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Report of the Bills Committee on Companies (Amendment) Bill 2002

Purpose

This paper reports on the deliberations of the Bills Committee on Companies (Amendment) Bill 2002.

Background

2. The Companies Ordinance (Cap. 32) (the Ordinance) aims to consolidate and amend the laws relating to companies. In February 2000, the Standing Committee on Company Law Reform (SCCLR) published a report on the recommendations of a consultancy report of the review of the Ordinance. The SCCLR Report contains recommendations on a wide range of legislative amendments to enhance shareholders' protection, update the requirements regarding directorships, simplify the requirements for registration of foreign companies and make structural changes to modernize the Ordinance. On the basis of the recommendations in the SCCLR Report, the Administration has identified a total of 62 items for legislative amendments or further study to be implemented in four phases.

The Bill

3. The Companies (Amendment) Bill 2002 seeks to implement 17 of the SCCLR's recommendations in relation to the rights of shareholders and duties of directors by -

(a) enforcing terms of memorandum and articles of association;

(b) reducing threshold for shareholders' proposals;

(c) removing directors by ordinary resolution;

(d) repealing right to resort to court under section 8 of the Ordinance;

(e) making directors vicariously liable for acts and omissions of their alternates;

(f) providing a statutory definition of "shadow director";

(g) allowing companies to indemnify officers and auditors;

(h) allowing companies to insure directors and officers; and

(i) extending the statutory provisions to cover in generic terms provision of financial assistance to directors.

The Bill also seeks to make certain technical amendments to replace the filing requirements of statutory declarations or affidavits processed by the Companies Registry with written statements; simplify the paper work in relation to incorporation of company, change of company name and other filing requirements; streamline and improve the charge registration system; and amend the winding-up provisions.

The Bills Committee

4. At the House Committee meeting on 1 February 2002, members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon Audrey EU Yuet-mee, the Bills Committee has held 26 meetings. The membership list of the Bills Committee is at **Appendix I**. Apart from examining the Bill with the Administration, the Bills Committee has also invited views from interested parties. 24 groups, including two from the legal profession, have made written and/or oral representation to the Bills Committee. A list of these groups is at **Appendix II**.

Deliberations of the Bills Committee

Reducing threshold for shareholders' proposals

5. Under the Ordinance, a company must circulate the requisitionists' proposal to shareholders on request by holders of not less than 5% of the voting rights or not less than 100 shareholders holding shares on which there has been paid up average sum of not less than $2,000 per person. To enhance participation of shareholders, the Bill proposes to reduce the existing threshold to 2.5% of the voting rights or 50 shareholders. While welcoming the proposed reduction, the Bills Committee notes that there has been concern over the reference to the paid-up sum of $2,000 per person which may be unfair to shareholders of companies with low par value relative to market value or net assets per share. Consideration should be given to introducing the concept of net assets. According to the Administration, the existing reference to the paid-up sum is relatively simple and easy to understand. It is therefore not necessary to introduce the concept of net assets, which appear to change in value from time to time.

6. On the expenses incurred by a requisitionist, members query the difference in expenses between a resolution proposed at an annual general meeting under section 111 and at an extraordinary general meeting under section 113 of the Ordinance. The Administration's explanation is that under section 113, the directors of a company are required to proceed to convene an extraordinary general meeting within 21 days from the deposit of the requisition and the costs incurred in convening the meeting will fall on the company. If the directors fail to do so, the requisitionist may convene the meeting and the expenses incurred, if reasonable, will be reimbursed by the company. Under section 115A of the Ordinance, a company is required to circulate to members of the company notice of any resolution intended to be moved at the next annual general meeting convened under section 111 of the Ordinance and any statement regarding the matter referred to in the proposed resolution or the business to be dealt with at the meeting. The expenses incurred for circulating the notice or statement will be borne by the requisitionists and those incurred for convening the meeting will fall on the company.

7. Members caution that it will run contrary to the legislative intent of enhancing shareholders' participation if the expenses arising from circulation of requisitionists' proposals are too high. At members' request, the Administration agrees to include an undertaking in the speech to be delivered by the Secretary for Financial Services and the Treasury at the resumption of Second Reading debate on the Bill that the Administration will examine the issue of cost implications for requisitionists, including the feasibility of introducing provisions such as a forfeitable deposit requirement to defray costs.

Removing directors by ordinary resolution

8. In common law, directors can be entrenched by a provision in the articles of association of a company. To remove such entrenched directors, shareholders are required to amend the articles of associations by special resolution to delete any entrenchment provisions. While section 157B of the Ordinance provides a more direct channel for removing a director by special resolution, such a resolution has to be passed by a majority of not less than three-quarters of the votes cast at a shareholders' meeting. As entrenchment of directors is undesirable and shareholders should have an overriding right to remove directors, the Bill proposes that removal of directors be made by ordinary resolution instead of special resolution.

9. Question has been raised on the applicability of the Bill on statutory bodies and public companies, including the Stock Exchange of Hong Kong and the Mass Transit Railway Corporation (MTRC). According to the Administration, the Bill applies to all companies incorporated under the Ordinance. In the case of a statutory body or a public company, the removal of the directors is subject to the relevant statute, if any. In the absence of such statute, the Bill shall prevail. By way illustration, the Mass Transit Railway Ordinance (Cap. 556) provides that the Chief Executive (CE) may appoint not more than three persons to be additional directors of MTRC and such directors may not be removed from office except by CE. Similarly, the Exchange and Clearing Houses (Merger) Ordinance (Cap. 555) provides that the Financial Secretary (FS) may appoint certain number of persons to be directors of the Hong Kong

Exchanges and Clearing Limited, the holding company of the Stock Exchange of Hong Kong Limited, and the power to remove such directors rests with FS. Hence, the Bill does not apply to the removal of directors in both cases. As there is no statute governing the removal of directors of the Stock Exchange of Hong Kong Limited, the Bill shall apply.

Repealing right to resort to court under section 8 of the Ordinance

10. Section 8 of the Ordinance provides for a company to amend, by special resolution, the objects clause stipulated in its memorandum of association. It also allows shareholders holding not less than 5% in the nominal value of the company's issued share capital or any class thereof to apply to the court to annul such amendments. Given that such a provision may permit a minority to impede fundamental business decisions made on business grounds, and that dissenting members of a public company can always sell their stake in the company, the Bill proposes that the right to resort to the court under section 8 of the Ordinance be repealed as regards public companies.

11. While members raise no objection to the proposal, they consider it necessary for the Administration to ascertain the implications of repealing the right to resort to court. According to the Administration, the effect will be minimal since the search on the Hong Kong Law Reports and Digest conducted by the Registrar of Companies (R of C) reveals that there has been no case involving an application made to the court under section 8 of the Ordinance since 1905.

Providing a statutory definition of "shadow director"

12. The Ordinance recognizes the concept of shadow directors and imposes a number of liabilities or prohibitions on a shadow director, though the term "shadow director" is not generally adopted and defined in the Ordinance. In the light of the SCCLR's recommendations on the need to define the term and to lower its threshold to include someone who can influence less than the whole board of directors, the Bill proposes that "shadow director" be defined to mean a person in accordance with whose directions or instructions the directors or a majority of directors of a company are accustomed to act.

13. Question has been raised on the policy intent for extending the scope of "shadow director". The Administration's explanation is that the rationale behind the concept of "shadow director" is to prevent the evasion of liabilities by persons who control the company but choose to remain in the shadow. If the majority of the directors of the company act in accordance with the directions or instructions of a person, the company will implement such directions or instructions. Hence, there seems to be little logic to exclude any person from the definition of "shadow director" merely because a single or a minority of the directors are not accustomed to act in accordance with his directions or instructions when the majority are so accustomed.

14. The Bills Committee expresses concern about the impact of the proposals relating to shadow directors, particularly on de facto directors of family-owned companies, foreign investors, trustee companies, trustees and nominee directors of offshore companies registered in Hong Kong. According to the Administration, the proposals will not affect a de facto director of a family-owned company or a nominee director of an offshore company registered in Hong Kong who falls within the scope of the definition of "director" in the Ordinance. Foreign investors and settlors of a trust will not be caught by the definition of "shadow director" unless the directors or a majority of directors of a company are accustomed to act in accordance with their instructions or directions. As to whether a receiver or a manager appointed by the secured creditor to manage the company's property for repayment of debts is considered to be a "shadow director", the Administration's explanation is that the person so appointed will not be regarded as a shadow director as he is only obliged to act for the benefit of the secured creditor and within the powers conferred on him under the relevant debenture or loan security agreement.

15. Noting that section 158 of the Ordinance requires a company to file with R of C particulars of its directors, including shadow directors, members question the practicality of such a disclosure requirement given that shadow directors do not wish to be known, and that no enforcement has ever been taken against non-compliance. The Administration's explanation is that while prosecution is not easy to be taken given the R of C's existing approach of acting on complaints received from the public, this does not mean that persons who have influence over the board or a majority of directors should be allowed to evade the law by remaining in the shadow. Cases where a company is shown to be in breach of the provisions relating to shadow directors, such as in the course of winding up of the company where investigation shows the existence of shadow directors, prosecution can then be taken. Nevertheless, the Administration is prepared to remove the requirement for a company to file particulars of its shadow director with R of C in the light of members' concern.

16. Doubt has been cast that in the absence of any requirement for a company to file particulars of its shadow directors, it will be difficult, if not impossible, for auditors to include in their reports loans to shadow directors whom they have no knowledge of. According to the Administration, it is in the interest of a company's shareholders to be provided with information relating to loans etc made by the company to its directors. To this end, section 161B of the Ordinance requires that the accounts that are required to be laid before a company in general meeting should include such information. It also requires that the directors should disclose any related matter to the company. In the event that the disclosure requirement is not complied with, the Ordinance places a specific duty on the company's auditors to include in their reports, as far as they are reasonably able to do, statement giving the required particulars. The policy intent is to limit the extent to which auditors will be required to include in their reports loans to directors to only cases where they are reasonably able to do so. In the light of members' requests, the Administration agrees to shelve the proposed removal of the requirement for a company to file particulars of its shadow director with R of C. In addition, the Administration will move a CSA requiring any shadow director of a company and any person who has at any time during the preceding five years been a shadow director of the company to

give notice in writing to the company of particulars of relevant transactions as may be necessary for inclusion in the accounts of loans to officers.

17. While welcoming the changes, members point out that the proposed extension of the scope of "loan" to embrace in generic terms the provision of financial assistance to directors may have complicated the disclosure requirement. Given that a company may, in the normal course of business, have carried out numerous transactions which fall within the expanded scope, the requirement for disclosure of all particulars of every such transaction can be unduly onerous and in practice overloads financial statements with details which would not be useful to most users. Consideration should be given to allowing items of similar nature to be disclosed in aggregate in order to avoid voluminous and unnecessarily detailed disclosures. The Administration note members' view and will move a CSA to the effect, adding that details of such transactions should be entered and maintained in a register of the company for inspection by its members for a period of 10 years.

18. As to whether a person who is subject to a disqualification order made by the court under the Ordinance will still be eligible for being a shadow director of a company, the Administration's explanation is that any person under a disqualification order shall not, among other things, be concerned or take part in the promotion, formulation or management of a company, whether directly or indirectly, for a specified period beginning with the date of the order.

Allowing companies to insure directors and auditors

19. At present, the ambit of a company's liability to exempt or indemnify its officers or auditors under the Ordinance is not clear. In the light of the SCCLR's recommendation, the Bill proposes to state explicitly that provisions in a company's articles or a contract granting exemptions or indemnities by a company to its officers or auditors against liability for negligence, default, breach of duty or breach of trust to the company or a related company shall be void. However, a company may, inter alia, indemnify its officers or auditors in defending any proceedings in which judgement is given in their favour or in which they are acquitted.

20. Concern has been raised that the proposal to insure auditors against any liability to the company may give rise to conflict of interest on the independent role of auditors as some auditors may tend to relax accounting standards to suit the need of the companies. According to the Administration, the proposal aims to allow a company to obtain insurance for directors' liabilities save for fraud but that insurance should cover the costs of litigation even if such litigation involves an allegation of fraud of a director. As the existing provisions in the Ordinance concerning indemnity for officers apply equally to auditors, it is considered reasonable to adopt a similar approach under these circumstances. Nevertheless, the Administration is prepared to consult the Hong Kong Society of Accountants if necessary.

Extending the statutory provisions to cover in generic terms provision of financial assistance to directors

21. Section 157H of the Ordinance prohibits, with limited exceptions, a company from making loans to or providing security for loans to directors or directors of its holding company or to another company controlled by one or more of its directors. This provision reflects the underlying principle that a company has little to gain from lending or providing financial assistance to a director who cannot obtain financing in the market on commercial terms on his own credit. While recognizing the law is fundamentally sound, SCCLR considers that this provision is unduly restrictive in that only loans and guarantee/security for loans are covered. The term "loan" means an advance of money to be repaid in the future and is inadequate to cover modern forms of credit. SCCLR therefore recommends that the term "loan" be extended to embrace in generic term the provision of other forms of financial assistance to directors. To this end, the Bill extends the existing regime to cover "quasi-loan" and "credit transaction", using the concept in the UK Companies Act 1985.

22. Doubt has been cast on the propriety of extending the scope of section 157H to directors of private companies which are excluded from the UK Companies Act 1985. The Administration agrees with the Bills Committee that the proposed extension should not apply to a private company except if it is a member of a group of companies one of which is a listed company. A CSA will be moved to that effect. Members' attention is however drawn to the fact that the UK Government is considering the recommendation of the UK's Company Review Steering Company that the provisions relating to quasi-loans etc in the UK Companies Act should apply to a private company. In this connection, the Administration will re-examine the scope of the prohibition in future should the situation warrant.

23. The Bill proposes to define "credit transaction" as a transaction between a company (as the creditor) and its director (as the borrower) under which the company -

(a) supplies goods to the director under a hire-purchase agreement;

(b) sells goods or land to the director under a conditional sale agreement;

(c) leases or hires goods or leases land to the director in return for periodic payments; or

(d) otherwise disposes of land or supplies goods or services to the director on the understanding that payment (whether in a lump sum or instalments or by way of periodic payments or otherwise) is to be deferred.

At members' request, the Administration proposes to define "conditional sale agreement" as an agreement for sales of goods or land under which the purchase price or part of it is payable by instalments, and the property in the goods or land is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods or land) until such conditions as to the payment of instalments or otherwise as may be

specified in the agreement are fulfilled.

24. Question has been raised on whether the term "conditional sale agreement" includes the usual agreement for sale and purchase of land which provides that the purchase of the property is to be paid by instalments, namely, an initial deposit, a further deposit(s) and the balance of purchase price before the title of the property is to be transferred to the purchaser after fulfilment of the conditions (as to the payment of instalments or otherwise) as maybe specified in the agreement.

25. According to the Administration, "conditional sale agreement" is not meant to cover the usual agreement for sale and purchase of property currently used in Hong Kong on the ground that -

(a) there is no provision in the agreements for sale and purchase on uncompleted properties (sale of property in the primary market) under the Lands Department's Consent Scheme for the purchaser to be given possession of the property prior to payment of the balance of the purchase price upon the occurrence of certain events; and

(b) there does not appear to be a common practice for a purchaser of property in the secondary property market to be given possession of the property prior to payment of the balance of the purchase price.

Members however point out the definition of "conditional sale agreement" as drafted is likely to cover the usual agreement for sale and purchase of land currently used and cannot reflect the policy intent to prohibit the taking of possession of property before full payment of purchase price. To this end, the Administration will move a CSA to that effect.

26. The Administration also agrees with members that "credit transaction" should not cover a transaction under which the company leases or hires land or goods to its directors in return for periodical payments where the terms of the transaction are not more favourable than those terms that it is reasonably expected to be offered at the market. It further undertakes to increase the prescribed transaction limit from $500,000 to $750,000 to take account of inflation since 1984. CSAs will be moved to these effects.

27. As regards the civil consequences of transactions contravening section 157H, the Bills Committee notes that a guarantee entered into or security provided by a company in breach of section 157H shall be unenforceable against the company. However, the interest in any property which has been passed by the company to any person by way of security provided in connection with any transaction or arrangement will not be affected. Members express grave concern over the confusion that the security given in a transaction in contravention of section 157H is valid but not enforceable. They also query how a chargee (such as a bank) can exercise its property rights under the security document in relation to a security provided by a company in breach of section 157H if the director fails to repay the loan.

28. According to the Administration, the provisions referred to are a reinstatement of the existing regime. The policy intent is to strike a reasonable and fair balance between the company and the chargee. As a general rule, any transaction contravening section 157H is an illegal contract. Hence, the person who obtains a security from the company should not be able to enforce the security. While the transaction contravenes the law, it should not be void because the chargee has provided consideration on the transaction (i.e. advanced money under the loan). Otherwise, the chargee will be left with no security to cover against the risk of non-payment by the director. In the event that the director fails to repay the loan, the chargee is entitled to foreclose the property, but an order of the court for foreclosure is essential. Where the charge is unenforceable against the company, it is unlikely that the court will allow the chargee to foreclose. While the chargee can exercise its right to sell the property without any order of the court, it has to obtain and execute an order for possession before entering into a contract of sale if it is not already in possession of the property. Since the charge is unenforceable against the company, it is doubtful whether the court will grant the order in favour of the chargee if the company contests the application. On the other hand, it is unlikely for the company to sell the property to a third party as the interest of such party will be subject to the prior interest of the chargee. Thus, if the company wishes to sell the property, it has to obtain a release of the security or guarantee from the chargee by paying the outstanding amount due under the loan. The company can then recover against the director for the loss that it has suffered.

29. Members however point out that there may be circumstances where the notice of contravention only comes after the property or the relevant mortgage is sold to a bona fide purchaser for value. They query how the interest of the innocent third party can be protected. While acknowledging members' concern, the Administration's explanation is that the question will not arise in reality for the following reasons -

(a) it is very unlikely that the mortgagee and its legal advisers will run the risk of deceiving the court by concealing the fact that the mortgage is unenforceable when applying for an order of possession in order for sale;

(b) it is likely that the mortgagee will be aware of the fact that the mortgage is unenforceable at the time it sells the property. All mortgages contain a covenant to repay and if the borrower defaults, the mortgagee will and must give notice to the company requiring payment of the mortgage money before it proceeds to exercise its power of sale. In reality, upon receipt of such notice, if the company is aware that mortgage is unenforceable, it will refuse payment on this ground and the mortgage will be put on notice of this fact;

(c) there is little reason why the mortgagee will proceed with the sale, well knowing that it will face legal action from the company for "wrongful" sale of the property and possibly from the purchaser for misrepresentation;

(d) in almost all cases, banks in Hong Kong are advised to obtain an order for possession and an order for sale whenever it seeks to exercise its power of sale;

(e) solicitors acting for the intended purchaser usually demand a copy of such an order from the mortgagee as evidence of good title; and

(f) in case of a mortgage of this nature, a prudent solicitor acting for the purchaser will ask the mortgagee's solicitor whether the loan in question is or is not in contravention of section 157H.

30. The Bills Committee is not convinced of the Administration's response as this is at variance with the spirit of law to cater for all situations. While acknowledging that the question of unenforceability has never arisen in the past, members stress that the issue warrants further consideration. In order not to delay the passage of the Bill and in the light of members' repeated requests, the Administration agrees to include in the speech to be delivered by the Secretary for Financial Services and the Treasury at the resumption of the Second Reading debate on the Bill an undertaking that the policy and drafting of the provisions on civil consequences of transactions contravening section 157H will be looked into by the Administration and referred to SCCLR taking into account members' views and the equivalent provisions in the UK Companies Act.

Permitting the formation of a company by one person

31. While supporting in principle the proposal to allow the formation of one-member companies, the Bills Committee expresses concern about the predicament which the company or any officer of the company may face upon the death of the sole member and director. By way of illustration, the company or any officer of the company may have practical difficulties to put the number of directors from zero to one as it will take time for the representative of the deceased director to apply for a probate, rendering it not possible for the company or any officer of the company to convene a general meeting to appoint a new director within the prescribed two-month period from the date on which the office is vacated. There is also legal difficulty for the company to register the grant of administration of the deceased sole member and director.

32. The Administration's explanation is that Regulations 24 to 26 of Table A to the Ordinance confers the powers of registration of transmission of shares to the directors of a company. Section 69 further provides that if a company refuses to register the request of a person to register himself as a member in respect of shares which have been transmitted to him by means of the grant, it shall send to the transferor and the transferee a notice of the refusal within two months after the date on which the transfer was lodged with the company. The transferee may apply to court to have the transfer registered by the company. If the court is satisfied that the application is well founded, it may disallow the refusal and order that the transfer be registered forthwith by the company.

33. The Bills Committee however considers the default arrangement too complicated, particularly for a one-member company that has no director as a result of the death of the sole member and director. Members therefore urge the Administration to consider making it a statutory requirement for the sole member and director of a one-member company to appoint a person to act in the place of director upon his death. Consideration should also be given to putting in place a simple mechanism for registration of the grant of administration of the deceased sole member and director.

34. According to the Administration, it is not desirable to have a separate mechanism in the Ordinance to deal with issues arising from the death of a company's sole member and director pending the grant of a probate as it would affect the established framework in respect of the administration of probate and may prejudice the interests of concerned parties in the deceased's property. It nevertheless agrees with members that there does not appear to be any provision in the Ordinance which provides that the surviving officers viz. the secretary or manager of a one-member company can convene a meeting to appoint a director upon the death of the sole member and director. In this connection, a CSA will be moved to the effect that for a one-member company where the member is its sole director, the company may nominate a reserve director who shall, unless prohibited by law to serve as a director, be deemed to be a director of the company for all purposes upon the death of the sole member and director until such time as a person is formally appointed as a director of the company. The Administration further proposes that under such circumstances, the prescribed two-month period will be extended to four months and will run from the date the probate or letter of administration in respect of the sole member and director's estate is granted by the court rather than the date the office is vacated .

35. As regards the request for a simple mechanism for registration of the grant of administration of a deceased sole member and director of a one-member company, the Administration's explanation is that there are various alternatives to address the issue in question, including the proposed mechanism for the nomination of a reserve director. As a reserve director shall be deemed to be a director after the death of the sole member and director, he will be able to exercise the power in respect of registration of transmission of shares as well as other management powers of the company. In the event that the company has chosen not to nominate a person as a reserve director, existing section 114B provides the legal personal representative a right to apply to the court for an order to call a meeting where a person can be appointed to be the company's director who can then deal with the registration of the transmission of shares and management matters of the company.

36. The Bills Committee notes that under new section 95A, a one-member company is required to enter into its register of members a statement in respect of its number of members falling to one or increasing from one to two. Doubt has been cast on the efficacy of such a requirement. Members hold the view that to enhance transparency in corporate governance, consideration should be given to requiring the company to file with R of C when there is a change in the number of members or a transfer of shares. The Administration's explanation is that under section 98 of the Ordinance, a company is required to make available its register of members for public

inspection upon payment of a fee. As such, there does not appear to be a strong reason for R of C to keep the concerned statement for the purpose of making it available for public inspection. Besides, the Administration is prepared to delete new section 95A if the Bills Committee considers it necessary. The Bills Committee notes that in the absence of section 95A, there will be no record of changes in the number of members of the company. As such, members agree to maintain the status quo.

Defining the term "manager" to which the definition of "officer" refers

37. Noting that the term "manager" will cover persons occupying a position under the immediate authority of the board of directors, members point out that the scope of "manager" is too wide and may catch those who are not managers but receive direct instructions from directors as in the case of one-member companies. In the light of members' concern, the Administration agrees to amend the term "manager" to cover those who, under the immediate authority of the board of directors, exercises managerial functions.

Reduction of share capital consists of a re-designation of the par-value to a lower amount

38. The Bill proposes to streamline the procedures relating to the reduction of share capital and to provide that court approval is not required where the reduction consists of a re-designation of the par-value to a lower amount. Concern has been raised that the Bill as drafted may permit the reduction of the capital of a company for any purpose, including the elimination of losses, without the sanction of the court. This is at variance with the intention of the SCCLR's recommendation to ensure that the capital of a company is maintained for the protection of its creditor.

39. The Administration agrees to move CSAs to make it clear that the court's confirmation can only be dispensed with if the sole purpose of the reduction is to re-designate the nominal value of the shares of the company to a lower amount, adding that the company has only one class of shares, that all issued shares are fully paid-up and the amount of the net assets of the company is not less than its paid-up share capital, that the reduction applies to and affects all shares equally, that the amount arising from the reduction is not less than an amount representing the difference between the amount of the company's fully paid-up share capital immediately before the reduction and the amount of its fully paid-up share capital immediately after the reduction, and that the amount arising from the reduction is credited to the share premium account of the company.

Amendments to replace the filing requirements of statutory declarations or affidavits processed by the Companies Registry with written statements

40. The Ordinance contains many provisions which require companies to file statutory declarations or affidavits in respect of certain matters pertaining to the company. To simplify the statutory procedures and to make them more user-friendly, the Bill proposes to amend the provisions by replacing statutory declarations or affidavits with simple written statements. The proposal is considered more

compatible with the objective of permitting the electronic filing of documents at the Companies Registry in due course, and is also in line with international developments.

41. There has been concern on the penalty for non-compliance with the filing requirement. According to the Administration, the Ordinance does not provide for punishment for the making of a false statutory declaration. It has to rely on section 36 of the Crimes Ordinance (Cap. 200) which provides that any person, who knowingly and wilfully makes a statement in a statutory declaration false in a material particular, may be prosecuted and, if convicted, subject to a fine and a maximum penalty of two years. With the filing requirements of a statutory declaration or an affidavit being replaced by a written statement as proposed in the Bill, the Administration will rely on section 349 of the Ordinance, which provides that any person in any return, report, certificate, balance sheet or other document required by or for the purposes of any of the provision of the Ordinance wilfully makes a statement false in any material particular, knowing it to be false, may be prosecuted and, if convicted to a maximum penalty of $100,000 and maximum imprisonment of six months. The purpose of section 349 is to provide a deterrent against making a false statement, thereby encouraging a culture of compliance with the filing requirement under the Ordinance. The offence in question is more in the nature of an offence of dishonesty rather than a regulatory offence. In addition, the Ordinance also provides for separate offences relating to making a statutory declaration where the relevant circumstances justify.

Amendments to streamline requirements and improve the charge registration system

42. Section 85 of the Ordinance provides for the release of part of the property from a charge. The Bill proposes to widen the scope of section 85 to include a release of the whole of a charge and releases of cases where the whole of the property charge has ceased to form part of the company's property or undertaking.

43. At present, there is no "set" form of "Memorandum of Satisfaction". This takes the form of a notice commonly prepared by the mortgagee (occasionally by the mortgagor) to CR together with such evidence as may be required concerning satisfaction or release of property from charge. The Bills Committee therefore welcomes the introduction of a specified form on release of registered charge. Members however emphasize the need to specify the documents required to evidence such a release and the details to be entered in the Land Registry, particularly if the registered charge is only partially released. The Administration subsequently agrees to revise the form along the line as proposed by members.

Others

44. To take account of the prevalence of electronic communications, the Bill provides that -

(a) the requirement for a communication between a company, its directors or members to be effected in writing may be satisfied by the communication being given in the form of an electronic record; and

(b) the requirement for a meeting of a company, its director or members to be held may be satisfied by the meeting being held by electronic means.

While agreeing to the Administration's policy intent, the Bills Committee points out that the provisions as drafted are not clear in respect of the manner in which the company shall hold its electronic meetings, which may in turn affect the validity of decisions made during these meetings. In response to members' request, the Administration agrees to move a CSA to the effect that the requirement may be satisfied by the meeting being held by lawful electronic means and in such manner as may be agreed by the company in general meeting.

Committee Stage amendments

45. A copy of the Committee Stage amendments to be moved by the Administration is at **Appendix III**.

Recommendation

46. The Bills Committee recommends the resumption of the Second Reading debate on the Bill on 2 July 2003.

Consultation with the House Committee

47. The House Committee at its meeting on 20 June 2003 supported the recommendation of the Bills Committee to resume the Second Reading debate on the Bill on 2 July 2003.

Prepared by
Council Business Division 1
Legislative Council Secretariat
26 June 2003

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Appendix I

Bills Committee on
Companies (Amendment) Bill 2002

Membership list

Chairman	Hon Audrey EU Yuet-mee, SC, JP
Members	Dr Hon David CHU Yu-lin, JP Hon Albert HO Chun-yan Hon Eric LI Ka-cheung, JP Hon NG Leung-sing, JP Hon CHAN Kwok-keung Hon CHAN Kam-lam, JP Hon SIN Chung-kai Hon Miriam LAU Kin-yee, JP Hon Emily LAU Wai-hing, JP Hon Henry WU King-cheong, BBS, JP (Total : 11 Members)
Clerk	Miss Becky YU
Legal Adviser	Miss Monna LAI
Date	4 October 2002

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Appendix II

List of individuals/organizatons who/which have made written and/or oral representations to the Bills Committee

(a) Mr Winston POON, SC

(b) Mr Clement SHUM

(c) Mr Peter TASHJIAN

(d) Mr David WEBB

(e) Ms YUNG Wing-sheung

(f) Baker & McKenzie

(g) Chinese General Chamber of Commerce

(h) Consumer Council

(i) Democratic Alliance for Betterment of Hong Kong

(j) Estate Agents Authority

(k) Faculty of Business, City University of Hong Kong

(l) Federation of Hong Kong Industries

(m) Hong Kong Association of Banks

(n) Hong Kong Bar Association

(o) Hong Kong General Chamber of Commerce

(p) Hong Kong Institute of Company Secretaries

(q) Hong Kong Mortgage Corporation Limited

(r) Hong Kong Society of Accountants

(s) Law Society of Hong Kong

(t) Real Estate Developers Association of Hong Kong

(u) Securities and Futures Commission

(v) Society of Chinese Accountants & Auditors

(w) Stephenson Harwood & Lo

(x) W H LAM & Company

COMPANIES (AMENDMENT) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services and the Treasury

Clause	Amendment Proposed
1(2)	By adding "and the Treasury" after "Services".
2	(a) In subclause (1)(b) –
	(i) in the proposed definition of "manager", by deleting "occupying a position under the immediate authority of the board of directors" and substituting "who, under the immediate authority of the board of directors, exercises managerial functions";
	(ii) by adding –
	""reserve director" (備任董事) means a person nominated as a reserve director of a private company under section 153A(6);".
	(b) In subclause (3) –
	(i) by deleting "(12)" and substituting "(10)";
	(ii) by deleting "(13)" and substituting "(11)".
New	By adding –
	"**13A. Definitions**
	Section 47B(2) is amended by repealing "157H(1)" and substituting "157HA(12)".".

26(2) By deleting the proposed section 58(3) and substituting –

"(3) Confirmation by the court of a reduction of the share capital of a company is not required under subsection (1) if the sole purpose of the reduction is to re-designate the nominal value of the shares of the company to a lower amount and the following conditions are satisfied –

(a) the company has only one class of shares;

(b) all issued shares are fully paid-up and the amount of the net assets of the company is not less than its paid-up share capital;

(c) the reduction applies to and affects all shares equally;

(d) the amount arising from the reduction is not less than an amount representing the difference between the amount of the company's fully paid-up share capital immediately before the reduction and the amount of its fully paid-up share capital immediately after the reduction; and

(e) the amount arising from the reduction is credited to the share premium account of the company.

(4) In this section, "net assets" (淨資產), in relation to a company, has the same meaning as in section 157HA(12).".

29 In the proposed section 61A(1)(b), by deleting "the company's compliance with section 58(3)" and substituting "that the conditions set out in section 58(3)(a), (b), (c), (d) and (e) have been satisfied".

31(3) In the proposed section 70(4), in the definition of "business day", by deleting "the Unified Exchange" and substituting "a recognized stock market".

New By adding –

"**31A. Interpretation**

Section 79A(1) is amended, in the definition of "net assets", by repealing "157H(1)" and substituting "157HA(12)".".

33 By deleting the proposed section 85(1), (2) and (3) and substituting –

"(1) The Registrar may, on application under this section, where he is satisfied that the debt for which a registered charge was given has been paid or satisfied in whole or in part, enter on the register a memorandum of satisfaction in whole or in part.

(2) The Registrar may, on application under this section, where he is satisfied that the whole or any part of the property or undertaking subject to a registered charge has been released from the charge or has ceased to form part of the company's property or undertaking, enter on the register a

memorandum of that fact.

(3) An application under this section shall be made in the specified form and be accompanied by such evidence as the Registrar may require.

(3A) The specified form referred to in subsection (3) shall contain –

(a) such particulars with respect to the debt, charge, property or undertaking in question as may be specified by the Registrar; and

(b) a statement certifying the fact of payment, satisfaction, release or cessation, as the case may be.

(3B) The specified form referred to in subsection (3) shall be signed by –

(a) where it is submitted to the Registrar on behalf of a company –

(i) a director or officer of the company;

(ii) a solicitor of the High Court acting on behalf of the company; or

(iii) in the case of an oversea company, a person authorized to accept service of process and notices on its behalf who is registered under section 333(1)(c); or

(b) in any other case, by the mortgagee or person entitled to the charge.”.

New By adding –

"**39A. Annual return to be made by company**

Section 107(2)(i) is amended by repealing "as are by this Ordinance required to be contained with respect to directors and the secretary respectively" and substituting "or a reserve director of the company as are by this Ordinance required to be contained with respect to them".".

44 (a) In the proposed section 116BC(1) –

(i) by deleting "or that" and substituting "and that";

(ii) by adding "agreed in accordance with section 116B" after "written resolution";

(iii) by deleting "30" and substituting "7".

(b) By adding after the proposed section 116BC(1) –

"(1A) Where the member provides the company with a written record of a decision in accordance with subsection (1), that record shall be sufficient evidence of the decision having been taken by the member.

(1B) A company shall cause a record of all written records provided to the company in accordance with this section to be entered into a book kept for that purpose in the same way as minutes of proceedings of a general meeting of the company.

(1C) Section 120 shall apply to a record made in accordance with subsection (1B) as that section applies to the minutes of proceedings of any general meeting of a company.".

(c) By adding after the proposed section 116BC(2) –

"(2A) If a company fails to comply with subsection (1B), the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.".

49 By deleting "單一" and substituting "唯一".

53 (a) In the proposed section 153A(3), by deleting "subsection (4)" and substituting "subsections (4) and (5)".

(b) In the proposed section 153A(4), by deleting "Where" and substituting "Subject to subsection (5), where".

(c) By adding after the proposed section 153A(4) –

"(5) Where the number of directors of a private company having only one director is reduced to zero by reason of the death of that director and the deceased director was, at the date of death, the sole member of the company, the company or any officer of the company shall not be liable for any default in respect thereof under this section unless the default continues for a period of 4 months beginning on the date of the grant of probate of the will, or of letters of administration of the estate, of the deceased director.

(6) Where a private company has only one member and that member is the sole director of the company, the company may in general meeting, notwithstanding anything in its articles, nominate a person (other than a body corporate) who has attained the age of 18 years as a reserve director of the company to act in the place of the sole director in the event of his

death. Where the company nominates a reserve director, it shall send to the Registrar particulars of the nomination in accordance with section 158(4), (4A) and (4B).

(7) The nomination of a person as a reserve director of a private company ceases to be valid if –

(a) before the death of the director in respect of whom he was nominated –

(i) he resigns as reserve director in accordance with section 157D; or

(ii) the company in general meeting revokes the nomination; or

(b) the director in respect of whom he was nominated ceases to be the sole member and sole director of the company for any reason other than the death of that director.

(8) Subject to compliance with the conditions set out in subsection (9), in the event of the death of the director in respect of whom the reserve director is nominated, the reserve director shall be deemed to be a director of the company for all purposes until such time as –

(a) a person is appointed as a director of the company in accordance with its articles; or

(b) he resigns from his office of director

in accordance with section 157D,

whichever is the earlier.

(9) The conditions referred to in subsection (8) are –

(a) the nomination of the reserve director has not ceased to be valid under subsection (7); and

(b) the reserve director is not prohibited by law from acting as a director of the company.".

55 By deleting the clause and substituting –

"**55. Section added**

The following is added –

"**153C. Written record of decision of sole director of private company**

(1) Where a private company has only one director and that director takes any decision that may be taken in a meeting of the directors and that has effect as if agreed in a meeting of the directors, he shall (unless that decision is taken by way of a resolution in writing) provide the company with a written record of that decision within 7 days after the decision is made.

(2) Where the director provides the company with a written record of a decision in accordance with subsection (1), that record shall be sufficient evidence of the decision having been taken by the director.

(3) A company shall cause a record of all written records provided to the company in accordance

with this section to be entered into a book kept for that purpose in the same way as minutes of proceedings of a meeting of the directors.

(4) If the director fails to comply with subsection (1), he shall be liable to a fine and, for continued default, to a daily default fine.

(5) If a company fails to comply with subsection (3), the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.

(6) Failure by the director to comply with subsection (1) shall not affect the validity of any decision referred to in that subsection.”.”.

56(3) In the proposed section 154(4), by deleting “單一” where it twice appears and substituting “唯一”.

New By adding –

“**57A. Resignation of director or secretary**

Section 157D is amended by adding –

“(4) In this section, “director” (董事) includes a reserve director and a person deemed to be a director under section 153A(8).”.”.

58 (a) By deleting the proposed section 157H(1) and (2) and substituting –

“(1) The prohibitions in this section are subject to the exceptions in section 157HA.

(2) A company shall not, directly or

indirectly –

(a) make a loan to a director of the company or of its holding company;

(b) enter into a guarantee or provide any security in connection with a loan made by any other person to such a director; or

(c) if any one or more of the directors of the company holds (jointly or severally or directly or indirectly) a controlling interest in another company –

(i) make a loan to that other company; or

(ii) enter into a guarantee or provide any security in connection with a loan made by any person to that other company.

(2A) A relevant company shall not –

(a) make a quasi-loan to a director of the company or of its holding company;

(b) enter into a guarantee or provide any security in connection with a quasi-loan made by any other person to such a director; or

(c) if any one or more of the directors of the company holds (jointly or

severally or directly or indirectly) a controlling interest in another company –

(i) make a quasi-loan to that other company; or

(ii) enter into a guarantee or provide any security in connection with a quasi-loan made by any other person to that other company.

(2B) A relevant company shall not –

(a) enter into a credit transaction as creditor for a director of the company or of its holding company;

(b) enter into a guarantee or provide any security in connection with a credit transaction entered into by any other person as creditor for such a director; or

(c) if any one or more of the directors of the company holds (jointly or severally or directly or indirectly) a controlling interest in another company –

(i) enter into a credit transaction as creditor for that other company; or

(ii) enter into a guarantee or provide any security in

connection with a credit transaction entered into by any other person as creditor for that other company.

(2C) A company shall not arrange for the assignment to it, or the assumption by it, of any rights, obligations or liabilities under a transaction that, if it had been entered into by the company, would have contravened subsection (2), (2A) or (2B).".

(b) In the proposed section 157H(3), by deleting "(2)" and substituting "(2C)".

(c) By deleting the proposed section 157H(4) and substituting –

"(4) A company shall not take part in any arrangement whereby –

(a) another person enters into a transaction or arrangement that, if it had been entered into by the company, would have contravened subsection (2), (2A), (2B) or (2C); and

(b) that other person, in pursuance of the arrangement, has obtained or is to obtain any benefit from the company or its holding company or a subsidiary of the company or its holding company.".

(d) In the proposed section 157H(5) –

(i) by deleting "subsection (1)" and substituting "subsections (2), (2A) and (2B)";

(ii) in paragraph (a), by deleting "in the case of which shares are listed on the Unified Exchange" and substituting "that has any of its shares listed on a recognized stock market".

(e) In the proposed section 157H(7) –

(i) in the definition of "company", by deleting paragraph (b) and substituting –

"(b) any other body corporate that is incorporated in Hong Kong under an Ordinance and that has any of its shares listed on a recognized stock market,";

(ii) in the definition of "credit transaction", by deleting paragraphs (a) and (b) and substituting –

"(a) supplies goods to the borrower under a hire-purchase agreement;

(b) sells goods or land to the borrower under a conditional sale agreement;

(ba) leases or hires goods or leases land to the borrower in return for periodical payments; or";

(iii) in the definition of "quasi-loan", in paragraphs (a) and (b), by deleting "under an agreement" and substituting "in pursuance of an agreement";

(iv) by adding –

""conditional sale agreement" (有條件售賣協議) means an agreement for the sale of goods or land under which –

(a) the purchase price or part of it is payable by instalments;

(b) the property in the goods or land is to remain in the seller until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled; and

(c) the buyer is (notwithstanding such reservation of property) to be in possession of the goods or land prior to the fulfilment of such conditions;

"hire-purchase agreement" (租購協議) means an agreement for the bailment of goods under which the bailee may buy the goods, or under which the property in the goods will or may pass to the bailee;

"land" (土地) includes any estate or interest in land, buildings, messuages and tenements of any nature or kind whatsoever;

"relevant company" (有關公司) means a company within the meaning of this subsection but does not include a private company other than a relevant private company;

"relevant private company" (有關私人公司) means a private company that is a member of a group of companies of which a company that has any of its shares listed on a recognized stock market is a member;".

(f) In the proposed section 157H(8) –

(i) in paragraph (a), by deleting "and" at the end;

(ii) in paragraph (b), by deleting the full stop and substituting "; and";

(iii) by adding –

"(c) a body corporate is not to be treated as a shadow director of any of its subsidiaries by reason only that the directors or a majority of the directors of the subsidiary are accustomed to act in accordance with its directions or instructions.".

(g) In the proposed section 157HA(1), by deleting "Nothing in section 157H shall be construed as prohibiting" and substituting "Section 157H does not prohibit".

(h) In the proposed section 157HA(2) –

(i) by deleting "Nothing in section 157H shall be construed as prohibiting" and substituting "Section 157H does not prohibit";

(ii) by deleting "other than a private company that is a member of a group of companies of which a company in the case of which shares are listed on the Unified Exchange is a member" and substituting "not being a relevant private company".

(i) In the proposed section 157HA(3) –

(i) by deleting "nothing in section 157H shall be construed as prohibiting a company" and substituting "a company is not prohibited by section 157H";

(ii) in paragraph (a), by deleting "or" at the end;

(iii) in paragraph (b)(iii), by deleting the full stop and substituting "; or";

(iv) by adding –

"(c) leasing or hiring goods or leasing land to a director of the company on terms not more favourable than the terms it is reasonable to expect the company to have offered, if the goods had been leased or hired or the land had been leased on the open market, to a person who is unconnected with the company.".

(j) In the proposed section 157HA(4), by deleting "Subsection (3)(a)" and substituting "The exception specified in subsection (3)(a)".

(k) In the proposed section 157HA(5), by deleting "Subsection (3)(b)" and substituting "The exception specified in subsection (3)(b)".

(l) By deleting the proposed section 157HA(6) and substituting –

"(6) Subject to this section, a company is not prohibited by section 157H(2) from entering into a transaction described in that section if the ordinary business of that company includes the entering into of transactions of that description.

(6A) Subject to this section, a relevant company is not prohibited by section 157H(2A) or (2B) from entering into a transaction described in that section if the ordinary business of that company includes the entering into of transactions of that description.".

(m) In the proposed section 157HA(7) –

(i) by deleting "Subsection (6) operates" and substituting "The exceptions specified in subsections (6) and (6A)

operate";

(ii) in paragraph (a), by adding "or relevant company, as the case may be," after "company";

(iii) in paragraph (b) –

(A) by adding "or relevant company, as the case may be," after "expect the company";

(B) by adding "or relevant company" after "with the company".

(n) By deleting the proposed section 157HA(8) and (9) and substituting –

"(8) Subsections (6) and (6A) do not authorize a company or relevant company, as the case may be, to enter into a transaction described in section 157H(2), (2A) or (2B) if, at the time the transaction is entered into, the relevant amount exceeds $750,000.

(9) For the purpose of subsection (8), "relevant amount" (有關款額) –

(a) in relation to a company that at the time of the transaction in question is subject to the prohibition in section 157H(2) but is not subject to the prohibitions in section 157H(2A) and (2B), means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the amount outstanding at that time in respect of principal on all loans made

by the company by virtue of subsection (6) to the director or other company concerned (excluding the transaction in question); and

(iii) the amount representing the maximum liability of the company at that time under all guarantees and all security entered into or provided by the company by virtue of subsection (6) in connection with any loans made by any person to the director or other company concerned (excluding the transaction in question); and

(b) in relation to a company that at the time of the transaction in question is subject to the prohibitions in section 157H(2), (2A) and (2B), means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the amount outstanding at that time in respect of principal on all loans and quasi-loans made by the

company to, and all credit transactions entered into by the company as creditor for, the director or other company concerned by virtue of subsection (6) or (6A) (excluding the transaction in question); and

(iii) the amount representing the maximum liability of the company at that time under all guarantees and all security entered into or provided by the company by virtue of subsection (6) or (6A) in connection with any loans or quasi-loans made by any person to, or any credit transactions entered into by any person as creditor for, the director or other company concerned (excluding the transaction in question).

(9A) Subsections (3), (6) and (6A) do not authorize a company to enter into a transaction if, at the time the transaction is entered into, the relevant amount exceeds 5 per cent of the amount of the company's net assets as shown in the latest balance sheet laid before the company in general meeting.

(9B) For the purpose of subsection (9A), "relevant amount" (有關款額) –

(a) in relation to a company that at the time of the transaction in question is subject to the prohibition in section 157H(2) but is not subject to the prohibitions in section 157H(2A) and (2B), means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the amount outstanding at that time, in respect of principal and interest or otherwise, on all loans made by the company to any of its directors (excluding the transaction in question and any loans made by virtue of subsection (1) or (2)); and

(iii) the amount representing the maximum liability of the company at that time under all guarantees entered into by the company, and in respect of all security provided by the company, in connection with any loans made by any person to any of its directors

(excluding the transaction in question and any guarantees or security entered into or provided by virtue of subsection (1) or (2)); and

(b) in relation to a company that at the time of the transaction in question is subject to the prohibitions in section 157H(2), (2A) and (2B), means the aggregate of the following amounts –

(i) the amount of the transaction in question;

(ii) the amount outstanding at that time, in respect of principal and interest or otherwise, on all loans and quasi-loans made by the company to, and all credit transactions entered into by the company as creditor for, any of its directors (excluding the transaction in question and any loans, quasi-loans or credit transactions made or entered into by virtue of subsection (1) or (2)); and

(iii) the amount representing the

maximum liability of the company at that time under all guarantees entered into by the company, and in respect of all security provided by the company, in connection with any loans or quasi-loans made by any person to, or any credit transactions entered into by any person as creditor for, any of its directors (excluding the transaction in question and any guarantees or security entered into or provided by virtue of subsection (1) or (2)).".

(o) By deleting the proposed section 157HA(13) and substituting –

"(13) All other terms and expressions used in this section have the same meaning as in section 157H subject to the following exceptions –

(a) for the purposes of subsection (3) of this section, "director" (董事) does not include a shadow director; and

(b) section 157H(5) shall not apply in relation to the references to a director in subsection (3) of this section insofar as that subsection applies in respect of a director of –

(i) a company that has any of its

shares listed on a recognized stock market; or

(ii) a company that is a member of a group of companies of which a company referred to in paragraph (a) is a member.".

59 (a) In subclause (1), in the proposed section 157I(1), by deleting "157H(1), (2) or (4)" and substituting "157H".

(b) In subclause (2), by deleting "157H(1), (2) or (4)" and substituting "157H".

(c) In subclause (3) –

(i) in the proposed section 157I(4), by deleting "157H(1), (2) or (4)" and substituting "157H";

(ii) in the proposed section 157I(5), by deleting "157H(1), (2) and (4)" and substituting "157H";

(iii) by deleting the proposed section 157I(6) and substituting –

"(6) In this section –

"company" (公司) has the same meaning as in section 157H(7);

"director" (董事), except in subsection (3), includes a shadow director;

"the relevant circumstances" (有關情況), in relation to a contravention of section 157H, means all the facts and other circumstances constituting that contravention including, in the case of a transaction or arrangement

which but for any fact or circumstance would be authorized by any provision of section 157HA, that fact or circumstance.".

60 (a) In the proposed section 157J(1) –

(i) by deleting "transaction or arrangement in contravention of section 157H(1), (2) or (4)" and substituting "transaction in contravention of section 157H(2), (2A) or (2B)";

(ii) in paragraph (a), by deleting "or arrangement is entered into in contravention of section 157H(1)(a), (b) or (c)" and substituting "is entered into in contravention of section 157H(2)(a) or (b), (2A)(a) or (b) or (2B)(a) or (b)";

(iii) in paragraphs (b) and (c), by deleting "or arrangement".

(b) By adding after the proposed section 157J(1) –

"(1A) Where a company enters into an arrangement in contravention of section 157H(2C) or (4), the following persons shall, subject to subsection (2), be guilty of an offence –

(a) if the arrangement is entered into in connection with a transaction described in section 157H(2)(a) or (b), (2A)(a) or (b) or (2B)(a) or (b), the company;

(b) any director of the company who wilfully authorized or permitted the arrangement to be entered into; and

(c) any person who knowingly procured

the company to enter into the arrangement.".

(c) In the proposed section 157J(4) –

(i) in the definition of "the relevant circumstances", by deleting "157H(1), (2) or (4)" and substituting "157H";

(ii) by adding –

""company" (公司) has the same meaning as in section 157H(7);".

61 By deleting the clause and substituting –

"**61. Register of directors and secretaries**

(1) Section 158 is amended by adding –

"(2B) Where the company is a private company having only one member and that member is the sole director of the company, the register shall contain the following particulars with respect to the reserve director of the company (if any) –

(a) his present forename and surname and any former forename or surname;

(b) any alias;

(c) his usual residential address; and

(d) the number of his identity card (if any) or, in the absence of such number, the number and issuing country of any passport held by him.".

(2) Section 158(4) is repealed and the following substituted –

"(4) The company shall –

(a) within 14 days from the appointment of the first directors of the company otherwise than by virtue of section 153(2) or 153A(2), send to the Registrar a return in the specified form containing the particulars specified in the register; and

(b) within 14 days from the occurrence of any change in the company's directors, reserve director (if any), secretary or joint secretaries (if any) or in any of the particulars contained in the register, send to the Registrar a notification in the specified form of the change and of the date on which it occurred.

(4A) The company shall, within 14 days from the appointment of a person as a director, secretary or joint secretary of the company or the nomination of a person as a reserve director of the company, send to the Registrar a notification in the specified form containing all such particulars with respect to that person as are required to be contained in the register with respect to him.

(4B) Subsection (4A) does not apply to an appointment or nomination the relevant particulars of which have been stated in a return or notification sent to

the Registrar under subsection (4).".

(3) Section 158(5) is amended –

(a) by repealing "writing" and substituting "the specified form";

(b) by adding "or 153A(2)" after "153(2)".

(4) Section 158 is amended by adding –

"(5A) Where a person is nominated as a reserve director of a private company, the company shall, within 14 days from the nomination, send to the Registrar a statement in the specified form, signed by such person, that he has accepted his nomination and that he has attained the age of 18 years.".

(5) Section 158(6) is repealed.

(6) Section 158(8) is amended by repealing "(3), (4) or (5)" and substituting "(2B), (3), (4), (4A), (5) or (5A)".

(7) Section 158(10)(a) is amended by repealing "person in accordance with whose directions or instructions the directors of a company are accustomed to act" and substituting "shadow director".".

New By adding –

"**61A. Duty to make disclosure for purposes of section 158**

Section 158B(1) is amended by adding ", reserve director" after "director".".

62 By deleting the clause and substituting –

"**62. Registrar to keep an index of directors**

(1) Section 158C(1)(a) is repealed and the following substituted –

"(a) The Registrar shall keep and maintain an index of every person who is a director of a company or a reserve director of a private company.".

(2) Section 158C(1)(b) is amended by adding "or reserve director" after "director" where it twice appears.".

63 (a) By adding after the proposed section 161B(1) –

"(1A) In the case of relevant transactions that consist of quasi-loans or credit transactions, there may be included in the accounts of the company, in lieu of the particulars required to be included under subsection (1), a statement showing, with respect to each borrower in relation to whom particulars are required to be given under that subsection –

(a) the name of that person;

(b) if subsection (1)(b) applies in respect of any such relevant transaction of which that person is the borrower, the name of the relevant director;

(c) the aggregate of the amounts outstanding on all such relevant transactions of which that person is the borrower, in respect of principal and interest or otherwise, at the beginning and at the end of the

company's financial year; and

(d) the aggregate of the amounts, if any, that, having fallen due, have not been paid and the aggregate of the amounts of any provision (within the meaning of the Tenth Schedule) made in respect of any failure or anticipated failure by that person to pay the whole or any part of the principal amount of any such relevant transaction or any other amount owing under it.".

(b) In the proposed section 161B(2), by adding ", subject to this section," after "shall".

(c) By adding after the proposed section 161B(3) –

"(3A) In the case of guarantees entered into or security provided in connection with relevant transactions that consist of quasi-loans or credit transactions, there may be included in the accounts of the company, in lieu of the particulars required to be included under subsections (2) and (3), a statement showing, with respect to each borrower in relation to whom particulars are required to be given under those subsections –

(a) the name of that person;

(b) if subsection (2) applies to any such guarantee or security for a reason given in subsection (3)(a), the name of the relevant director;

(c) the maximum liability of the company, both at the beginning and at the end of the financial year, under all guarantees entered into, and in respect of all security provided, by the company in connection with all such relevant transactions of which that person is the borrower; and

(d) the aggregate of the amounts paid and of all liabilities incurred by the company for the purpose of fulfilling the guarantees or discharging the security referred to in paragraph (c) (including the aggregate of all losses incurred by the company by reason of the enforcement of such guarantees or security).".

(d) In the proposed section 161B(4) –

(i) by adding ", subject to this section," after "shall";

(ii) in paragraph (a) –

(A) by deleting "an officer of the company (whether or not he was an officer" and substituting "a director or other officer of the company (whether or not he was a director or other officer of the company";

(B) in subparagraphs (i) and (iv), by adding "director or" before "officer";

(iii) in paragraph (b) –

(A) by deleting “an officer of the company (whether or not he was an officer” and substituting “a director or other officer of the company (whether or not he was a director or other officer of the company”;

(B) in subparagraph (i), by adding “director or” before “officer”.

(e) By adding after the proposed section 161B(4) –

“(4A) In the case of quasi-loans and credit transactions, there may be included in the accounts or group accounts of the company, in lieu of the particulars required to be included under subsection (4), a statement showing, with respect to each director or other officer in relation to whom particulars are required to be given under that subsection –

(a) the name of that person;

(b) the aggregate of the principal amounts of all quasi-loans made by the subsidiary to, and all credit transactions entered into by the subsidiary as creditor for, that person;

(c) the aggregate of the amounts outstanding on all such quasi-loans and credit transactions, in respect of principal and interest or otherwise, at the beginning and at the end of the company’s financial year;

(d) the aggregate of the amounts, if any, that, having fallen due, have not been paid and the aggregate of the amounts of any provision (within the meaning of the Tenth Schedule) made in respect of any failure or anticipated failure by that person to pay the whole or any part of the principal amount of any such quasi-loan or credit transaction or any other amount owing under it;

(e) the aggregate of the principal amounts of all quasi-loans made by any person to, and all credit transactions entered into by any person as creditor for, that person under all guarantees entered into and all security provided by the subsidiary and in respect of which the liability of the subsidiary has not been discharged before the beginning of the company's financial year;

(f) the maximum liability of the subsidiary, both at the beginning and at the end of the financial year, under the guarantees and security referred to in paragraph (e); and

(g) the aggregate of the amounts paid

and of all liabilities incurred by the subsidiary for the purpose of fulfilling the guarantees or discharging the security referred to in paragraph (e) (including the aggregate of all losses incurred by the subsidiary by reason of the enforcement of such guarantees or security).".

(f) In the proposed section 161B(7)(a)(i) and (ii), by deleting "an officer of the company (whether or not he was an officer" and substituting "a director or other officer of the company (whether or not he was a director or other officer of the company".

(g) In the proposed section 161B(10), by adding ", 161BB" after "161BA".

(h) In the proposed section 161B(11)(a), by deleting "an officer" where it first appears and substituting "a director or other officer".

(i) By adding after the proposed section 161B(12) –

"(12A) For the purposes of this section, a person is connected with a director of a company if, but only if, he is –

(a) that director's spouse, child or step-child;

(b) a person acting in his capacity as the trustee (other than as trustee under an employees' share scheme or a pension scheme) of any trust the beneficiaries of which include the

director, his spouse or any of his children or step-children or the terms of which confer a power on the trustees that may be exercised for the benefit of the director, his spouse or any of his children or step-children; or

(c) a person acting in his capacity as partner of that director or of any person who by virtue of paragraph (a) or (b) is connected with that director,

and in this subsection a reference to the child or step-child of any person shall include a reference to any illegitimate child of that person, but shall not include a reference to any person who has attained the age of 18 years.".

(j) In the proposed section 161B(13), by adding ", (4A)" after "(4)".

64 (a) By renumbering the clause as clause 64(1).

(b) By adding –

"(2) Section 161BA(7) is amended by adding "該" before "公司" where it secondly and thirdly appears.

(3) In the Chinese text, section 161BA(8) is repealed and the following substituted –

"(8) 就本條所訂的任何罪行而言 —

(a) 凡該罪行包括沒有採取合理步驟以確保公司遵從本條的規定，在任何就該罪行而針對某

人提起的法律程序中，如該人能證明他有合理理由相信而又確實相信，一名合資格而又可靠的人，已獲委以確保該等規定獲遵從的職責並處於能夠執行該項職責的景況，即可以此作為免責辯護；及

（b） 除非處理該案的法院認為該人故意犯該罪行，否則該人不得因上述罪行而被判處監禁。”.

(4) Section 161BA(10) is amended by repealing “公司接獲該項要求翌日起計” and substituting “自公司接獲該項要求之日的翌日起計的”.

(5) In the Chinese text, section 161BA(11) and (12) is repealed and the following substituted –

“（11） 如根據本條進行查閱的要求遭拒絕，或根據本條所要求的副本沒有在恰當的期限內送交，則有關公司及其每名失責高級人員均可處罰款，如持續失責，則可處按日計算的失責罰款。

（12） 如有上述拒絕或失責情況，法院可藉命令強迫將有關陳述書立即供查閱，或指示將所要求的副本送交要求取得該等副本的人。”.”.

New By adding –

“**64A. Section added**

The following is added –

"**161BB. Further provisions relating to quasi-loans and credit transactions, etc.**

(1) Where a company includes in its accounts (including group accounts) in respect of a financial year a statement referred to in section 161B(1A), (3A) or (4A), the company shall enter in a register to be maintained by it for the purpose of this section those particulars that would, but for section 161B(1A), (3A) or (4A), be required by section 161B to be shown in its accounts in respect of that financial year, which particulars shall be retained in the register for a period of 10 years.

(2) The register referred to in subsection (1) shall be kept at the same place as the company's register of members.

(3) If any person being a director of a company fails to take all reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall be liable on conviction to imprisonment and a fine.

(4) As respects an offence under this section –

(a) in any proceedings against a person in respect of such an offence consisting of a failure to take reasonable steps to secure compliance by the company with the requirements of this section, it shall be a defence to prove that he

had reasonable ground to believe and did believe that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty; and

(b) a person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the court dealing with the case, the offence was committed wilfully.

(5) The register referred to in subsection (1) shall be made available for inspection during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose, so that not less than 2 hours in each day be allowed for inspection) by any member of the company, without charge.

(6) Any member of the company may require a copy of the register referred to in subsection (1), or any part thereof, on payment of 25 cents, or such less sum as the company may prescribe, for every 100 words or fractional part thereof required to be copied. The company shall cause any copy so required by any member to be sent to that member within a period of 10 days commencing on the day next after the day on which the requirement is received by the company.

(7) If any inspection required under this

section is refused or if any copy required under this section is not sent within the proper period, the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine.

(8) In the case of any such refusal or default, the court may by order compel an immediate inspection of the register or direct that the copies required shall be sent to the member requiring them.”.”.

New By adding –

“**64B. General duty to make disclosure for purposes of sections 161 and 161B**

(1) Section 161C(1) is repealed and the following substituted –

“(1) It shall be the duty of any director of a company to give notice in writing to the company of such matters relating to himself as may be necessary for the purposes of section 161 and of section 161B except so far as it relates to –

(a) loans or quasi-loans made, by the company or by any other person under a guarantee from or on a security provided by the company, to an officer of the company; or

(b) credit transactions entered into by the company as creditor for an officer of the company, or entered into by any other person as creditor

for an officer of the company under a guarantee from or on a security provided by the company.".

(2) Section 161C is amended by adding –

"(2A) It shall be the duty of any shadow director of a company and any person who has at any time during the preceding 5 years been a shadow director of the company to give notice in writing to the company of such matters relating to himself as may be necessary for the purposes of section 161B.".".

65 (a) In the proposed section 162B, in the heading, by deleting "單一" and substituting "唯一".

(b) By deleting the proposed section 162B(6) and substituting –

"(6) For the purposes of this section –

(a) subject to paragraph (b), where the sole member of a company is a shadow director, that member shall be treated as a director of the company;

(b) a body corporate is not to be treated as a shadow director of any of its subsidiaries by reason only that the directors or a majority of the directors of the subsidiary are accustomed to act in accordance with its directions or instructions.".

70(2) In the proposed section 178(4), by deleting "an amount greater than $10,000" and substituting "any amount".

76 In the proposed section 228A(18), by deleting "單一" and substituting "唯一".

79(6) (a) In the proposed section 233(6), by deleting "單一" and substituting "唯一".

(b) In the proposed section 233(7)(b), by deleting "it" and substituting "the declaration".

93 By deleting the clause and substituting –

"**93. Section substituted**

Section 314 is repealed and the following substituted –

"**314. Authentication of statements of existing companies**

The lists of members and directors and any other particulars relating to the company required to be delivered to the Registrar shall be verified by a statement in writing signed by –

(a) in the case of a company having only one director, the sole director or a principal officer of the company; and

(b) in any other case, any 2 or more directors or other principal officers of the company.".".

96(2) In the proposed section 327(6), by deleting "an amount greater than $10,000" and substituting "any amount".

108(c) In the proposed regulation 1 –

(a) in the third paragraph, by adding "if the person to whom the communication is given consents to it being given to him in that form" after "electronic record";

(b) in the fourth paragraph, by deleting "electronic means" and substituting "such lawful electronic means and in such manner as may be agreed by the company in general meeting".

112 (a) In subclause (1), by adding after paragraph (j) –

"(ja) in the entry relating to section 161C(3), in the second column, by adding "or shadow director" after "Director";".

(b) In subclause (2), in the proposed entry relating to section 116BC(2), in the second column, by deleting "單一" and substituting "唯一".

(c) In subclause (2), by adding after the proposed entry relating to section 116BC(2) –

"116BC(2A)	Company failing to enter record of written record of decision provided in accordance with section 116BC	Summary	level 3	$300".

(d) In subclause (2), by adding after the proposed entry relating to section 153A(3) –

"153C(4)	Sole director	Summary	level 3	$300

	failing to provide the company with a written record of his decision			
153C(5)	Company failing to enter record of written record of decision provided in accordance with section 153C	Summary	level 3	$300
161BB(3)	Director failing to take all reasonable steps to ensure the company keeps a register of particulars relating to quasi-loans and credit transactions, etc.	Summary	level 5 and 6 months	–
161BB(7)	Company failing	Summary	level 3	$300”.

to permit
inspection or
to send a copy
as required of
the register of
particulars
relating to
quasi-loans
and credit
transactions,
etc.

122 (a) By deleting the subheading "**Stock Exchanges Unification Ordinance**" immediately before the clause.

(b) By deleting the clause.

123 (a) By deleting the subheading "**Securities (Disclosure of Interests) Ordinance**" immediately before the clause.

(b) By deleting the clause.

124 (a) By deleting "**(Clearing Houses)**" in the subheading immediately before the clause.

(b) In the heading, by deleting "由某些交易得來的某些款項" and substituting "得自某些交易的某些款額".

(c) By deleting "Section 11(2) of the Securities and Futures (Clearing Houses) Ordinance (Cap. 420)" and substituting "Section 51(3) of the Securities and Futures Ordinance (Cap. 571)".