

**For discussion
on 7 January 2013**

**Legislative Council
Panel on Financial Affairs**

**Subsidiary Legislation for Implementation of
the New Companies Ordinance**

PURPOSE

This paper seeks Members' views on the subsidiary legislation proposed to be made under the new Companies Ordinance ("new CO").

BACKGROUND

2. The rewrite of the Companies Ordinance ("existing CO") (Cap.32) aims to provide a modernised legal regime for the formation and operation of companies in Hong Kong. In January 2011, we introduced the Companies Bill ("CB") into the Legislative Council ("LegCo") and a Bills Committee was formed to scrutinise the Bill. The CB was passed on 12 July 2012 and it was subsequently gazetted as the new CO (28 of 2012) on 10 August 2012. Our target is to bring the new CO into operation in the first quarter of 2014.

OVERVIEW

3. The new CO contains a number of provisions which empower respectively the Financial Secretary and the Chief Justice to make subsidiary legislation on various administrative, procedural and technical matters. The subsidiary legislation mainly re-enacts matters prescribed in existing CO provisions and regulations to be repealed upon the commencement of the new CO. As the subsidiary legislation will form part of the new regime, they need to be enacted before the new CO can be brought into operation. Preparation of the subsidiary legislation commenced soon after passage of the CB.

4. A list of the proposed subsidiary legislation is as follows –

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

THE PROPOSED SUBSIDIARY LEGISLATION

5. Following the completion of public consultation on the draft subsidiary legislation (see paragraphs 28 to 29), we propose to introduce the subsidiary legislation into LegCo by batches beginning from the first quarter of 2013. Brief descriptions of each piece of the subsidiary legislation and the key proposals are set out in paragraphs 6 to 25 below.

(a) Companies (Words and Expressions in Company Names) Order¹

6. In accordance with section 20(2)(b) of the existing CO, approval has to be sought from the Companies Registry (“CR”) should a company wish to register a name containing any words or expressions listed in the existing Companies (Specification of Names) Order (Cap.32E). This section has been substantially re-enacted as section 100(2)(b) of the new CO. The proposed Order will set out the updated list of words and expressions. It basically follows the existing list in Cap.32E but with the addition of “levy” and “tourism board” (and their Chinese equivalents) to guard against the registration of a company name purporting to be responsible for collection of levies or to be the Hong Kong Tourism Board. We will also take the opportunity of this legislative exercise to delete those words and expressions which are obsolete or no longer required to be included.

(b) Companies (Disclosure of Company Name and Liability Status) Regulation²

7. This Regulation will re-enact the existing requirements in sections 93 and 94 of the existing CO, which concern the display and disclosure of company names at the company’s offices and in its communication documents, etc. Having regard to technological advancement, we propose to modernise the requirements by providing for the manner of displaying a company name via electronic devices. We also propose to clarify the law by providing that a company name and the liability status must also be disclosed in documents and instruments in electronic form, and extend such requirements to cover the company’s websites.

(c) Company Records (Inspection and Provision of Copies) Regulation

8. At the suggestion of the Bills Committee on CB, the new CO contains provisions allowing a company to keep its company records³ at

¹ This Regulation was entitled the Companies (Specification of Names) Order in the consultation document. It has been renamed to better reflect its contents.

² This Regulation was entitled the Companies (Trading Disclosures) Regulation in the consultation document. It has been renamed to better reflect its contents.

³ In the new CO context, the term “company records” is defined in section 654 to mean any register, index, agreement, memorandum, minutes or other document required by the new CO to be kept by a company, but does not include accounting records.

places other than its registered office, such as warehouses and back offices. This Regulation will set out the arrangements for the inspection of such records by prescribing the manner for requesting an inspection, the fees payable for inspection in the case of a non-member, as well as the time, duration and manner of inspection.

9. Under the existing CO, there are different requirements for request of copies of different types of records. We propose to standardise the relevant requirements in this Regulation. In particular, this Regulation will provide for a specified time period for a company to provide the copies of company records requested (proposed to be not more than five working days) as well as the fees payable for obtaining such copies⁴.

10. Pursuant to sections 644(1)(b) and 651(1) of the new CO, a company may withhold part of the identification numbers of a director, a reserve director or a company secretary in its register of directors or register of company secretaries. The detailed manner as to how a company may withhold such information will also be prescribed in this Regulation.

(d) Companies (Residential Addresses and Identification Numbers) Regulation

11. Section 49 of the new CO allows for the withholding of the usual residential address and the full identification number of an individual (usually a director or a company secretary) (i.e. “withheld information”) in a document registered with CR from public inspection upon application by the individual concerned. Section 54 further provides that such information in a document registered with CR after commencement of the new CO will not be made available for public inspection (i.e. “protected information”). To allow legitimate access to the withheld or protected information, sections 51(3) and 58(3) permit CR to disclose such information to specified types of persons.

⁴ For provision of company records in hard copy form, the maximum fees payable under the existing CO for obtaining a copy vary depending on the types of records. The more common rate is \$2 for each 100 words. We propose to abolish the word-count basis and adopt a per-page basis (\$5 per page) in this Regulation. As for copies of company records in electronic form, we also propose take on board the views gathered from public consultation by specifying that a company may impose a reasonable fee for provision of such copies.

12. This Regulation will provide for the application procedures for the withholding of personal information and the disclosure of withheld or protected information. It will also specify the types of persons who may make an application to CR for access to such information and the applicable conditions, which are as follows –

- (a) the data subject may access his or her own information;
- (b) a person authorised in writing by a data subject may access the information relating to the data subject;
- (c) a member of a company may access the information in documents in respect of the company;
- (d) a public officer, a public body or a specified body may access the information required for performing its functions; and
- (e) a liquidator or a receiver under the Companies (Winding-up and Miscellaneous Provisions) Ordinance⁵ as well as a trustee in bankruptcy may access the information required for performing its functions.

(e) Companies (Accounting Standards (Prescribed Body)) Regulation

13. Section 380(4)(b) of the new CO stipulates that the financial statements of a company must comply with the applicable statements of standard accounting practices issued or specified by a body prescribed by subsidiary legislation. This Regulation specifies the Hong Kong Institute of Certified Public Accountants (“HKICPA”) as such a body⁶.

(f) Companies (Disclosure of Information about Benefits of Directors) Regulation

14. Sections 161 and 161B of the existing CO require the disclosure of information on payments relating to a director’s services (namely emoluments, pensions and compensation for termination) and dealings in

⁵ The existing CO will be renamed the Companies (Winding-up and Miscellaneous Provisions) Ordinance upon commencement of the new CO.

⁶ The accounting standards prescribed by the HKIPCA include the Hong Kong Financial Reporting Standards (“HKFRSs”), the Hong Kong Financial Reporting Standard for Private Entities (“HKFRS for PE”) and the Small and Medium-sized Entity Financial Reporting Standard (“SME-FRS”).

favour of directors (namely loans, quasi-loans and credit transactions⁷) in the company's accounts respectively. This Regulation will restate and consolidate the detailed disclosure requirements, including the separate regime for the disclosure of dealings in favour of directors by authorized financial institutions⁸. We have also taken the opportunity to refine the disclosure regime, for example –

- (a) the scope of emoluments will be clarified to include bonuses and the sums paid to a person for accepting office as a director;
- (b) the disclosure requirements applicable to non-cash benefits will be strengthened to require an indication of the nature of such benefits;
- (c) the references to “pensions” will be replaced by references to “retirement benefits” to more adequately reflect the intention of the disclosure regime; and
- (d) section 383(1)(f) of the new CO introduces a new requirement for the disclosure of information on the consideration provided to any third party for making available a director's services. This Regulation prescribes the detailed requirements in this respect.

(g) Companies (Directors' Report) Regulation

15. This Regulation will re-enact certain requirements concerning the contents of a directors' report (which are currently prescribed in section 129D(3) of the existing CO) with suitable modifications. To enhance corporate governance and transparency, we propose to expand the scope of disclosure to require the inclusion of –

- (a) information on equity-linked agreements entered into by a company; and
- (b) a summary of reasons given by a director who has resigned out of disagreement with the board of directors. This requirement will not be applied to companies that prepare simplified reports.

⁷ Including guarantees entered into and security provided by the company in relation to such dealings.

⁸ Authorized financial institutions refer to licensed banks, restricted licence banks and deposit-taking companies under the Banking Ordinance (Cap.155).

(h) Companies (Summary Financial Reports) Regulation

16. The existing CO allows a listed company to prepare its financial report in summary form (“summary financial report”) for sending to its members in place of the documents from which the report is derived. This arrangement is retained in the new CO with the eligibility for preparation of summary financial reports expanded to include non-listed companies that do not prepare simplified reports.

17. This Regulation will basically follow the existing Companies (Summary Financial Reports of Listed Companies) Regulation (Cap.32M) and set out the requirements on the forms and contents of a summary financial report as well as the relevant notifications and notices. Necessary modifications will be made to tie in with the changes brought by the new CO, e.g. a member will receive a copy of the summary financial report by default unless the member indicates otherwise.

(i) Companies (Revision of Financial Statements and Reports) Regulation

18. Under the existing CO, section 141E provides that the directors of a company may voluntarily revise its accounts (and make necessary consequential revisions to the summary financial report and the directors’ report) after the accounts have been provided to its members. The detailed requirements concerning the revised documents, the manner for which the provisions in the CO apply to the revised documents and the relevant offences which are prescribed in the existing Companies (Revision of Accounts and Reports) Regulation (Cap.32N) follow the general principle that the obligations and arrangements concerning the original documents also apply to the revised documents. Among others, the revised documents are subject to the same set of audit requirements that apply to the original documents.

19. Section 449 of the new CO which allows for the voluntary revision of financial statements is premised on the existing mechanism as described above. This Regulation will basically re-enact Cap.32N and follow the changes made in the provisions on accounts and audit in the new CO. In this connection, the matters provided in sections 407 and 408 of the new CO concerning the contents of an auditor’s report and auditor’s liability will correspondingly apply to the audit report on the revised financial statements.

(j) Companies (Model Articles) Notice

20. The CO has always provided standard articles of association⁹ for companies to choose to adopt upon their incorporation. This Notice will prescribe three sets of model articles for (i) public companies limited by shares; (ii) private companies limited by shares; and (iii) companies limited by guarantee respectively.

21. As compared to the standard articles provided under the existing CO¹⁰, the proposed improvements include, for example –

- (a) in respect of decision-making by directors, the model articles will consist of additional clauses to provide for written resolutions and the appointment and removal of alternate director;
- (b) in respect of the proceedings of general meetings, an article will be added to expressly state the rights of directors and non-members to attend and speak at general meetings whereas the articles relating to the effect, validity and the delivery of relevant notices for proxies will be elaborated; and
- (c) for matters relating to share capital, the rules relating to forfeiture of partly-paid shares will be set out in greater detail and an article will be added to deal with surrender of shares in lieu of enforcement of a call for payment. Amendments will also be made to reflect the greater flexibility resulting from migration to no-par shares in the new CO.

22. Apart from the above, we have also made considerable efforts to enhance the readability and user-friendliness of the model articles by re-organising the articles, presenting them in shorter paragraphs where practicable and adding headings for each article.

⁹ The articles of association are a set of rules for regulating the internal management of a company which also serves as a principal source of shareholders' rights. It is mandatory under the existing CO as well as the new CO for all companies incorporated in Hong Kong to have a set of articles of association.

¹⁰ These standard articles refer to Table A of the First Schedule to the existing CO in respect of companies limited by shares; and Table C in respect of companies limited by guarantee.

(k) Companies (Non-Hong Kong Companies) Regulation

23. Non-Hong Kong companies (“NHKCs”) (i.e. companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong) are currently subject to Part XI of the existing CO. Under the new CO, Part 16 deals with matters relating to NHKCs whereas the procedures and the detailed requirements including the documents to be submitted upon the registration of NHKCs, the furnishing of supporting documents or certified translation and the delivery of annual returns are to be prescribed by subsidiary legislation. This Regulation will basically restate the existing requirements and the arrangements in respect of these matters.

(l) Companies (Fees) Regulation

24. This Regulation will set out the fees payable to CR for its various functions. It will restate the existing fees set out in the Eighth Schedule of the existing CO and introduce new fees concerning (i) the withholding the residential addresses and full identification numbers in documents from public inspection and (ii) the disclosure of such information (see also paragraphs 11 and 12). On the other hand, the existing CO has been applying an escalating scale to the annual registration fee for late filing of annual returns by companies limited by shares since 1988. We propose to extend the arrangement to companies limited by guarantee, which are currently subject to a fixed annual registration fee, so as to encourage compliance with the statutory filing requirement in light of increasing public expectation of corporate transparency¹¹. The proposed escalating scale for companies limited by guarantee is the same as the existing scale applicable to private companies limited by shares. The proposed new fees are set out at Annex.

(m) Companies (Unfair Prejudice Petitions) Proceedings Rules¹²

25. 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

¹¹ Only 21.9% of companies limited by guarantee complied with the filing requirement on time in 2011-12, which is much lower than the compliance rate by companies limited by shares.

¹² This Regulation was entitled the Companies (Unfair Prejudice Proceedings) Rules in the consultation document. It has been renamed to better reflect its contents.

conducted in a manner unfairly prejudicial to any member of the company. While at present the existing Companies (Winding-up) Rules (Cap.32H) regulate the conduct of such proceedings, Cap.32H is primarily for winding up proceedings. We propose to regulate the conduct of applications relating to claims of unfair prejudice under the new CO regime by a specific set of rules instead of relying on Cap.32H. The Rules, to be made by the Chief Justice and subject to positive vetting procedures, will set out procedural requirements regarding the form of the petition, the service of the petition, the drawing up and the service of an order as well as other relevant matters.

CONSEQUENTIAL AMENDMENTS

26. Upon the commencement of the new CO, most of the provisions in the existing CO concerning the formation and operation of live companies in Hong Kong will be repealed. For other pieces of legislation which refer to or rely on those provisions to be repealed in their own contexts, consequential amendments to these other pieces of legislation will be necessary in time for commencement of the new CO. Schedules 9 and 10 to the new CO have provided for such consequential amendments but they cover only the legislation enacted up to March 2012. We therefore need to examine the legislation enacted thereafter and, where necessary, incorporate new consequential amendments into these two Schedules before the new CO commences operation. We will also amend the list of compoundable offences in Schedule 7 by including several offences relating to the display of company names, which is contingent on the enactment of the Companies (Disclosure of Company Name and Liability Status) Regulation¹³ (item (b) under paragraph 4). The amendments to Schedules 7, 9 and 10 of the new CO will be effected by way of publication of notices in the gazette later in 2013.

COMMENCEMENT

27. Our intention is to bring the new CO and its subsidiary legislation into operation on the same date, tentatively in the first quarter of 2014. We will keep in view the progress of preparatory work and make arrangement later in 2013 for their commencement.

¹³ Namely the offences relating to display of company names by local companies to be contained in the proposed Companies (Disclosure of Company Name and Liability Status) Regulation and the corresponding offences for NHKCs contained in Part 16 of the new CO.

PUBLIC CONSULTATION

28. We have published the draft provisions of 12 pieces of subsidiary legislation (Items (a) to (k) and (m) under paragraph 4) in two batches for seeking the views of the public and relevant stakeholders including professional bodies and the business community, with batch one published on 28 September 2012 and batch two on 2 November 2012. The consultation period was six weeks in both phases. The consultation exercise was publicised through press releases and government websites¹⁴, while we have also issued letters to relevant stakeholders to invite their comments and conducted briefings for them. As for Companies (Fees) Regulation (Item (l) under paragraph 4), we have written to relevant stakeholders on our proposals to restate existing fees and to introduce a few new fee items as mentioned in paragraph 24 above. The Standing Committee on Company Law Reform was also consulted in the process.

29. We have altogether received 31 submissions. The respondents were generally supportive of the proposed subsidiary legislation and most of their comments are on technical aspects concerning the draft provisions of the subsidiary legislation. We will fine-tune the draft subsidiary legislation in light of the comments received.

WAY FORWARD

30. Subject to Members' views, we intend to introduce into LegCo the subsidiary legislation by batches beginning from the first quarter of 2013 to facilitate scrutiny. We aim to secure enactment of the subsidiary legislation progressively within 2013 to allow time for relevant stakeholders to familiarise themselves with the requirements before commencement of the new regime in the first quarter of 2014.

ADVICE SOUGHT

31. Members are invited to offer views on the proposed subsidiary legislation and the way forward suggested above.

¹⁴ The two consultation papers are available on the websites of the Financial Services and the Treasury Bureau (http://www.fstb.gov.hk/fsb/co_rewrite/) and the Companies Registry (<http://www.cr.gov.hk/>).

**Financial Services and the Treasury Bureau
Companies Registry
December 2012**

**New fees to be introduced
in the proposed Companies (Fees) Regulation**

<i>Description</i>	<i>Fee (\$)</i>
(1) Fee for an application requesting the Registrar of Companies to withhold residential address and identification number from public inspection (per document per individual basis)	55
(2) Fee for an application for disclosure of withheld or protected information to a specified person (per document per individual basis)	25
(3)* Annual registration fees to be paid on delivery of annual returns by companies limited by guarantee –	
(i) if delivered within 42 days after the company's return date	105
(ii) if delivered more than 42 days but within 3 months after the company's return date	870
(iii) if delivered more than 3 months but within 6 months after the company's return date	1,740
(iv) if delivered more than 6 months but within 9 months after the company's return date	2,610
(v) if delivered more than 9 months after the company's return date	3,480

* Companies limited by guarantee are currently subject to a fixed annual registration fee. It is proposed to extend the escalating scale to the annual registration fee for late filing of annual returns (which has been applicable to companies limited by shares since 1988) to them so as to encourage compliance with the statutory filing requirement in light of increasing public expectation of corporate transparency. The proposed escalating scale for companies limited by guarantee is the same as the existing scale applicable to private companies limited by shares