

Bills Committee on Companies Bill

Parts 6 to 8 of the Companies Bill

PURPOSE

This paper explains the major proposals and policy issues in Part 6 (Distribution of Profits and Assets), Part 7 (Debentures) and Part 8 (Registration of Charges) of the Companies Bill. It also outlines relevant overseas experience, public views received during earlier public consultations on the major proposals and our responses.

DETAILS

2. Details for each Part are contained in the Annexes:-

Annex A - Part 6 (Distribution of Profits and Assets)

Annex B - Part 7 (Debentures)

Annex C - Part 8 (Registration of Charges)

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

5 May 2011

Bills Committee on Companies Bill

Part 6 - Distribution of Profits and Assets

INTRODUCTION

Part 6 (Distribution of Assets and Profits) of the Companies Bill (CB) contains provisions that deal with distribution of profits and assets of a company to members.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 6 does not propose fundamental changes to the distribution provisions in the Companies Ordinance (CO) as the current rules have generally worked well and provided certainty. It mainly reorganises the existing provisions and proposes some minor technical amendments.

Current position

3. The specific provisions on distributions are currently contained in sections 79A to 79P of Part IIA of the CO. While the usual form of distribution is dividend, under the existing regime, “distribution” means every description of distribution of a company’s assets to its members whether in cash or otherwise, except distribution by way of bonus shares, redemption or buy-back of shares, reduction of capital and distribution in a winding up. Distribution can only be made out of profits available for the purpose. A company’s profits available for distribution are its accumulated, realised profits (so far as previously not distributed or capitalised) less its accumulated, realised losses (so far as not previously written off in a reduction or reorganisation of capital)¹.

¹ Section 79B(2) of CO.

4. There are further restrictions for listed companies². The consequences of unlawful distribution are provided for³.

Proposal and key provisions in the Bill

(I) Reorganising the provisions and modernising the language

5. Part 6 mainly reorganises, with some modifications, the existing CO provisions in a more logical, user-friendly and readable way and modernises the language to facilitate easier understanding.

6. Part 6 contains provisions relating to the distribution of profits and assets to members. It is divided into four Divisions. Each Division has a specific function. **Division 1** defines or otherwise explains the expressions used in Part 6. **Division 2** deals with the prohibitions and restrictions on distributions by a company to members. **Division 3** contains provisions supplementary to Division 2, for example **clause 298** provides that the amount of a distribution that may be made lawfully is to be determined by reference to certain financial items as stated in the financial statements specified in Division 4. **Division 4** specifies the financial statements for the purposes of **clause 298**. The specified financial statements for distribution purpose are the annual financial statements, the interim financial statements and the initial financial statements. These are the same as under the existing CO.

(II) Technical amendments

7. There are technical amendments to change the terms used in Part 6 in accordance with the changes made in other Parts of the Bill. For example, the term “accounts” will be replaced by “financial statements” as in Part 9, and 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”

² Section 79C of CO: a listed company can only make a distribution if the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves, and to the extent that the distribution does not reduce the amount of those assets to less than that aggregate.

³ Section 79M of CO: if the member to whom the distribution is made knows or has reasonable grounds to believe that it is made in contravention of the law he is liable to repay to the company.

will be removed in parallel with the introduction of the no-par regime in Part 4.

PUBLIC COMMENTS

8. We have consulted the public on the draft Bill in two phases in December 2009 to March 2010 and May to August 2010 respectively. Part 6 was covered by the second phase consultation. The public comments on our major proposals are set out below. For other comments on Part 6 and our response, they are set out in Appendix III to the consultation conclusions issued on 25 October 2010⁴.

Major Comments	Administration's Response
<i>Solvency test for distribution</i>	
<ul style="list-style-type: none"> • Distribution should only be subject to the solvency test. 	<ul style="list-style-type: none"> • We are inclined to maintain the current regime given the majority view in the topical public consultation in 2008 that the solvency test approach should not be adopted across the board⁵.
<i>Distribution in-specie</i>	
<ul style="list-style-type: none"> • Guidance should be provided as to how to value a distribution in-specie along the lines of the Companies Act 2006 of the United Kingdom (UK). 	<ul style="list-style-type: none"> • We have considered the issue but note that there has been no major problem in this area in Hong Kong and are inclined not to follow the UK.

⁴ Financial Services and the Treasury Bureau (FSTB), *Consultation Conclusions on Second Phase Consultation on the Draft Companies Bill* (October 2010) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion_e.pdf).

⁵ FSTB, *Consultation Conclusions on Share Capital, the Capital Maintenance Regime, Statutory Amalgamation Procedure* (February 2009), paragraphs 31 to 33 (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/cmrsap_conclusion_e.pdf).

Major Comments	Administration's Response
<i>Justification of distribution by reference to financial statements</i>	
<ul style="list-style-type: none"> • Provisions should be put in place to address the situation where a distribution has been proposed or approved, but before it has actually been made, a certain event occurs that may change the opinion regarding the financial ability of the company. 	<ul style="list-style-type: none"> • Should such a situation arise, a director is bound by his fiduciary duties to reconsider the distribution.
<i>Last annual financial statements specified for the purposes of clause 298</i>	
<ul style="list-style-type: none"> • It is burdensome for a holding company that intends to distribute its profits and assets to be required to prepare its own annual financial statements (under Part 6) in addition to the consolidated financial statements of the group (under Part 9). 	<ul style="list-style-type: none"> • Concern noted and the draft CB has accordingly been amended (clause 300) so that the consolidated financial statements prepared by a holding company for the group under Part 9 can also be used for the purpose of distribution under clause 298. Under the requirements in Part 9, the holding company's own statement of financial position would be included in the notes to the consolidated financial statements.

Major Comments	Administration's Response
<i>Interim financial statements and initial financial statements specified for the purposes of clause 298</i>	
<ul style="list-style-type: none"> • It appears that the requirement for such financial statements to give a true and fair view may have become an overriding requirement, irrespective of whether the additional information included in those financial statements is pertinent to the question of the legality of the distribution. 	<ul style="list-style-type: none"> • Concerns noted and the draft CB (clauses 301 and 302) has accordingly been amended so that the interim and initial financial statements should be prepared in accordance with Subdivision 3 of Division 4 of Part 9, except such matters which are not material for determining the distributable profit and that the financial statements may not cover a full financial year.

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Part 7 - Debentures

INTRODUCTION

Part 7 (Debentures) of the Companies Bill (CB) contains provisions that deal with matters concerning debentures, for example, keeping of the register of debenture holders, rights to inspect and make copies of the register, trust deeds and other documents and convening meetings of debenture holders.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 7 contains initiatives that aim at modernising the law (subparagraph (a) below) and ensuring better regulation (subparagraphs (b) to (d)), namely:-

- (a) Improving clarity by separating provisions applicable to debentures from those applicable to shares (paragraph 4 below).
- (b) Aligning provisions for keeping of the register of debenture holders with similar provisions for register of members in Part 12 (paragraphs 5 to 11);
- (c) Introducing new requirements for registration of allotment of debentures to align with similar requirements for shares introduced in Part 4 (paragraphs 12 to 15); and
- (d) 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 (paragraphs 16 to 19).

3. The details of the above major proposals in Part 7 are set out in paragraphs 4 to 19.

Improving clarity by separating provisions applicable to debentures from those applicable to shares (Clauses 308, 318 and 320 to 321)

4. Currently, some of the provisions applicable to both shares and debentures are scattered in different parts of the CO. This arrangement is not user-friendly as those interested only in debentures would need to go through the various parts to identify provisions applicable to debentures. To improve clarity, all substantive requirements about debentures are now grouped under Part 7. For example, power to close the register of debenture holders (**clause 308**), registration of transfer or refusal of registration (**clause 318**), duties of companies with respect to issue of debentures or certificates for debenture stock on transfer (**clause 320**) and the Court's power to order such issue (**clause 321**).

Aligning provisions for keeping of the register of debenture holders with similar provisions for register of members (Clauses 304 to 312)

Current position

5. Currently, the Companies Ordinance (CO) sets out requirements for keeping the register of debenture holders (section 74(A)) in a manner similar to those for a register of members in respect of shareholding in a company (section 95). However, there is a difference between the two, i.e. only the register of debenture holders is required to detail the occupation or give a description of the debenture holder. Also, under the CO, there are provisions for keeping of a branch register for the register of members (sections 103 and 104) but there are no similar provisions for the register of debenture holders.

Proposal and key provisions in the Bill

6. To ensure consistency and to clarify the law in the CB, the provisions relating to the register of debenture holders are aligned with and mirror those relating to the register of members¹, including removing the requirement to disclose the debenture holder's occupation (**clause 304**), and adding the provisions for keeping of branch registers in respect of debenture holders (**clauses 309 to 312**).

7. **Clause 304** provides for the keeping of a register of debenture holders. **Clause 305** provides for the place where the register of debenture holders must be kept. **Clause 306** provides for the right to inspect and request a copy of the register of debenture holders. **Clauses 309 to 312** provide for the keeping of branch registers of debenture holders.

Overseas experience

8. In the UK, the keeping of the register of debenture holders is not obligatory. The particulars of the register of debenture holders are not specified. The register of debenture holders may be kept at the registered office of the company or a place prescribed by regulation. There are also provisions for the keeping of branch register².

9. In Australia, the keeping of the register of debenture holders is obligatory. The particulars in the register of debenture holders are name, address, and amount of debenture held. The register of debenture holders may be kept at the specified offices which must be in Australia; or a place approved by the Australian Securities and Investments Commission. There is no provision for the keeping of branch register for debentures³.

10. In Singapore, the keeping of the register of debenture holders is obligatory. The particulars in the register of debenture holders are name,

¹ Subdivisions 1 and 2 of Division 2 of Part 12.

² Section 743 of the UK Companies Act 2006 (UKCA 2006).

³ Sections 168, 171, 172 of the Australia Corporations Act.

address and amount of debenture held. The register of debenture holders may be kept at the registered office or some other place in Singapore. There are also provisions for the keeping of branch register for debentures⁴.

Public consultation

11. We consulted the public on this issue in the second phase consultation of the draft CB⁵. No major views were received, though some were mistaken that the criminal liabilities under clause 305(5) for contravening the requirements to keep the register of debenture holders available for inspection are new offences. We clarified that it is not a new offence as the clause is a mere restatement of section 74A(4) of the CO.

Introducing new requirements for registration of allotment of debentures to align with similar requirements for shares in Part 4 (Clauses 313 and 314)

Current position

12. Currently, the CO requires a company to deliver a return of allotment of shares to the Registrar of Companies (the Registrar) for registration, but there are no similar requirements in respect of an allotment of debentures. Section 70(1) of the CO obliges a company to complete and deliver the debentures or certificates for debenture stock within two months after their allotment. However, the CO does not require an entry to be made in the register of debenture holders after an allotment of debentures.

⁴ Section 93 of the Singapore Companies Act.

⁵ Financial Services and the Treasury Bureau, *Consultation Conclusions on Second Phase Consultation on the Draft Companies Bill* (October 2010) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion_e.pdf).

Proposal and key provisions in the Bill

13. **Clause 313** provides that within one month after the allotment of debentures (including debenture stock), a company must deliver to the Registrar a return of the allotment for registration. **Clause 314** provides that as soon as practicable, and in any event within two months after an allotment of debentures, a company must register the allotment in the register of debenture holders. These are new provisions to help protect investors in debentures and align the position of debenture holders with that of members. Clauses 313 and 314 largely mirror similar requirements for shares under clauses 137 and 138 of Part 4.

Overseas experience

14. The UK also requires the registration of an allotment in the register of debenture holders⁶. There is no such requirement in Australia and Singapore. It does not appear that there is similar requirement of filing a return of allotment of debentures in the UK, Singapore and Australia.

Public consultation

15. We consulted the public on this issue in the second phase consultation of the draft CB. No major views were received.

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 (Clause 328)

Current position

16. Section 75A of the CO provides that where the debentures or the trust deed or other document securing the debentures or stock provide for the holding of meetings of holders of debentures or stock, then subject to

⁶ Section 741 of the UKCA 2006.

such provisions, such meetings shall be convened subject to the relevant provisions in the CO⁷. In practice, however, section 75A is unlikely to be invoked, because if the debenture documents do not provide for meetings, the CO provisions would 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 CO provisions.

Proposal and key provision of the Bill

17. **Clause 328** replaces section 75A of the CO to provide that the Court may order a meeting of debenture holders. The clause provides for the right for debenture holders holding 10% of the value of the debentures in total to apply to the Court to order a meeting for giving directions to the trustee. This is subject to any provisions in the debentures, or the trust deeds or other documents securing the issue of the debentures that exclude such right or require a higher percentage of debenture-holdings. This clause applies to debentures forming part of a series issued by the company and ranking *pari passu* (i.e. of the same rank) with other debentures of that series, and debenture stock.

Overseas experience

18. There are no equivalent provisions to section 75A of the CO in the UK and Singapore legislation but there are detailed provisions in Part 2L.5 of the Australian Corporations Act 2001 regarding the meeting of debenture holders⁸.

⁷ Sections 113, 114B, 114C, 114D(2) and 114E of the CO.

⁸ Sections 283EA, 283EB and 283EC. The clauses provide that holders of 10% or more of the nominal value of the issued debentures may require, the trustee may call or the Court may order a meeting. Requisition by debenture holders may be made to consider financial statements laid before last Annual General Meeting, or to give trustee directions in exercising powers. Trustee may call meeting in the event borrower or guarantor fails to remedy any breach when required by trustee. Court may order meeting to give directions to trustee. There are also detailed requirements on the procedures e.g. the giving of notice of meeting.

Public consultation

19. We consulted the public on this issue in the second phase consultation of the draft CB. Some respondents did not agree with the proposal, considering that such meetings should be governed by the debenture documents and that the status quo should be maintained. As aforementioned, the current CO provisions would unlikely be invoked in practice (paragraph 16), while clause 328 of the CB provides that the right to apply to the Court for a meeting may be excluded by the debentures, trust deeds or other documents securing the debentures (paragraph 17), the proposal should be sufficient to address the respondents' concern and strikes a reasonable balance.

PUBLIC COMMENTS

20. We have consulted the public on the draft Bill in two phases in December 2009 to March 2010 and May to August 2010 respectively. Part 7 was covered by the second phase consultation. The public comments on our major proposals are discussed above. For other comments on Part 7 and our response, they are set out in Appendix III to the consultation conclusions issued on 25 October 2010⁹.

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⁹ See footnote 5.

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Part 8 - Registration of Charges

INTRODUCTION

Part 8 (Registration of Charges) of the Companies Bill (CB) contains provisions that deal with registration of charges by both Hong Kong and registered non-Hong Kong companies. It sets out the types of charges that require registration, registration procedures, consequences of non-compliance, and other related matters such as keeping and inspection of copies of charge instruments and registers of charges.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 8 basically retains the current registration regime under Part III of the Companies Ordinance (CO)¹, with the following initiatives that aim at ensuring better regulation by enhancing disclosure and improving the registration system:-

- (a) Updating the list of registrable charges (paragraphs 5 to 8 below);
- (b) Replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount should be immediately payable where a charge is rendered void for non-compliance with the registration requirements (paragraphs 9 to 11);
- (c) Requiring a certified copy of the charge instrument to be registered and available for public inspection (paragraphs 12 to 14);
- (d) Shortening the period for delivery to the Registrar of Companies (the Registrar) of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month (paragraphs 15 to 18);

¹ Sections 80 to 91 of the CO.

- (e) Requiring a certified copy of the written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection (paragraphs 19 to 22);
- (f) Clarifying the effect of a Court order to extend the time for registration as regards criminal liability already incurred (paragraphs 23 to 25); and
- (g) Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge (paragraphs 26 to 28).

3. The details of the above proposals in Part 8 are set out in paragraphs 5 to 28 below.

4. To modernise and clarify the law, Part 8 sets out specific provisions for registered non-Hong Kong companies to deal with charge-related issues. We consider this to be an improvement over the current section in the CO (section 91), which is a single lengthy and complicated section that sets out the applicability of relevant charge-related provisions under Part III of the CO to registered non-Hong Kong companies.

Updating the list of registrable charges (Clause 333)

Current position

5. Under the CO, the categories of charges listed under section 80(2) are required to be registered. There are some difficulties with the existing provisions as follows:-

- (a) Charge on an aircraft or any share in an aircraft

Currently, there are uncertainties as to whether particular mortgages over aircrafts are registrable as bills of sale under section 80(2)(c) of the CO².

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).

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

Currently, it is unclear whether a charge on calls made but not paid, registrable under section 80(2)(g) of the CO, should also cover a charge on instalments due, but not paid, on the issue price of the shares as these instalments are not calls in the strict sense.

(c) Charges for the purpose of securing any issue of debentures

Currently, charges for the purpose of securing any issue of debentures are registrable under section 80(2)(a) of the CO. Typically, issues of debentures are supported by a floating charge or a fixed charge. Hence, this head is redundant and overlaps with other heads of registrable charges under section 80(2) of the CO.

(d) Lien on subfreights

Currently, there are divergent judicial views as to whether a shipowner's lien on subfreights is registrable as a charge on book debts or a floating charge or whether it is a charge at all³.

(e) Cash deposits

Currently, a charge over cash deposits could arguably be registrable under section 80(2)(e) of the CO as a charge over book debts.

Proposal and key provisions in the Bill

6. To remove the ambiguities and dispense with redundant items, we will make the following changes:-

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

³ There is judicial authority to support the principle that a shipowner's contractual lien on subfreights is a charge on book debts (*Re Welsh Irish Ferries Ltd* [1986] Ch 471) or a floating charge (*The Annangel Glory* [1988] 1 Lloyd's Rep 45) 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 (Lord Millett in *Re Brumark Ltd: Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, at paragraph 41).

Clause 333(1)(h) expressly provides that a charge on an aircraft or any share in an aircraft is registrable.

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

Clause 333(1)(f) expressly makes a charge on instalments due, but not paid, on the issue price of shares registrable.

(c) Charges for the purpose of securing any issue of debentures

Under the CB, this head of registrable charge is removed.

(d) Lien on subfreights

As charterparties are usually negotiated by shipbrokers (not lawyers) and are of relatively short duration, requiring a lien to be registered is inconvenient from a commercial perspective. **Clause 333(4)** clarifies that a shipowner's lien on subfreights shall not be regarded as a charge on book debts or as a floating charge and is therefore not registrable.

(e) Cash deposits

Clause 333(3)(b) stipulates that if a company maintains a deposit of money with another person, a charge on the company's right to repayment is not a charge on book debts of the company. The proposal is based on the fact that such charges are normally taken over credit balances with financial institutions in the form of charge-backs with the depository 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 balance. Moreover, as a charge-back, such charges would have the effect of a set-off which of itself does not require registration.

Overseas experience

7. In Singapore, a charge on a ship or aircraft or any share in a ship or aircraft is registrable⁴. In Australia, a charge for the purpose of

⁴ Section 131(3)(i) of the Singapore Companies Act (SCA).

securing any issue of debentures is not a registrable charge⁵. The UK Companies Act 1989 (UKCA 1989)⁶ specifically stated that a shipowner's lien on subfreights does not constitute a charge on book debts or a floating charge.

Public consultation

8. We consulted the public on this issue in a topical consultation in 2008⁷, and during the second phase consultation of the draft CB⁸. In the topical consultation, there was majority support for making charges on aircrafts and interests in them registrable, removing the requirement for registration of a charge for the purpose of securing any issue of debentures, and excluding lien on subfreights and cash deposits from the registrable head of "book debts". In the second phase consultation on the draft CB, some suggested that all charges should be registrable, while those types of charges not appropriate for registration can be specified as exceptions. We do not favour such a negative listing approach, as in complex financial transactions, charges not intended to be registrable might be inadvertently caught. In addition, the current positive listing approach has been working well and is familiar to practitioners. In any event, the definitional problem (i.e. how to define charges that should be made exceptions) and the need to update the list over time to suit the prevailing needs will remain, even if the negative listing approach is adopted.

Replacing the automatic acceleration of repayment obligation (Clause 336)

Current position

9. Section 80(1) of the 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 would automatically become immediately

⁵ Section 262 of the Australia Corporations Act (ACA).

⁶ Section 93 of the UKCA 1989. The provision was not implemented in the UK and not restated in the UKCA 2006.

⁷ Financial Services and the Treasury Bureau (FSTB), *Consultation Conclusions on Company Names, Directors' Duties, Corporate Directorship and Registration of Charges* (December 2008) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/cdrc_conclusion_e.pdf).

⁸ FSTB, *Consultation Conclusions on Second Consultation on the Draft Companies Bill* (October 2010) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion_e.pdf).

payable. We note that this statutory acceleration of repayment may create problems for banks, as the acceleration arises automatically.

Proposal and key provision in the Bill

10. **Clause 336(6)** replaces the “automatic” acceleration provision with a “discretionary” acceleration provision, giving a choice to the lender as to whether the secured amount is to become immediately payable.

Public consultation

11. In the 2008 topical consultation, the vast majority of respondents supported the proposal, while in the second phase consultation of the draft CB, no objection was received.

Requiring a certified copy of the charge instrument to be registrable and available for public inspection (Clauses 334, 335 and 337 to 339)

Current position

12. The CO requires a charge instrument (if any) together with prescribed particulars of the charge in a specified form⁹ to be submitted to the Registrar for registration. However, only the prescribed particulars are required to be registered and made available for public inspection¹⁰ 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.

Proposal and key provisions in the Bill

13. We consider that it would be desirable to make available to those who search the Register more detailed information as to the charges. Therefore, **clauses 334(1) and (2), 335(1) and (2), 337(2), 338(3) and 339(2) and (3)** provide that both a certified copy of the charge instrument (if any) and the prescribed particulars of the charge are registrable and

⁹ The prescribed particulars are contained in Form M1.

¹⁰ Only those prescribed particulars as set out in section 83(1) of the CO are required to be entered in the public register kept by the Registrar and made available for public inspection.

available for public inspection¹¹. The availability of a certified copy of the charge instrument will give rise to constructive notice of all the terms in the charge instrument, including negative pledge clauses, to those who may reasonably be expected to search the Register, such as banks, financiers and relevant professionals.

Public consultation

14. In the 2008 topical consultation, the majority of the respondents supported the proposal. Some considered that the charge documents should not be made available for public inspection as this would disclose the terms of the charge to parties not privy to the transaction. As the proposal will enhance disclosure and given the majority support in the 2008 topical public consultation, and the fact that no strong objection was received in the 2010 second phase consultation on the draft CB, we will proceed with the proposal. Any commercially sensitive information may be contained in a document separate from the charge deed.

Shortening the period for delivery to the Registrar of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month (Clauses 334, 335 and 337 to 339)

Current position

15. The CO requires delivery of a charge instrument (if any) and its prescribed particulars for registration within five weeks. It is therefore possible that the prescribed particulars will only be visible on the public register at the end of the five-week period.

Proposal and key provisions in the Bill

16. To minimise the period during which the particulars of a charge could be invisible to outside parties, **clauses 334(5), 335(6), 337(3), 338(4) and 339(5)** shorten the delivery period to one month.

¹¹ The particulars of a charge required for registration under the CB are to be contained in a specified form of “statement of the particulars of a charge”. The statement will contain fewer details than as currently required under the CO, since a certified copy of the charge instrument itself will be registered. Where a registrable charge created by the company is not registered in time, the charge will be void as against the liquidator and creditors (clause 336(4)), as is the case under section 80 of the CO.

Overseas experience

17. In the UK, the period for delivery is 21 days¹². We proposed the same in the 2010 second phase consultation on the draft CB, but subsequently amended to “one month” given the views collected. Please see paragraph 18 below.

Public consultation

18. In the 2008 topical consultation, the majority of the respondents supported the proposal to shorten the period to register a charge to 21 days. However, in the 2010 second phase consultation on the draft CB, some suggested that a period longer than 21 days should be allowed, especially for charges that are executed outside Hong Kong. To address the concerns, we have changed “21 days” to “one month” in the CB to strike a reasonable balance.

Requiring a certified copy of the written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection (Clause 344)

Current position

19. Under the CO, if a debt secured by a registered charge has been satisfied, an application in the specified form (Form M2) may be made to the Registrar for entering on the Register a memorandum of satisfaction. Likewise, where a property or undertaking has been released from a registered charge or has ceased to form part of the company’s property or undertaking, the Registrar will, upon application, enter on the Register a memorandum of release or cessation. Such applications have to be accompanied by evidence of discharge, usually in the form of a deed of release or discharge.

20. Currently, only the memoranda of satisfaction or release are open for public inspection, but the evidence of discharge is neither registered nor available for public inspection.

¹² Section 870 of the UKCA 2006.

Proposal and key provision in the Bill

21. **Clause 344(4)** provides that a certified copy of the evidence of discharge also has to be registered and made available for public inspection.

Public consultation

22. In the second phase consultation of the draft CB, some considered that the Form M2 signed by the chargee should continue to be sufficient evidence of satisfaction or release, and that it is not necessary to make the deed of discharge registrable and available for public inspection. We consider that the deed of release or discharge is the primary evidence of release or discharge and should be registered and made available for inspection.

Clarifying the effect of an order made by the Court to extend the time for registration in respect of criminal liability already incurred (Clause 345)

Current position

23. Under section 86(2) of the CO, if the Court grants relief to extend the time for registration of a charge, the Court can direct that the relief will not relieve the company or its officer from the criminal liability incurred under section 81 of the CO for their failure to register. It is, however, unclear in section 86(2) whether in the absence of any court direction, the relief granted would automatically relieve the company and the officers from the criminal liability.

Proposal and key provisions in the Bill

24. To remove the abovementioned uncertainty, **clause 345(4) and (5)** states that unless the Court directs otherwise, such criminal liability incurred¹³ would be extinguished provided that registration is effected within the extended time.

¹³ For offences under clauses 336(2), 337(5), 338(6), 339 (7), 340(8) or 342(1) of the CB, or sections 81, 82 or 91(6) of the CO.

Public consultation

25. The issue was covered in the second phase consultation of the draft CB. No objection was received.

Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge (Clause 346)

Current position

26. Currently, section 86(1) of the CO allows the Court to rectify an omission or misstatement of the particulars of a charge or in the memoranda of satisfaction or release that have been registered.

Proposal and key provisions in the Bill

27. As the CB will make a certified copy of the charge instrument (if any) and evidence of discharge registrable and open to public inspection, **clause 346(1)(a)(i) and (iii)** empowers the Court to also rectify an omission or misstatement of the particulars in the registered charge instrument and evidence of discharge. **Clause 346(4)** specifies that such powers of rectification will be subject to the common law rules and equitable principles applied to registration of documents, i.e. to the extent that the instrument has failed to accurately record the intention of the parties¹⁴.

Public consultation

28. In the 2010 second phase consultation on the draft CB, some considered that it is not necessary to extend the Court's power to rectify the underlying charge instrument, as such rectification could be dealt with under the general common law mechanisms for rectifying contracts. As the proposal would provide a platform to allow an omission or misstatement of a registered instrument in the public register to be rectified, and as the power would be exercised subject to the extent as permitted by common law rules and equitable principles, we consider it preferable to proceed with the proposal.

¹⁴ 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.

PUBLIC COMMENTS

29. We consulted the public on registration of charges under the CO in April to June 2008¹⁵. We have consulted the public on the draft Bill in two phases in December 2009 to March 2010 and May to August 2010 respectively. Part 8 was covered by the second phase consultation. The public comments on our major proposals are discussed above. For other comments on Part 8 and our response, they are set out in Appendix III to the consultation conclusions issued on 25 October 2010¹⁶.

**Financial Services and the Treasury Bureau
Companies Registry
5 May 2011**

¹⁵ See footnote 7.
¹⁶ See footnote 8.