

立法會
Legislative Council

LC Paper No. CB(1)1182/12-13(01)

Ref : CB1/SS/5/12

**Subcommittee on Subsidiary Legislation Made under
the New Companies Ordinance**

**Updated background brief
(as at 31 May 2013)**

Purpose

This paper provides background information on the subsidiary legislation to implement the new Companies Ordinance ("CO"). It also summarizes the discussions of the Bills Committee on Companies Bill ("the Bills Committee") on issues related to the third batch of subsidiary legislation made under the new CO.

Background

2. The CO was enacted in 1932 with its major provisions originated from the 1929 Companies Act of the United Kingdom ("UK"). The legislation provides the legal framework which enables the business community to form and operate companies, and sets out the parameters within which companies must operate so as to safeguard the interests of those parties who have dealings with them such as shareholders and creditors. In order to modernize the company law to further enhance Hong Kong's status as a major international business and financial centre, the Administration launched a comprehensive rewrite of the CO ("CO Rewrite") in mid-2006, and conducted three topical public consultations in 2007 and 2008 to gauge public views. A draft bill was published for further public consultation in two phases from December 2009 to August 2010.

3. In view of the extensive nature of the CO Rewrite, the Administration has adopted a phased approach by tackling the provisions which affect the operation of live companies in Hong Kong by introducing the Companies Bill ("CB") into

the Legislative Council ("LegCo") in January 2011. The Bills Committee was formed in February 2011 to scrutinize the CB. The hyperlink of the Bills Committee's report is in **Appendix I**. The CB¹ was enacted on 12 July 2012.

Subsidiary legislation to be made for implementation of the new Companies Ordinance

4. The new CO has adopted the same approach as the existing CO of prescribing technical requirements, operational details and fees items in subsidiary legislation so as to facilitate future updates. The Administration has identified 13 pieces of subsidiary legislation that are required to implement the new CO, amongst which 12 pieces will be made by the Financial Secretary ("FS") and subject to the negative vetting procedure of the LegCo, and one piece will be made by the Chief Justice ("CJ") and subject to the positive vetting procedure. A list of the subsidiary legislation is in **Appendix II**.

5. The Financial Services and the Treasury Bureau and the Companies Registry ("CR") have jointly published documents for public consultation on the subsidiary legislation for implementation of the new CO in two phases in September and November 2012². According to the Administration, a total of 34 submissions were received by end-2012 and the respondents were generally supportive of the proposed subsidiary legislation. The Administration's plan is to introduce the subsidiary legislation subject to negative vetting in batches beginning from the first quarter of 2013. As regards the subsidiary legislation subject to positive vetting, it will be introduced as and when ready. Subject to LegCo's scrutiny, the subsidiary legislation will commence operation together with the new CO, tentatively in the first quarter of 2014. At the meeting of the Panel on Financial Affairs ("FA Panel") on 7 January 2013, the Administration provided an overview on the 13 pieces of proposed subsidiary legislation and its plan to submit the subsidiary legislation to LegCo in batches³.

¹ The enacted CB was published in the gazette on 10 August 2012 as the new CO (Ordinance no. 28 of 2012). The new CO will be given a new Chapter number. The existing CO is still Cap. 32 but re-titled as Companies (Winding up and Miscellaneous Provisions) Ordinance.

² The hyperlinks of the Administration's consultation papers containing details of the scope and draft provisions of the proposed subsidiary legislation are available at Appendix I.

³ The Administration issued an information paper "New arrangement for the inspection of personal information on the Companies Register under the new Companies Ordinance" to the FA Panel on 28 March 2013 indicating its plan not to make the subsidiary legislation concerning the new inspection arrangement at this stage, and not to include the relevant provisions in the commencement notice to be made in the fourth quarter of 2013 for commencing the new CO. The FA Panel was consulted on the way forward for the new inspection arrangement at its meeting held on 8 April 2013.

First and second batches of subsidiary legislation

6. At the House Committee meeting on 8 February 2013, Members agreed to form a single subcommittee to study the 13 pieces of subsidiary legislation to be made under the new CO. The first batch of five pieces of subsidiary legislation was gazetted on 1 February 2013 and tabled at LegCo for negative vetting on 6 February 2013⁴. The Subcommittee on Subsidiary Legislation Made under the New Companies Ordinance ("the Subcommittee") has completed scrutiny of the first batch of subsidiary legislation and reported its deliberations to the House Committee in March 2013. The First Report of the Subcommittee is hyperlinked in **Appendix I**.

7. The second batch of two pieces of subsidiary legislation⁵ subject to the negative vetting procedure of LegCo were gazetted on 22 March 2013 and tabled before LegCo at the meeting of 27 March 2013. The Subcommittee has studied the subsidiary legislation in April 2013. In response to the views of the Subcommittee, the Administration has originally planned to make a few amendments to the subsidiary legislation. However, as LegCo was unable to deal with the motion to extend the scrutiny period of the subsidiary legislation to 15 May 2013 before the expiry of their 28-day scrutiny period, the Administration was therefore unable to move motions to make the proposed amendments. The Subcommittee reported its deliberations to the House Committee on 3 May 2013. The Second Report of the Subcommittee is hyperlinked in **Appendix I**. The Administration advised the Subcommittee vide a letter dated 14 May 2013 that it would seek to give effect to the proposed amendments to the two pieces of subsidiary legislation by way of amendment regulations to be introduced together with the third batch of subsidiary legislation.

Third batch of subsidiary legislation

Companies (Unfair Prejudice Petitions) Proceedings Rules

8. Sections 723 to 727 of the new CO restate and expand the arrangement under the existing CO for members of a company to petition to the court for relief if the company's affairs are being or have been conducted in a manner unfairly prejudicial to any member of the company. The Companies (Unfair Prejudice Petitions) Proceedings Rules, a subsidiary legislation subject to the

⁴ The first batch of five pieces of subsidiary legislation are: Companies (Words and Expressions in Company Names) order; Companies (Disclosure of Company Name and Liability Status) Regulation; Companies (Accounting Standards (Prescribed Body)) Regulation; Companies (Directors' Report) Regulation and Companies (Summary Financial Reports) Regulation.

⁵ The second batch of two pieces of subsidiary legislation are: Companies (Revision of Financial Statements and Reports) Regulation and Companies (Disclosure of Information about Benefits of Directors) Regulation.

positive vetting procedure of LegCo, was made by CJ pursuant to section 727 of the new CO to set out the procedures on unfair prejudice petitions, including procedural requirements regarding presentation of the petition, service of the petition, drawing up and the service of an order as well as other relevant matters. According to the Administration, the Rules mainly re-enact the procedural requirements set out in the relevant provisions in the Companies (Winding-Up) Rules of the existing CO (Cap. 32 sub. leg. H).

Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013 and Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013

9. The captioned amendment Regulations were made by FS to give effect to proposed amendments to the two pieces of subsidiary legislation which have been scrutinized by the Subcommittee under the second batch of subsidiary legislation as explained in paragraph 7 above. The two amendment Regulations were gazetted on 24 May 2013 and tabled at the LegCo meeting of 29 May 2013 for negative vetting. The major amendments are as follows:

- (a) *Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013* – mainly to amend section 20(4)a of the Regulation such that the maximum period of imprisonment will be 12 months (instead of two years in the Regulation); and to introduce a new provision, section 20(4A), to stipulate that a person may be sentenced to imprisonment only if the offence relating to the auditor's report on revised financial statements under section 20(3) was committed wilfully; and
- (b) *Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013* – to give effect to a number of minor textual amendments to both the English text and the Chinese text of the Regulation for further elucidating the requirements concerned and for better flow and consistency.

Other four pieces of subsidiary legislation

10. A brief description on the other four pieces of subsidiary legislation gazetted on 24 May 2013 and tabled at the LegCo meeting of 29 May 2013 for negative vetting is given below:

- (a) *Company Records (Inspection and Provision of Copies) Regulation* (made by FS under sections 356 and 657 of the new CO) sets out the arrangements and procedures concerning company records kept by a company in respect of – (i) the place for keeping of records;

(ii) the inspection of records⁶; and (iii) the provision of copies of records⁷. The Regulation applies to those company records which the new CO has identified and stipulated as being subject to this Regulation. For example, it does not apply to accounting records which are governed by sections 373 to 378 of the new CO.

- (b) *Companies (Model Articles) Notice* (made by FS under section 78 of the new CO) prescribes model articles of association ("AA")⁸, which a company to be incorporated under the new CO may adopt in part or in its entirety at its volition⁹. Three distinctive sets of model articles are prescribed for (i) public companies limited by shares (Schedule 1 to the Notice); (ii) private companies limited by shares (Schedule 2 to the Notice); and (iii) companies limited by guarantee (Schedule 3 to the Notice).
- (c) *Companies (Non-Hong Kong Companies) Regulation* (made by FS under sections 804 and 805 of the new CO) basically restates the requirements and arrangements (with minor changes where appropriate) applicable to non-Hong Kong companies ("NHKCs") under Part XI of the existing CO. NHKCs are companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong. The concerned existing requirements and arrangements are set out as follows –
- (i) the particulars and documents required to accompany application for registration of a NHKCs; annual returns; and returns on change of particulars or termination of authorization of the authorized representative of a registered NHKC;

⁶ Including (i) the manner of making a request for inspection of records, (ii) the fee payable for an inspection and (iii) the obligations of companies to make available company records for inspection during business hours and to permit a copy of company records to be made in the course of inspection. It also provides for the powers of the Court to make certain orders relating to the inspection of company records.

⁷ Including the obligation of companies to provide copies of company records within five business days upon receipt of the request or payment of the prescribed fees for the copies (whichever is the later). It also prescribes the fee payable for a copy of company records and empowers the Court to make certain orders relating to the provision of a copy of company records.

⁸ Currently, the constitutional documents of a company formed in Hong Kong are the Memorandum of Association ("MA") and AA. The MA used to contain the objects clause and the authorized capital of the company, whereas AA are a set of rules for regulating the internal management of a company which also serves as a principal source of shareholders' rights. With the less significance of MA and the removal of the authorized capital following the migration to no par, as well as to align with other common law jurisdictions such as Australia and New Zealand requiring companies to have only a single constitutional document, the requirement for an MA for companies was abolished under the new CO.

⁹ An existing company may, however, amend its articles to follow the model articles at its volition.

- (ii) the eligibility and detailed requirements concerning the registration of certified translations of the domestic name of a NHKC; and
 - (iii) the requirements applicable to the revised accounts of a registered NHKC.
- (d) *Companies (Fees) Regulation* (made by FS under sections 26 and 909 of the new CO) – to set out the fees payable to the Registrar of Companies ("the Registrar") in respect of the performance of the Registrar's functions under the new CO or in respect of the provision of services or facilities by the Registrar¹⁰, as well as miscellaneous fees. The fees are set out in four schedules to the Regulation for the Registrar's functions in relation to: (i) the registration of a company or registration of documents; (ii) inspection or obtaining documents or information on the Companies Register; (iii) granting of approval or licence under the new CO; and (iv) miscellaneous fees. The Regulation also subjects companies limited by guarantee to an escalating scale to the annual registration fee for late filing of annual returns which is currently applied to companies limited by shares and NHKCs, so as to encourage compliance with the statutory filing requirement in light of increasing public expectation of corporate transparency. According to the Administration, the items of fees under the Regulation are in line with the corresponding items or fee level as stipulated in the existing CO. The escalating scale in respect of companies limited by guarantee is the same as the one applicable to private companies limited by shares.

Major concerns/views expressed by Members

11. The ensuing paragraphs summarize the major views and concerns raised by Members at the meetings of the Bills Committee which may be relevant to the third batch of subsidiary legislation.

Place for keeping and inspection of records and registers of a company available

12. Section 615 of the new CO provides that a company must keep records mentioned in section 618 at the company's registered office, or a prescribed place (to be set out in the regulations made under section 657) for inspection. Members of the Bills Committee suggested that companies should be allowed to

¹⁰ Including services and facilities provided by the Registrar under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

keep its records and registers in more than one place as many companies in Hong Kong had to keep records in different warehouses. The Administration has taken on board the Bills Committee's suggestion to allow a company to keep its records at more than one place in Hong Kong and to allow inspection to take place at a place other than the place(s) at which the records are kept.

Penalty levels

13. To ensure that offences of similar nature under the new CO would be punishable with similar penalties and that the penalties involved reflected the relative seriousness of the offences, and to align the penalties for offences committed by Hong Kong companies and those by non-Hong Kong companies, the Administration had taken an exercise to align and rationalize the penalty levels for all offences under the new CO. Bills Committee members had enquired about the general rationale for setting different levels of fines for different offences in the alignment exercise. The Administration explained that the general principles were that penalty should reflect the relative seriousness of the offences and offences of similar nature or seriousness should be punishable with similar penalties. The Bills Committee had also examined the corresponding levels of daily default fines to different levels of fines for offences having regard to the need to relieve the burden on Small and Medium-sized Enterprises relating to minor offences while ensuring quick remedial actions by offenders. Bills Committee members also considered it important for CR to formulate clear policies for prosecuting offences under the new CO in order to enhance consistency and transparency in the exercise of the power.

Latest development

14. The Subcommittee on Subsidiary Legislation Made under the New Companies Ordinance will commence scrutiny of the third batch of subsidiary legislation made under the new CO at the meeting on 3 June 2013.

Relevant papers

15. A list of the relevant papers on the LegCo website is in **Appendix I**.

List of relevant papers

Date	Event	Papers/Minutes of meeting
25 February 2011	Meeting of the Bills Committee on Companies Bill	Background brief on the Companies Bill (LC Paper No. CB(1)1406/10-11(01)) http://www.legco.gov.hk/yr10-11/english/bc/bc03/papers/bc030225cb1-1406-1-e.pdf Legislative Council Brief on Companies Bill (File Ref.: CBT/17/2C) http://www.legco.gov.hk/yr10-11/english/bills/brief/b20_brf.pdf
29 June 2011	Council meeting	Report of the Bills Committee on Companies Bill (LC Paper No. CB(1)2221/11-12)) http://www.legco.gov.hk/yr10-11/english/bc/bc03/reports/bc030627cb1-2221-e.pdf
12 July 2011	Council meeting	Companies Bill passed at the Council meeting http://www.legco.gov.hk/yr11-12/english/ord/ord028-12-e.pdf
September 2012	Public consultation on subsidiary legislation for implementation of the new Companies Ordinance (Phase One)	Phase One consultation document http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/sub_leg_new_comp_ordinance_ph1_e.pdf
November 2012	Public consultation on subsidiary legislation for implementation of the new Companies Ordinance (Phase Two)	Phase Two consultation document http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/sub_leg_new_comp_ordinance_ph2_e.pdf

Date	Event	Papers/Minutes of meeting
7 January 2013	FA Panel meeting	<p>Administration's paper (LC Paper No. CB(1)358/12-13(04)) http://www.legco.gov.hk/yr12-13/english/panels/fa/papers/fa0107cb1-358-4-e.pdf</p> <p>Administration's paper (LC Paper No. CB(1)385/12-13(02)) http://www.legco.gov.hk/yr12-13/english/panels/fa/papers/fa0107cb1-385-2-e.pdf</p> <p>Background brief (LC Paper No. CB(1)358/12-13(05)) http://www.legco.gov.hk/yr12-13/english/panels/fa/papers/fa0107cb1-358-5-e.pdf</p> <p>Follow-up paper (LC Paper No. CB(1)508/12-13(01)) http://www.legco.gov.hk/yr12-13/english/panels/fa/papers/fa0107cb1-508-1-e.pdf</p>
23 January 2013	Council meeting	<p>Written question raised by Dr Hon Kenneth CHAN on "Policy on public access to government information"</p> <p>Press release http://www.info.gov.hk/gia/general/201301/23/P201301230307.htm</p> <p>Hansard (pages 6-10) http://www.legco.gov.hk/yr12-13/english/counmtg/hansard/cm0123-translate-e.pdf</p>
30 January 2013	Council meeting	<p>Written question raised by Hon Ronny TONG on "Public consultation on draft bills conducted by Government".</p> <p>Press release http://www.info.gov.hk/gia/general/201301/30/P201301300434.htm</p> <p>Hansard (pages 43-49) http://www.legco.gov.hk/yr12-13/english/counmtg/hansard/cm0130-translate-e.pdf</p>

Date	Event	Papers/Minutes of meeting
30 January 2013	-	<p>Legislative Council Brief on Companies Ordinance – Companies (Words and Expressions in Company Names) Order, Companies (Disclosure of Company name and Liability Status) Regulation, Companies (Accounting Standards (Prescribed Body)) Regulation, Companies (Directors' Report) Regulation and Companies (Summary Financial Reports) Regulation (CBT/7/6C)</p> <p>http://www.legco.gov.hk/yr12-13/english/subleg/brief/7-11_brf.pdf</p>
8 February 2013	Meeting of the House Committee	<p>Legal Service Division Report on Subsidiary Legislation Gazetted on 1 February 2013 (LC Paper No. LS23/12-13)</p> <p>http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0208ls-23-e.pdf</p>
21 February 2013 to 12 March 2013	Meetings of the Subcommittee on Subsidiary Legislation Made under the New Companies Ordinance ("the Subcommittee")	<p>Background brief (LC Paper No. CB(1)579/12-13(01))</p> <p>http://www.legco.gov.hk/yr12-13/english/hc/sub_leg/sc05/agenda/sc0520130221.htm</p> <p>First report of the Subcommittee (LC Paper No. CB(1)727/12-13)</p> <p>http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0315cb1-727-e.pdf</p>
21 March 2013	-	<p>Legislative Council Brief on Companies Ordinance – Companies (Revision of Financial Statements and Reports) Regulation and Companies (Disclosure of Information about Benefits of Directors) Regulation (CBT/7/6C)</p> <p>http://www.legco.gov.hk/yr12-13/english/subleg/brief/34_35_brf.pdf</p>

Date	Event	Papers/Minutes of meeting
12 April 2013	Meeting of the House Committee	Legal Service Division Report on Subsidiary Legislation Gazetted on 22 March 2013 (LC Paper No. LS34/12-13) http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0412ls-34-e.pdf
9 and 16 April 2013	Meetings of the Subcommittee	Updated background brief (LC Paper No. CB(1)802/12-13(01)) http://www.legco.gov.hk/yr12-13/english/hc/sub_leg/sc05/papers/sc050409cb1-802-1-e.pdf Second report of the Subcommittee (LC Paper No. CB(1)949/12-13) http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0503cb1-949-e.pdf
15 May 2013	-	Legislative Council Brief on Companies (Unfair Prejudice Petitions) Proceedings Rules (CBT/7/6C) http://www.legco.gov.hk/yr12-13/english/subleg/brief/sc05_brf.pdf
22 May 2013	-	Legislative Council Brief on Companies (Revision of Financial Statements and Reports)(Amendment) Regulation 2013 and Companies (Disclosure of Information about Benefits of Directors)(Amendment)Regulation 2013) (CBT/7/6C) http://www.legco.gov.hk/yr12-13/english/subleg/brief/75_76_brf.pdf

Date	Event	Papers/Minutes of meeting
22 May 2013	-	Legislative Council Brief on Companies (Model Articles) Notice, Company Records (Inspection and Provision of Copies) Regulation, Companies (Non-Hong Kong Companies) Regulation and Companies (Fees) Regulation (CBT/7/6C) http://www.legco.gov.hk/yr12-13/english/subleg/brief/77-80_brf.pdf
24 May 2013	Meeting of the House Committee	Legal Service Division Report on Proposed Resolution under section 727 of the Companies Ordinance (28 of 2012) (LC Paper No. LS55/12-13) http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0524ls-55-e.pdf
31 May 2013	Meeting of the House Committee	Legal Service Division Report on Subsidiary Legislation Gazetted on 24 May 2013 (LC Paper No. LS56/12-13) http://www.legco.gov.hk/yr12-13/english/hc/papers/hc0531ls-56-e.pdf

**A list of the 13 pieces of subsidiary legislation under
the new Companies Ordinance**

On company names

- (a) Companies (Words and Expressions in Company Names) Order
- (b) Companies (Disclosure of Company Name and Liability Status) Regulation

On company records

- (c) Company Records (Inspection and Provision of Copies) Regulation
- (d) Companies (Residential Addresses and Identification Numbers) Regulation

On accounts and audit

- (e) Companies (Accounting Standards (Prescribed Body)) Regulation
- (f) Companies (Disclosure of Information about Benefits of Directors) Regulation
- (g) Companies (Directors' Report) Regulation
- (h) Companies (Summary Financial Reports) Regulation
- (i) Companies (Revision of Financial Statements and Reports) Regulation

On others matters

- (j) Companies (Model Articles) Notice
- (k) Companies (Non-Hong Kong Companies) Regulation
- (l) Companies (Fees) Regulation
- (m) Companies (Unfair Prejudice Petitions) Proceedings Rules

- Note :
- (1) Items (a) to (c), and (e) to (l) have been made by the Financial Secretary and are subject to the negative vetting procedure.
 - (2) Item (m) has been made by the Chief Justice and is subject to the positive vetting procedure.
 - (3) Refer to footnote 3 in the main paper for item (d).