

**Bills Committee on Companies (Amendment) Bill 2003**

**Summary of written submissions and the Administration's response  
on Schedule 3 of the Bill**

**(as at 14 April 2004)**

<b>Section No. of Schedule 3 / Subject</b>	<b>Name of organizations/ individuals</b>	<b>Major views on the Bill</b>	<b>Administration's response</b>
General comments	The Hong Kong Institute of Company Secretaries (HKICS)	HKICS is in favour of the proposals in Schedule 3.	We welcome the support of HKICS.
	Hong Kong Small and Medium Enterprises Association	The Association supports the simplified registration requirements of non-Hong Kong companies proposed in the Bill, but considers that the Administration should revisit the impact of the proposed requirements on disclosure and annual returns on the operating cost of small and medium enterprises.	We note the support of the Association. However, we consider the impact of the proposed requirements on disclosure and annual returns on the operating cost of small and medium enterprises should be minimal.

Section No. of Schedule 3 / Subject	Name of organizations/ individuals	Major views on the Bill	Administration's response
Section 1 - <i>Interpretation - "place of business"</i>	The Law Society of Hong Kong	<p><u>Letter dated 19 September 2003</u></p> <p>The proposal to remove the element of share transfer office from the definition of a "<i>place of business</i>" could have a significant impact on the amount of information available in respect of companies listed in Hong Kong where neither the place of business nor the place of incorporation is in Hong Kong. For example, most H share companies would no longer be required by the Ordinance to register under Part XI if the proposal is adopted.</p> <p>There is no requirement under the Listing Rules for a place of business to be established before a company can be listed in Hong Kong. A company can be listed if it appoints a service agent in Hong Kong and there is a place in Hong Kong for document inspection in certain circumstances. None of these would necessarily amount to a "<i>place of business</i>" under the new definition.</p>	<p>In relation to the proposed removal of the phrase "a share transfer or share registration office" from the definition of "place of business" in Section 341 of the Companies Ordinance (CO), we uphold our view that the body of case law has already provided the corresponding definition.</p> <p>However, in response to the concern of the Society, we have further consulted the Securities and Futures Commission (SFC) and the Hong Kong Exchanges and Clearing Limited (HKEx). For the sake of better clarity, they share the views of the Society and agree to retain the phrase in question.</p> <p>Therefore, we have no objection to the Society's proposal and we will follow up the matter with the Bills Committee.</p>

Section No. of Schedule 3 / Subject	Name of organizations/ individuals	Major views on the Bill	Administration's response
Section 1 - <i>Interpretation - "place of business"</i> ( <i>Cont'd</i> )	The Law Society of Hong Kong ( <i>Cont'd</i> )	<p><u>Letter dated 16 October 2003</u></p> <p>It is precisely because of the "share registration office" element of the definition of "place of business" that in practice, all the 58 H-share companies listed on the Main Board and 28 listed on GEM are registered under Part XI of the Ordinance.</p> <p>The Society takes the view that, unless a suitable alternative is put in place, the relevant proposed amendment should not be made since (i) it would take a substantial number of existing Hong Kong listed companies outside the statutory disclosure regime of Part XI of the Ordinance (except that the prospectus provisions will continue to apply) and (ii) when similar companies apply for a listing in Hong Kong, they will not be required to be registered under Part XI of the Ordinance.</p>	As above.

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Section 1 - <i>Interpretation - "place of business"</i> (Cont'd)	The Hong Kong Chinese Enterprises Association (HKCEA)  Linklaters	(a) The new definition of " <i>place of business</i> " will give rise to factual difficulties or disputes. The new definition only provides that it does not include a local representative office established or maintained by a bank with the approval of the Hong Kong Monetary Authority. No other guidance is given on the circumstances under which a "non-Hong Kong" company would be considered as having a "place of business" in Hong Kong.	(a) As regards representative offices of non-Hong Kong companies, the intention of the proposed amendments to the definition of "place of business" was not to widen the scope of Part XI registration regime or to catch all such representative offices except those maintained by duly licensed banks as approved by the HKMA. One of the reasons for the proposal to exempt representative offices of duly licensed banks as approved by the HKMA was to remove the "double negative" provision introduced in 1984 in Section 341 which is unique to Hong Kong and has no parallel in other common law jurisdictions. When the definition was drafted in 1984, the HKMA did not exist but Hong Kong now has a sophisticated regulatory structure for banks. Given the supervision by the HKMA and the obligation to register under the Banking Ordinance, it is unnecessary to require the representative offices of oversea banks to register under Part XI.

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Section 1 - <i>Interpretation - "place of business"</i> (Cont'd)	HKCEA Linklaters (Cont'd)	<p>(b) The new definition may give rise to difficulty or confusion on whether or not an H-share company listed in Hong Kong which does not have any operations in Hong Kong except for the maintenance of a branch share register as required under the Listing Rules would be regarded as having a place of business in Hong Kong.</p> <p>(c) Section 744 of UK's Company Act defines a "place of business" as including "a share transfer or share registration office."</p> <p>(d) <b>HKCEA</b> recommends that some guidelines on the meaning of a <i>"place of business"</i> should be included in the Ordinance, and reference to <i>"share transfer or share registration office"</i> should be included in the definition.</p> <p>(e) <b>Linklaters</b> considers that the reasons for amending the definition of <i>"place of business"</i> should be clearly spelt out to enable a clear understanding of the scope of application of Part XI.</p>	<p>(b) &amp; (c)</p> <p>In relation to the proposed removal of the phrase "a share transfer or share registration office" from the definition of "place of business" in Section 341 of the Companies Ordinance (CO), we uphold our view that the body of case law has already provided the corresponding definition.</p> <p>However, in response to the concern of various respondents, we have further consulted the Securities and Futures Commission (SFC) and the Hong Kong Exchanges and Clearing Limited (HKEx). For the sake of better clarity, they agree to retain the phrase in question. We will follow up the matter with the Bills Committee.</p> <p>(d) Please refer to our response in parts (b) and (c) above.</p> <p>(e) Given the clarity of the Bill, we consider it unnecessary to clearly spell out the definition of "place of business". As for the concern over the proposed removal of the phrase "a share transfer or share registration office" from the definition of "place of business" in Section 341 of the Companies Ordinance (CO), please see our response in parts (b) and (c) above.</p>

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Section 14 – <i>Section 91 of the Ordinance substituted (Application of Part III to non-Hong Kong companies)</i>	The Hong Kong Association of Banks (HKAB)	<p>Under <b>proposed section 91(2)</b> regarding the application of section 80 to charges on property in Hong Kong that are created by a non-Hong Kong company, where the property was not in Hong Kong at the time when those charges were so created, the requirement of delivering the charges to the Registrar "<i>within 5 weeks after the date of its creation</i>" will be substituted by "<i>within 5 weeks after the date when it is brought into Hong Kong</i>". HKAB seeks clarification on the following areas:</p> <p>(a) definition of "brought into Hong Kong";</p> <p>(b) whether it is necessary to provide evidence/supporting documents to the Companies Registry for registering the charge;</p>	<p>(a) The date upon which the subject of the charge was brought into Hong Kong would vary according to the nature of the property in question and that this should be an issue best decided by chargees who would be most familiar with the nature of their own particular businesses.</p> <p>(b) The Companies Registry ("CR") proposes to introduce a new field in the form used for reporting mortgage or charge details to the CR (Form M1). It will require the presenter to report the date on which the property in question was brought into Hong Kong. Whilst no particular evidence or declaration is to be required, the form will need to be signed by either the non-Hong Kong company or chargee concerned. Indeed, over 90% of the charges are reported to the CR by the chargee rather than the chargor.</p>

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Section 14 – <i>Section 91 of the Ordinance substituted (Application of Part III to non-Hong Kong companies)</i> (Cont'd)	HKAB (Cont'd)	(c) Currently it is common that "date of document" is interpreted as "date of creation" and the filing period shall count 5 weeks from the date of document. After the Bill is enacted, the filing date will count from the date when the property is "brought into Hong Kong". The Companies Registry should clarify whether it will accept filing for those charges that were created by a non-Hong Kong company where the property is not yet in Hong Kong at the time of the charge; and	(c) The Form M1 will be accepted for registration in cases where the field for the “date of creation” of the charge has been completed by inserting the date of the charge instrument in question. Very often, the date of creation of the charge and of the instrument (or document) creating the charge will be the same. However, there are some cases where charges are considered by the chargee as having been created by action subsequent to the execution of the charging instrument, particularly where complicated financial arrangements are concerned. It is also possible that charges may be created by action or by oral agreement alone. Therefore, the HKAB’s proposal for using the reference of the “date of document” may not be practicable.  If the non-Hong Kong company has created charges over property which is not yet in Hong Kong at the time of the charge, there is no need for the non-Hong Kong company registering such a charge when the property is not located in Hong Kong, as this would contravene the principle of legislation not having extra-territorial effect.

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Section 14 – <i>Section 91 of the Ordinance substituted (Application of Part III to non-Hong Kong companies)</i> (Cont'd)	HKAB (Cont'd)	(d) It may be more practical to require filing of the charge once it is created for monitoring purposes and ease of operation, as it would be rather difficult to monitor as to when the property is "brought into Hong Kong". If the proposed amendments are to be revised to improve clarity, HKAB requests to be consulted on the draft wording of the revised version.	<p>Neither the UK, Australia nor Singapore requires evidence of the date when the property subject to a charge was brought into the jurisdiction. The signature of the authorized person on the specified form suffices.</p> <p>(d) The basic rule for registration of a charge is governed by Section 80 of the Companies Ordinance ("CO") which requires registration of charges within 5 weeks after the date of their creation. Section 91 extends the application of Part III of the CO to charges on property in Hong Kong of an non-Hong Kong company registered under Part XI. It is necessary to apply different provisions to the registration of charges on property owned by non-Hong Kong company to cater for the various scenarios pertaining to the property and charge in question. We consider that the decision to register and when to register will be a commercial decision for each company to take, having regard to the nature of the charge and of the company's business.</p>



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<p>Section 7 - <i>Incorporation form</i></p> <p>Section 20 - <i>Register of directors and secretaries</i></p> <p>Section 26 - <i>Documents, etc. to be delivered to Registrar by companies that establish places of business in Hong Kong</i></p> <p>Section 31 - <i>Annual return to be made by non-Hong Kong company</i></p> <p>Section 35 – <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i></p>	<p>Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO)</p>	<p><u>Submission date 16 September 2003</u></p> <p>The Bill proposes that relevant personal data shall be submitted under specified forms under the <b>proposed sections 14A, 158(4) and (5), 333(2)(d) 333(2)(e), 334(3)(g) and 337A(1)(d)(iv).</b> PCO recommends that the data subjects should be explicitly informed of the matters mentioned in the Data Protection Principle (DPP) 1(3) such as the purpose for collection of the data, the classes of persons to whom such data may be transferred and the right to access to and request for correction of data. The notification may take the form of a Personal Information Collection Statement (PICS) being incorporated into the specified forms for collection of the personal data, if such administrative measures are not yet in place.</p>	<p>We confirm that the data subjects affected by those provisions will be explicitly informed of the matters mentioned in Data Protection Principle (“DPP”) 1(3) by means of a Personal Information Collection Statement (“PICS”) which is included in the Notes for Completion on the reverse of each relevant specified forms.</p> <p>In addition to the PICS included in the specified forms, a copy of the same PICS is posted in the public search area of the Companies Registry (“CR”) and shown on the CR’s website and contained in diskettes of all specified forms.</p> <p>A copy of the PICS is also attached to various documents such as application forms for company particular reports and notices displayed on the CR’s On-Line Public Search System etc.</p>

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<p>Section 7 - <i>Incorporation form</i></p> <p>Section 20 - <i>Register of directors and secretaries</i></p> <p>Section 26 - <i>Documents, etc. to be delivered to Registrar by companies that establish places of business in Hong Kong</i></p> <p>Section 31 - <i>Annual return to be made by non-Hong Kong company</i></p> <p>Section 35 – <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i></p> <p>(Cont'd)</p>	<p>PCO  (Cont'd)</p>	<p><u>Submission dated 14 October 2003</u></p> <p>Noting that the Administration will implement administrative measures for the provision of PICS, PCO adds that a data user should take all reasonably practicable steps to ensure that the notification is sufficiently brought to the attention of the data subjects and in this respect, the prominence and location for display of such notice are relevant factors for consideration.</p>	<p>We note the comments of PCO and would take all reasonable and practicable steps to ensure that the notification is sufficiently brought to the attention of the data subjects.</p>

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<p>Section 23 -</p> <p><i>Inspection, production and evidence of documents kept by Registrar</i></p>	<p>PCO</p>	<p><u>Submission dated 16 September 2003</u></p> <p>(a) It is doubtful whether the documents available for public inspection may include personal particulars of persons other than directors, former directors and other officers covered by the <b>proposed section 305(1A)(a)</b>. If such is the case, the purpose statement laid down in the proposed section 305(1A) may need to be reviewed to apply to all other categories of data subjects whose personal data are made available for public inspection by the Registrar.</p>	<p>(a) The collection of personal particulars of individuals who are not officers of a company e.g. a receiver, mortgagee, provisional liquidator or liquidator could come within the meaning of “enabling any member of the public to ascertain whether he is dealing with a specified corporation or its directors or other officers in matters of or connected with any act of such specified corporation” under the proposed section 305(1A). Given that a receiver, mortgagee or liquidator is appointed, whether by Order of the Court or pursuant to the terms of a deed, specifically to take action in relation to the affairs of a specified corporation and that individual is required pursuant to a specified provision in the Companies Ordinance (“CO”) to provide his personal data, we believe that the wording laid down in the proposed section 305(1A) is sufficiently wide to apply to data subjects other than directors or other officers of the company as his personal data is supplied pursuant to a statutory provision in the CR.</p>

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<p>Section 23 - <i>Inspection, production and evidence of documents kept by Registrar</i> (Cont'd)</p>	<p>PCO (Cont'd)</p>	<p><u>Submission dated 16 September 2003</u></p> <p>(b) In order to ensure that members of the public shall not use the personal data collected for purposes other than the specified purposes, imposition of sanction upon breach as a means of effective enforcement is recommended.</p>	<p>(b) As regards the imposition of sanctions, we consider it more appropriate to deal with this issue pursuant to the Personal Data (Privacy) Ordinance (“PD(P)O”) rather than the CO. The sentence “Any person who uses such personal data for any purpose other than the purposes in paragraph 1 of the PICS above or in contravention of the requirements under PD(P)O is liable to pay compensation and may be subject to action under the PD(P)O” will be added to the CR’s PICS to make it clear that this notice sets out the purposes for which the data are to be used and the fact that subsequent use of the data should also be limited to those purposes. Use of Data in contravention of the stated purposes or any of the requirements of the PD(P)O is liable to render the data user to action under the PD(P)O.</p> <p>Adequate administrative measures have already been put in place in the CR to ensure that all persons accessing the register are aware of the specified purposes and the need to confine the subsequent usage of the data to such purposes.</p>

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<p>Section 23 - <i>Inspection, production and evidence of documents kept by Registrar</i> (Cont'd)</p>	<p>PCO (Cont'd)</p>	<p><u>Submission dated 14 October 2003</u></p> <p>Noting the Administration's response, PCO opines that, for the sake of clarity, the purpose statement in <b>proposed section 305(1A)</b> should be clearly phrased to extend and cover persons who are not the directors (whether former or present) or other officers of a specified corporation but whose personal data may also be made available for public inspection under this proposed section.</p> <p><u>Submission dated 3 December 2003</u></p> <p>PCO doubts if the term "officer" is broad enough to cover such individual as mortgagee who would have no locus <i>vis-a-vis</i> the capacity <i>qua</i> "officer". While it may be sufficiently clear to the member of the public undertaking a search of the register that the relevant act is "an act of the specified corporation", the purpose statement should also clearly address the interest of the counter party to that act, where that counter party is an individual whose personal data are being disclosed.</p>	<p>We agree to amend section 305 to clarify beyond doubt that the purpose statement covers persons other than directors and other officers whose data are kept for public inspection, i.e., so that it would also cover searches in respect of mortgagees, liquidators etc who act in relation to a specified 'corporation'. We will follow up the matter with the Bills Committee.</p> <p>For the sake of better clarity, we agree to further amend the proposed section 305 so that the purpose statement would also cover searches in respect of mortgagees, liquidators etc who act in relation to a specified 'corporation'.</p>

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Section 26 - <i>Section substituted (Documents. etc. to be delivered to Registrar by companies that establish places of business in Hong Kong)</i>	Hong Kong Society of Accountants (HKSA)	(a) HKSA notes that under proposed section 333(5) of the Ordinance, a body corporate, other than a solicitor corporation or a corporate practice under the Professional Accountants Ordinance (Cap. 50), may not be authorized to accept, on behalf of any oversea company, service of process or any notices required to be served on the company. HKSA considers the provision is unduly restrictive and suggests that a body corporate that is controlled by a firm of certified public accountants or solicitors should also be allowed to act as an authorized representative of an oversea company in Hong Kong.	(a) A body corporate that is controlled by a firm of certified public accountants or solicitors may not necessarily have professionally qualified personnel actually working for that company and their staff members may not even be working in the same location as the controlling company which might diminish the degree of control over the company. It might thus be argued that there would not be sufficient certainty that process or notices served on the company would be properly attended to. On balance, we prefer retaining the wording of section 333(5) to its present form as the existing provision has operated without any problems up until now.

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<p>Section 28 - <i>Section substituted (Continuing obligation in respect of authorized representative)</i></p> <p>Section 29 - <i>Section substituted (Termination of registration of authorized representative)</i></p>	<p>HKSA</p>	<p>(b) Under <b>existing section 333A</b>, where an authorized representative of an oversea company registered under Part XI ceases to be able to act on behalf of the company by reason of death or incapacity or other unforeseen circumstances, the company is required, within 6 weeks from that time, to file with the Registrar of Companies a notice of appointment of a new authorized representative. A similar requirement is not provided in <b>proposed section 333A</b>. Furthermore, <b>proposed section 333B</b> provides for the termination of registration of an authorized representative but there is no concurrent obligation to appoint a replacement within a certain timeframe.</p> <p>HKSA considers that under <b>proposed sections 333A and 333B</b>, a non-Hong Kong company could easily find itself technically in breach of the continuing obligation to maintain an authorized representative. HKSA therefore proposes retaining the requirement of filing the notice of appointment of a new authorized representative, under <b>existing section 333A</b>, except that the notice should be filed within 14 days after the date of the termination of authorization in respect of the former incumbent, or within 28 days after the date on which the notice of termination is filed, whichever is the later.</p>	<p>(b) The issue raised by HKSA is covered by the provisions of the new Section 335(1) (Clause 32 of the Bill) which provide as follows –</p> <p>“(1)Where in the case of a non-Hong Kong company registered under this part, any alteration is made in –</p> <p>(b) the directors, secretaries (or whether are joint secretaries, each of them) or authorised representative of the company; .....</p> <p>the company shall, within 21 days after the date of the alteration, deliver to the Registrar for registration a return in the specified form containing the particulars of the alteration.”</p> <p>This provision mirrors the existing Section 335(1) and the details of the alteration are required to be delivered in the specified form F3. The new provision does, therefore, contain a statutory grace period for registering details of the change in authorised representative with the Companies Registry so there should be no difficulty for a non-Hong Kong company registered under the Companies Ordinance (CO) finding itself “technically” in breach of the obligation to maintain authorised representative. The period allowed for filing (21 days) is considered reasonable.</p>

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Section 35 - <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i>	HKSA	<p>(c) <b>Proposed section 337A</b> requires notification to be given to the Registrar of the commencement of any proceedings for the liquidation of a non-Hong Kong company. HKSA does not agree with the proposal to remove the obligation upon the officers of the company in Hong Kong, in addition to the company itself, to deliver such notice to the Registrar. HKSA also considers that "the officers of the company in Hong Kong" should be extended to include provisional liquidators and liquidators for the purposes of this provision.</p> <p>Where no (provisional) liquidator has been appointed, HKSA suggests that the information required to be filed should also include the date of hearing of the petition filed and the identity of the petitioner. Standard form should also be specified for such filing.</p>	<p>(c) The Standing Committee on Company Law Reform (SCCLR) considered that the phrase "and the officers of the company in Hong Kong" should be omitted from section 337A(1) in line with section 339. In that case, it places the obligation to deliver any further documents to the Registrar of Companies once the non-Hong Kong company has ceased to have a place of business in Hong Kong on the company, and not on the company and its officers. The fact that some overseas/non-Hong Kong companies might only have employees instead of officers in Hong Kong and the fact that only the company was required to file notices reporting other changes to its corporate structures were valid reasons for removing officers of the company from this provision. It seems to be less likely that once a petition has been issued for the liquidation of an overseas/non-Hong Kong company either in Hong Kong or elsewhere in the world, the directors would actually be within the jurisdiction of Hong Kong courts (particularly where the liquidation had commenced in another country) and thus not capable of being served with a prosecution for breach of an offence under this section.</p>



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Section 35 - <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i> (Cont'd)	HKSA (Cont'd)		The SCCLR also considered whether provisional liquidators and liquidators should be held responsible for giving notification to the Registrar of the commencement of winding up proceedings but it was felt that this provision should mirror similar provisions (Section 185 of the CO) concerning local companies for the sake of consistency. In practice, however, the Companies Registry has routinely accepted for registration notices of commencement of liquidation under the existing provision presented by the authorised representative or the liquidator and the new specified form which will be introduced in relation to this provision once the Bill has been enacted will require the information such as the date of commencement of proceedings for liquidation and country in which proceedings has been commenced etc.

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Section 35 - <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i> (Cont'd)	HKSA (Cont'd)		As regards the proposal of including the date of hearing of the petition filed and the identity of the petitioner, we consider that the present provisions are adequate. Those information can be easily ascertainable from the Official Receivers' Office or corresponding authority in other jurisdictions. There is no requirement in the present legislation or in the proposed Bill for liquidators to be required to provide a copy of the winding-up petition or order as it is considered more appropriate that this information be obtained either from the Courts or office responsible for registration of winding-up orders in the country in question. We also acknowledge the need to have a specified form for such filing.
Section 38 - <i>Section substituted (Notices to be sent when non-Hong Kong companies cease to have places of business in Hong Kong)</i>	HKCEA Linklaters	The requirement under <b>proposed section 339</b> for any non-Hong Kong company ceasing to have a place business in Hong Kong to give notice to the Registrar within 7 days may be onerous. <b>HKCEA and Linklaters</b> recommend to extend the notification period to 14 days.	We consider that the notification period being seven days after the cessation of business is in line with international practice as both Australia and Singapore impose the same requirement. In the present commercial environment where electronic communications are being used more and more frequently, it should not be unduly onerous to require filing within 7 days.