences punishable by a Level 3 fine and daily default fine of \$300 under the Companies Bill**

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
<b>Part 4 – Share Capital</b>	
Clause 161(2)	<ul style="list-style-type: none"><li>Listed company failing to publish in the Gazette a notice of the issue of the new certificate and cancellation of the original certificate; and deliver a copy of the notice to the recognized stock market concerned within the prescribed time.</li></ul>
<b>Part 5 – Transactions in relation to Share Capital</b>	
Clause 213(3) (in respect of clause 213(1))	<ul style="list-style-type: none"><li>Company failing to publish a notice about the particulars of a proposed reduction of share capital in the Gazette within the prescribed time.</li></ul>
Clause 213(3) (in respect of clause 213(2))	<ul style="list-style-type: none"><li>Company failing to comply with the requirement either to publish a notice about the particulars of a proposed reduction of share capital in newspapers or give written notice to that effect to creditors within the prescribed time.</li></ul>
Clause 256(3) (in respect of clause 256(1))	<ul style="list-style-type: none"><li>Company failing to publish a notice about the particulars of a proposed payment out of capital in the Gazette within the prescribed time.</li></ul>
Clause 256(3) (in respect of clause 256(2))	<ul style="list-style-type: none"><li>Company failing to comply with the requirement either to publish a notice about the particulars of a proposed payment out of capital in newspapers or give written notice to that effect to creditors within the prescribed time.</li></ul>
Clause 279(5)	<ul style="list-style-type: none"><li>Company failing to send to its member a copy of the solvency statement and a notice containing prescribed information about the giving of financial assistance within the prescribed time.</li></ul>
<b>Part 9 – Accounts and Audit</b>	
Clause 372(5)	<ul style="list-style-type: none"><li>Company failing to adequately record information contained in accounting records.</li></ul>

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
(in respect of clause 372(1))	
Clause 372(5) (in respect of clause 372(3))	<ul style="list-style-type: none"> <li>• Company failing to reproduce in hard copy form the accounting records that are kept in electronic form.</li> </ul>
Clause 372(5) (in respect of clause 372(4))	<ul style="list-style-type: none"> <li>• Company failing to take adequate precaution and steps to guard against, and facilitate the discovery of, falsification of accounting records.</li> </ul>
Clause 416(4) (in respect of clause 416(1))	<ul style="list-style-type: none"> <li>• A retiring auditor not reappointed, or an auditor removed from office, failing to give the company on termination of his appointment a statement of circumstances/ no circumstances that should be brought to the attention of members or creditors.</li> </ul>
Clause 416(4) (in respect of clause 416(2))	<ul style="list-style-type: none"> <li>• A retiring auditor not reappointed or an auditor removed from office failing to send to the company a statement of circumstances/ no circumstances in clause 416(1) so that it will be received by the company within the specified time.</li> </ul>
<b>Part 10 – Directors and Company Secretaries</b>	
Clause 462(5) (in respect of clause 462(2))	<ul style="list-style-type: none"> <li>• Company failing to keep available for members’ inspection copy of permitted indemnity provision or memorandum thereof at the prescribed places.</li> </ul>
Clause 462(5) (in respect of clause 462(3))	<ul style="list-style-type: none"> <li>• Company failing to retain and keep for members’ inspection copy of permitted indemnity provision or memorandum thereof for at least one year after the date of termination or expiry of the permitted indemnity provision.</li> </ul>
Clause 463(4)(a)	<ul style="list-style-type: none"> <li>• Company failing to provide a member of the company upon request with a copy of the permitted indemnity provision or memorandum thereof within the prescribed time.</li> </ul>
Clause 474(6) (in respect of clause 474(4))	<ul style="list-style-type: none"> <li>• Sole director of a company failing to provide the company with a written record of any of his decision that may be taken in a directors’ meeting and has effect as if agreed in such meeting.</li> </ul>
<b>Part 11 – Fair Dealings by Directors</b>	
Clause 533(6) (in respect of clause 533(2))	<ul style="list-style-type: none"> <li>• Company failing to include in the director’s report for the relevant year a statement of the existence and duration of a management contract and the name of every director and shadow director interested in the</li> </ul>

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
	contract, and the nature and extent of the interest.
Clause 533(6) (in respect of clause 533(3))	<ul style="list-style-type: none"> <li>• Company failing to keep available for inspection at a prescribed place a copy of the management contract; or a written memorandum setting out the terms of the contract if the contract is not in writing.</li> </ul>
Clause 533(6) (in respect of clause 533(4))	<ul style="list-style-type: none"> <li>• Company failing to retain and keep available for members' inspection copy of a contract by which a person undertakes the management and administration of the whole or any substantial part of any of the company's business or memorandum thereof for at least one year after the date of termination or expiry of the contract.</li> </ul>
Clause 534(4)(a)	<ul style="list-style-type: none"> <li>• Company failing to provide to a member of the company upon request with a copy of the contract or memorandum thereof within the prescribed time.</li> </ul>
Clause 535(3)	<ul style="list-style-type: none"> <li>• Company failing to ensure that the terms of a contract with its sole member who is also a director are set out in a written memorandum and the memorandum be kept at the prescribed place.</li> </ul>
<b>Part 12 – Company Administration and Procedure</b>	
Clause 584(2)	<ul style="list-style-type: none"> <li>• Company failing to record in the minutes of proceedings of a general meeting the prescribed results of each resolution decided on a poll.</li> </ul>
Clause 607(3)	<ul style="list-style-type: none"> <li>• Sole member failing to provide the company with a written record of any decision made by him within the prescribed time.</li> </ul>
Clause 646(5) (in respect of clause 646(1))	<ul style="list-style-type: none"> <li>• Company failing to adequately record the required information in company records.</li> </ul>
Clause 646(5) (in respect of clause 646(3))	<ul style="list-style-type: none"> <li>• Company failing to ensure that the company records that are kept in electronic form are capable of being reproduced in hard copy form.</li> </ul>
Clause 647(2)	<ul style="list-style-type: none"> <li>• Company failing to take adequate precaution and steps to guard against, and facilitate the discovery of, falsification of company records.</li> </ul>
Clause 651	<ul style="list-style-type: none"> <li>• Company failing to disclose company name etc. in accordance with the requirements prescribed by the Financial Secretary in regulations.</li> </ul>
<b>Part 16 – Non-Hong Kong Companies</b>	

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
Clause 780(8) (in respect of clause 780(2))	<ul style="list-style-type: none"> <li>• Non-Hong Kong company failing to exhibit its names and place of incorporation on every place it carries on business in Hong Kong and (if applicable) conspicuously exhibit a notice of the fact that the liability of its members is limited.</li> </ul>
<b>Part 18 – Communications to and by Companies</b>	
Clause 825(3)	<ul style="list-style-type: none"> <li>• Company failing to provide a document or information in hard copy form as requested by its member or debenture holders within the prescribed time.</li> </ul>
<b>Part 20 - Miscellaneous</b>	
Clause 884(3) (in respect of clause 884(1))	<ul style="list-style-type: none"> <li>• A person who is not incorporated with limited liability using, trading or carrying on business under a name or title of which (a) the word “Limited”, or a contraction or imitation of that word, is the last word; (b) the Chinese version of the word “Limited”, or of a contraction or imitation of that word, is the last word; or (c) the Chinese characters “有限公司” form part.</li> </ul>
Clause 884(3) (in respect of clause 884(2))	<ul style="list-style-type: none"> <li>• A person who is not incorporated using, trading or carrying on business under a name or title of which (a) the word “Corporation” or “Incorporated”, or a contraction or imitation of that word, is the last word; (b) the Chinese version of the word “Corporation” or “Incorporated”, or of a contraction or imitation of that word, is the last word; or (c) the Chinese characters “註冊公司” or “法人團體” form part.</li> </ul>

**Proposed retention of daily default fine****List of filing offences punishable by a Level 3 fine and daily default fine of \$300 under the Companies Bill**

Offence provision in the CB	General description of the offence
<b>Part 3 – Company Formation and Related Matters, and Re-registration of Company</b>	
Clause 83(6)	<ul style="list-style-type: none"> <li>Company failing to, after alteration of the company’s articles takes effect, deliver a notice of the alteration and a copy (certified by an officer of the company as correct) of the articles as altered to the Registrar of Companies (the Registrar) for registration within the prescribed time.</li> </ul>
Clause 84(9)	<ul style="list-style-type: none"> <li>Company failing to, after passing a special resolution altering its objects, deliver a notice of the alteration and a copy (certified by an officer of the company as correct) of the articles as altered to the Registrar for registration within the prescribed time.</li> </ul>
Clause 85(8)	<ul style="list-style-type: none"> <li>Company failing to, after passing a special resolution altering certain articles by existing company, deliver a notice of the alteration and a copy (certified by an officer of the company as correct) of the articles as altered to the Registrar for registration within the prescribed time.</li> </ul>
Clause 89(3) (in respect of clause 89(2)(a))	<ul style="list-style-type: none"> <li>Company failing to deliver to the Registrar for registration, following alteration of a private company’s articles such that the company ceases to be a private company, a notice of the change of the company’s status within the prescribed time.</li> </ul>
Clause 90(3) (in respect of clause 90(2))	<ul style="list-style-type: none"> <li>Company failing to deliver to the Registrar for registration, following alteration of a public company’s articles such that the company ceases to be a public company, a notice of the change of the company’s status within the prescribed time.</li> </ul>
Clause 91(4) (in respect of clause 91(1) or (2))	<ul style="list-style-type: none"> <li>Company failing to deliver to the Registrar for registration, following alteration of the company’s articles by a Court order, a notice of the alteration of the company’s articles, or an office copy of the Court order and a copy of the articles as altered by the order (accompanying the said notice of alteration) within the prescribed time.</li> </ul>
Clause 92(3) (in respect of clause 92(1) or (2))	<ul style="list-style-type: none"> <li>Company failing to deliver to the Registrar for registration a notice of the alteration of a company’s articles by any other ordinance, or accompany the notice with a copy of the articles as altered that that other ordinance within the prescribed time.</li> </ul>
Clause 102(6)	<ul style="list-style-type: none"> <li>Company failing to deliver to the Registrar for registration a notice of the change of company name within the</li> </ul>

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
	prescribed time.
Clause 109(2)	<ul style="list-style-type: none"> <li>• Company limited by guarantee failing to deliver to the Registrar for registration, following increasing the number of its members beyond the registered number, a notice of increase within the prescribed time.</li> </ul>
<b>Part 5 – Transactions in relation to Share Capital</b>	
Clause 215(5)	<ul style="list-style-type: none"> <li>• Company failing to give the Registrar notice of the relevant application within the prescribed time after an application to oppose a proposed reduction of share capital is served on the company.</li> </ul>
Clause 218(2)	<ul style="list-style-type: none"> <li>• Company failing to deliver an office copy of an order (to confirm or cancel a proposed reduction of share capital) to the Registrar for registration within the prescribed time.</li> </ul>
Clause 258(5)	<ul style="list-style-type: none"> <li>• Company failing to give the Registrar notice of the application within the prescribed time after an application to oppose a proposed payment out of capital is served on the company.</li> </ul>
Clause 261(2)	<ul style="list-style-type: none"> <li>• Company failing to deliver an office copy of an order (to confirm or cancel a proposed payment out of capital) to the Registrar for registration within the prescribed time.</li> </ul>
Clause 282(6)	<ul style="list-style-type: none"> <li>• Company failing to give the Registrar notice of the relevant application within the prescribed time after an application to oppose a financial assistance proposal is served on the company.</li> </ul>
Clause 285(2)	<ul style="list-style-type: none"> <li>• Company failing to deliver an office copy of an order (to confirm or cancel a financial assistance proposal) to the Registrar for registration within the prescribed time.</li> </ul>
<b>Part 8 – Registration of Charges</b>	
Clause 347(4)	<ul style="list-style-type: none"> <li>• A person who has obtained 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 has appointed such a receiver or manager under the powers contained in an instrument, failing to deliver a statement of that fact to the Registrar for registration within the prescribed time.</li> </ul>
Clause 348(4)	<ul style="list-style-type: none"> <li>• Mortgagee who has entered into possession of the property of a company, or the charged property of a registered non-Hong Kong company, failing to deliver to the Registrar for registration a statement of that fact within the prescribed time.</li> </ul>
Clause 349(7)	<ul style="list-style-type: none"> <li>• Receiver or manager or mortgagee failing to deliver to the Registrar for registration within the prescribed time</li> </ul>

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
	(a) a statement of his cessation to act as receiver or manager; (b) a statement of his going out of possession of the property or charged property; or (c) a statement of change of his particulars given.
<b>Part 9 – Accounts and Audit</b>	
Clause 367(8) (in respect of clause 367(2))	<ul style="list-style-type: none"> <li>• Company failing to notify the Registrar of the new accounting reference date within the prescribed time after the resolution specifying the new date is passed.</li> </ul>
Clause 410(5)	<ul style="list-style-type: none"> <li>• Company failing to notify the Registrar of passing a resolution to remove an auditor within the prescribed time.</li> </ul>
Clause 417(7) (in respect of clause 417(5))	<ul style="list-style-type: none"> <li>• Auditor who has given a statement of circumstances; and has not received notice of an application to Court for non-publicity of the statement within 21 days of receipt of the statement by the company, failing to deliver a copy of the statement to the Registrar for registration within the prescribed time.</li> </ul>
Clause 419(2) (in respect of clause 418(5))	<ul style="list-style-type: none"> <li>• An auditor, who has given a statement of circumstances to the company, failing to deliver a copy of the statement to the Registrar for registration within the prescribed time after receipt of notice of the court's decision not to grant the application for non-publicity of the statement from the company.</li> </ul>
<b>Part 10 – Directors and Company Secretaries</b>	
Clause 462(5) (in respect of clause 462(4))	<ul style="list-style-type: none"> <li>• Company failing to deliver to the Registrar for registration a notice of the place, or any change in the place, at which the copy permitted indemnity provision or memorandum thereof is kept available for inspection within the prescribed time.</li> </ul>
<b>Part 11 – Fair Dealing by Directors</b>	
Clause 533(6) (in respect of clause 533(5))	<ul style="list-style-type: none"> <li>• Company failing to deliver to the Registrar for registration within the prescribed time a notice of the place, or any change in the place, at which the copy contract or memorandum thereof is kept available for inspection.</li> </ul>
<b>Part 12 – Company Administration and Procedure</b>	
Clause 612(7) (in respect of clause 612(2))	<ul style="list-style-type: none"> <li>• Company failing to deliver to the Registrar within the prescribed time a copy of resolution passed or agreement made.</li> </ul>

<b>Offence provision in the CB</b>	<b>General description of the offence</b>
<b>Part 13 – Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back</b>	
Clause 675(7)	<ul style="list-style-type: none"> <li>• Company failing to deliver to the Registrar for registration an office copy of Court order made under clause 675 within the prescribed time.</li> </ul>
<b>Part 14 – Remedies for Protection of Companies’ or Members’ Interests</b>	
Clause 715(5)	<ul style="list-style-type: none"> <li>• Company failing to deliver to the Registrar for registration an office copy of the Court order altering the company’s articles within the prescribed time.</li> </ul>
<b>Part 15 – Dissolution by Striking off or Deregistration</b>	
Clause 758(6)	<ul style="list-style-type: none"> <li>• Company failing to change prohibited name by a special resolution within the prescribed time after the restoration and notify the Registrar of the change.</li> </ul>
<b>Part 16– Non-Hong Kong Companies</b>	
Clause 766(10)	<ul style="list-style-type: none"> <li>• Registered non-Hong Kong company failing to notify Registrar of addition, change or cessation of name or translation of name.</li> </ul>
Clause 781(7) (in respect of clause 781(1))	<ul style="list-style-type: none"> <li>• Registered non-Hong Kong company failing to notify the Registrar commencement of liquidation and its particulars and further particulars on appointment of liquidator or provisional liquidator within the prescribed time.</li> </ul>
Clause 781(7) (in respect of clause 781(6))	<ul style="list-style-type: none"> <li>• Registered non-Hong Kong company failing to notify the Registrar change in the particulars of liquidation, appointment or cessation of liquidators or provisional liquidators within the prescribed time.</li> </ul>
Clause 782(3)	<ul style="list-style-type: none"> <li>• Registered non-Hong Kong company failing to notify the Registrar of cessation of place of business in Hong Kong within the prescribed time.</li> </ul>
Clause 783(3)	<ul style="list-style-type: none"> <li>• Authorized representative of a registered non-Hong Kong company failing to notify the Registrar of dissolution within the prescribed time.</li> </ul>

## Annex C

### **Number of cases and level of penalties upon conviction for offences punishable by daily default fines under different fine levels under the Companies Ordinance (Cap 32) in 2009 to 2011**

#### **Level 3 fine offences**

<b>Year</b>	<b>No. of Cases</b>	<b>Range of global fine (\$)</b>	<b>Range of basic fine (\$)</b>	<b>Range of daily default fine (\$)</b>
2009	30	\$2,500 - \$8,500	\$2,000 - \$10,000	\$5 - \$30
2010	43	\$2,500 - \$12,000	\$2,000 - \$8,000	\$20 - \$200
2011	49	\$3,000 - \$15,000	\$1,500 - \$8,000	\$10 - \$100

#### **Level 4 fine offences**

<b>Year</b>	<b>No. of Cases</b>	<b>Range of global fine (\$)</b>	<b>Range of basic fine (\$)</b>	<b>Range of daily default fine (\$)</b>
2009	1	\$1,000	-	-
2010	1	\$8,000	-	-
2011	-	-	-	-

#### **Level 5 fine offences**

<b>Year</b>	<b>No. of Cases</b>	<b>Range of global fine (\$)</b>	<b>Range of basic fine (\$)</b>	<b>Range of daily default fine (\$)</b>
2009	319	\$1,000 - \$50,000	\$2,000 - \$25,000	\$10 - \$200
2010	384	\$500 - \$45,000	\$1,000 - \$40,000	\$5 - \$400
2011	402	\$1,000 - \$50,000	\$1,000 - \$50,000	\$10 - \$500

#### **Level 6 fine offences**

<b>Year</b>	<b>No. of Cases</b>	<b>Range of global fine (\$)</b>	<b>Range of basic fine (\$)</b>	<b>Range of daily default fine (\$)</b>
2009	19	\$10,000 - \$25,000	\$6,000 - \$50,000	\$30 - \$100
2010	40	\$6,000 - \$30,000	\$4,000 - \$15,000	\$20 - \$200
2011	55	\$2,000 - \$30,000	\$2,000 - \$10,000	\$10 - \$100