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Report of the Bills Committee on Companies (Amendment) Bill 2003

Purpose

This paper reports on the deliberations of the Bills Committee on Companies (Amendment) Bill 2003.

The Bill

2. On 13 June 2003, the Administration introduced the Companies (Amendment) Bill 2003 into the Legislative Council (LegCo). The Bill contains four main groups of proposed legislative amendments and these amendments are set out in Schedules 1 to 4 of the Bill as follows -

Schedule 1 - Amendments to the Companies Ordinance (the Ordinance) relating to prospectuses

Schedule 2 - Amendments to the Ordinance relating to group accounts

Schedule 3 - Amendments to the Ordinance relating to oversea companies

Schedule 4 - Amendments to the Ordinance relating to shareholders' remedies

Schedule 5 of the Bill contains the consequential and other amendments.

3. The package of proposals in the Bill aims to improve the prospectus regime to facilitate market development, to enhance corporate governance standards by strengthening remedies for shareholders and aligning the definition of "subsidiary" for the purposes of preparing group accounts with the International Accounting Standards and to modernize the registration regime for oversea companies.

4. The existing regulatory framework for prospectuses was introduced decades ago and amendments over the years do not adequately accommodate offering structures and other market practices prevalent in developed markets today. In

response to specific requests from market participants, the prospectus-related proposals in Schedule 1 have been drawn up to, among other things, simplify the procedures for the registration and issue of prospectuses, thereby fostering the development of retail bonds and other financial products[1]. Opportunity has also been taken to clarify the application of certain prospectus-related provisions to enhance investor protection.

5. The amendments relating to group accounts in Schedule 2 seek to make the meaning of "subsidiary" in the Ordinance more closely align with that in the International Accounting Standards in the context of group accounts. This would ensure that under the law, group accounts would better reflect the financial position of the company. The definition of "subsidiary" for purposes other than the preparation of group accounts would not be affected.

6. The amendments in Schedule 3 aim to modernize the registration regime for overseas companies by improving the registration system, streamlining the incorporation procedures and removing compliance difficulties and ambiguities, such as those over certification of documents and registration of charges, in the Ordinance.

7. The amendments in Schedule 4 aim to enhance corporate governance standards by strengthening remedies for shareholders. The proposals are related to statutory derivative action, unfair prejudice remedies, order for inspection of company records, injunction orders, etc., which were received with support during the consultation on Corporate Governance Review (Phase I) conducted by the Standing Committee on Company Law Reform in July 2001.

The Bills Committee

8. The House Committee agreed at its meeting on 27 June 2003 to form a Bills Committee to study the Bill. Under the Chairmanship of Hon Audrey EU Yuet-mee, the Bills Committee has held 30 meetings. The membership list of the Bills Committee is in **Appendix I**. 30 organizations and 5 individuals have made written submissions and/or oral representation to the Bills Committee. A list of these organizations is at **Appendix II**. The Bills Committee has been able to complete the scrutiny of Schedules 1, 3 and 4 and the related consequential amendments in Schedule 5 of the Bill. As regards Schedule 2 of the Bill, the Administration at the

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[1] The Financial Secretary highlighted in his Budget Speech in 2002 the importance of increasing liquidity through attracting more financial product issuers to Hong Kong, as well as capital and investors from the Mainland and overseas. One of the initiatives endorsed by the Financial Secretary for increasing liquidity is to implement a three-phase approach to overhaul the existing regulatory framework for offers of shares and debentures. The first phase involved the issue by the Securities and Futures Commission (SFC) in February 2003 various guidelines to streamline the procedures for the registration and issue of prospectuses. The SFC also issued two class exemptions relating to prospectuses for offers of debentures. The second phase is the subject of this Bill. In the third phase, the SFC will conduct a comprehensive review of all local laws and procedures governing public offers of securities with reference to relevant regulatory reforms introduced in other leading jurisdictions.

later stage of the Bills Committee's deliberation, advises that in view of time and resource constraints, the Administration has decided to withdraw Schedule 2 of the Bill and the related consequential amendments from the Bill.

Deliberations of the Bills Committee

Updating the prospectus regime (Schedule 1 of the Bill)

9. Schedule 1 of the Bill seeks to amend Part II (applicable to companies incorporated in Hong Kong) and Part XII (applicable to companies incorporated outside Hong Kong) of the Ordinance, and the objectives are to -

(a) clarify the types of offers which can be made without triggering the prospectus regime;

(b) make clear that subject to necessary investor protection safeguards, it is permissible for issuers to issue "awareness advertisements" to allow investors more time to arrange their financial and other affairs in anticipation of a public offer;

(c) provide a dual prospectus structure, with appropriate safeguards on provision of information to investors, to facilitate the conduct of programme offers;

(d) remove the discrepancies in certain regulatory requirements applicable to offers made by companies incorporated locally and overseas;

(e) expand the existing exemption power of the Securities and Futures Commission (SFC) for increasing flexibility in administering the prospectus regime, and require SFC to publish details of exemptions granted for greater transparency; and

(f) amend the prospectus civil and criminal liabilities provisions under the Ordinance.

<u>Offers of shares or debentures which can be made without triggering the prospectus regime ("safe harbours")</u>

10. One of the major objectives of Schedule 1 of the Bill is to provide certainty as to the types of offers which can be made without triggering the prospectus regime. The types of offers are specified in proposed new Seventeenth Schedule of the Ordinance (Clause 27), and the offering documents in respect of these specified types of offers are carved out from the definition of "prospectus" in the Ordinance.

11. Among the various types of offers specified in the proposed Seventeenth Schedule exempted from the prospectus regulatory regime, members have thoroughly considered the scope of "qualifying persons" in section 8 of Part I. The proposed scope of "qualifying persons" include employees, directors, officers, consultants, former employees, former directors, former officers, former consultants, and their dependents. Some members are concerned that as an offer of shares or debentures under this exemption scheme can be made for consideration, some employees and their dependents who may not have sufficient knowledge of the financial conditions of the company, in subscribing the shares or debentures of the company without a prospectus, may be exposed to risks not made known to them.

12. The Administration and SFC explain that under the existing section 48A(2) of the Ordinance, any offer which can be properly regarded in all the circumstances as being a domestic concern of the persons making and receiving it shall not be taken as an offer to the public and thus would not fall under the prospectus regulatory regime. Such offers include one where there is a pre-existing special relationship between the offeror and the members of the group (e.g. employees of the offeror) to whom the offer is made. Therefore, the proposed scope of "qualifying person" is consistent with the current practice of SFC in granting exemption and the understanding of the market. SFC's past experience is that the risk of abuse is minimal. Moreover, existing sections 107 and 108 of the Securities and Futures Ordinance (Cap. 571) (SFO) provide the statutory safeguards against misrepresentation and untrue statements.

13. As regards members' particular concern about the inclusion of the dependents of the offeror's employees in the scope of "qualifying persons", the Administration and SFC explain that according to SFC's existing practice and understanding of the market, "dependents" of the members of the group to whom the offer is made would also fall under the category of "domestic concern" under section 48A(2) of the Ordinance as they have a sufficiently close nexus with the offerees. In other words, the existing regime already allows the exclusion of offers to "dependents" of members of the group who have a special relationship with the offeror from the prospectus requirements under the Ordinance. The proposed provisions in the Bill would provide certainty to this type of offer that can be made without triggering the prospectus regime. SFC advises that there are similar practices in overseas jurisdictions, such as Australia, the United Kingdom (UK) and the United States, to exempt offers to employees' dependents. The Bills Committee also notes that SFC's interpretation of "domestic concern" under section 48A(2) of the Ordinance has not been challenged by the court.

14. The Bills Committee also notes the concern raised by a deputation about the inclusion of "consultants" and "former consultants" of the offeror as "qualifying persons". According to the Administration and SFC, it is not uncommon for services to be provided by a consultant instead of an employee. It would be arbitrary to provide an exemption in respect of an employee but not a consultant with a contractual relationship with the issuer. The Administration and SFC explain that the proposed

exempt offer to consultants would unlikely be open to abuse because it is sufficiently limited by the restriction that the services rendered by a consultant must be those "commonly rendered by an employee of the relevant company or a company belonging to the class of companies which predominantly carry out the same kind of business as the relevant company".

15. In view of the concerns raised, the Bills Committee requests, and the Administration and SFC agree, to include the operation of the above exemption scheme in SFC's Phase III review on offers of shares and debentures.

Restriction on the sale of shares or debentures acquired pursuant to an offer made under an exemption scheme specified in Part 1 of the new Seventeenth Schedule

16. The Bill originally proposed to add new sections 38AA and 342AB to impose restrictions on the sale of shares or debentures acquired pursuant to an offer specified in Part 1 of the new Seventeenth Schedule so as to prevent abuse of the exemption schemes ("safe harbours") introduced under the new Seventeenth Schedule. In response to the concerns raised by members on the possible overlap of the new sections with some existing provisions in the Ordinance and on whether similar measures are adopted in other jurisdictions, the Administration, after re-examination, advises that the resale restriction in the proposed new sections 38AA and 342AB is not necessary. The Administration affirms that the intended policy objectives of the proposed sections 38AA and 342AB would have been achieved by the existing Ordinance and SFO and other proposed provisions in the Bill. In particular, any resale of shares/debentures acquired under a "safe harbour" to a wider section of the public will render the offer ineligible for the "safe harbour" in question, and hence the safeguards provided for under the current prospectus regulatory regime in the Ordinance will apply.

17. As regards the practice in other jurisdictions, the Administration advises that under the prospectus regulatory regimes in UK, Australia and Singapore where there are also "safe harbours", no restriction on the repeated use of safe harbours is imposed. In Australia, repeated use of the "safe harbours" is expressly permitted in its Corporations Act. Resale of shares/debentures acquired under "safe harbours" to persons falling outside the exemptions within 12 months will require a prospectus. In Singapore, there is also a restriction on resale of shares/debentures acquired under exempt offers to persons falling outside the exemptions. The Administration confirms that by taking out the resale restriction specified in the new sections 38AA and 342AB, the proposed regime would be largely in line with the standards and practices in other major financial markets.

18. The Administration therefore proposes Committee Stage amendments (CSAs) to take out from Schedule 1 of the Bill clauses 4 and 17 (i.e. proposed new sections 38AA and 342AB), as well as provisions relating to punishment of offences under sections 38AA(4) and 342AB(4) in clause 26. The Bills Committee concurs

that the proposed new sections 38AA and 342AB are not needed and thus should be deleted from the Bill.

Matters to be specified in prospectus and reports to be set out therein (proposed amendments to the existing Third Schedule)

19. Under section 38 of the Ordinance, unless otherwise exempted under section 38A, every prospectus issued by or on behalf of a company must state the matters specified in Part I of the Third Schedule and set out the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of the said Schedule.

20. The existing paragraph 3 of the Third Schedule requires for *"Sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the shares or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus."* The Bill proposes to add at the end of this paragraph: *"taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them".*

21. The Bills Committee notes that paragraph 3 will likely be relied on by an aggrieved investor to seek redress from the issuer. There is a possibility that when faced with allegations that the amount of information in a prospectus is inadequate or insufficiently clear, an issuer may rely on the proposed amendment and successfully argue for a lower standard of disclosure.

22. The Bills Committee notes the Administration's advice that the existing prospectus content requirements in the Third Schedule do not differentiate between equity and debt issues. All issues, regardless of whether they are equity or debt issues, have to comply with the relevant disclosure requirements set out in the Third Schedule. What may be seen as relevant information for an investor in equity (e.g. profitability of a company) may not be viewed as such by a debt investor who may be more concerned about the sufficiency of reserves of the company in determining its repayment ability. The proposed amendment to paragraph 3 is to allow the regulator to tailor disclosure requirements to a particular offer, having regard to the nature of the company and securities being offered, etc. The language reflects the approach now being adopted by SFC in practice. SFC's regulatory experience shows that this approach operates well and has not given rise to any regulatory concern. The Administration also advises that a similar approach is adopted in UK, as per section 80(4) of the Financial Services and Markets Act 2000.

23. The Administration further advises that the purpose of the amendment is to encourage appropriate disclosure for different types of issues. The revised provision would enable the court to decide that, in practice, a higher standard of disclosure is appropriate in some cases, depending on the type of issue. The

Administration and SFC believe that the amendment may in fact call for a higher standard of disclosure.

Registration of material contracts in relation to a prospectus

24. The Bill originally sought to replace the existing requirement with respect to registration of material contracts in relation to a prospectus with the Companies Registry (CR) with a new arrangement of displaying such contracts at the company's registered office in Hong Kong. Under this proposed new arrangement, the material contracts shall be displayed for not less than 14 days from the date of publication of the prospectus at the company's registered office or, in case the company does not have a place of business in Hong Kong, other places in Hong Kong as specified by SFC. The purpose of the proposed new arrangement is to facilitate issuers by removing the requirement of registering material contracts with CR without denying public access to the material contracts.

25. The Bills Committee has expressed concerns on whether the 14-day inspection period is sufficient and suggested that the period be lengthened to, say, cover the whole period during which the offer is made or the entire life of the financial product concerned. In making these suggestions, members note that under the existing arrangement, the public can have access to the material contracts registered with CR anytime and may make copies of the documents at a reasonable cost. The Administration considers that members' suggestion of lengthening the inspection period represents material departure from the original proposal exposed to the public in March 2003 during which no objection has been received. It has therefore undertaken to seek the views of all consultees covered in that consultation exercise.

26. In response to the Administration's consultation, about half of the 21 submissions support lengthening the inspection period. Some respondents are of the view that removing the requirement of registering material contracts with CR will not significantly reduce compliance costs, in particular if companies are required to make available for public inspection such contracts at their registered offices for a long period of time. In terms of investor protection, many respondents consider the current arrangement whereby the public may inspect and make copies of material contracts at CR at anytime is effective in ensuring ready access to such information.

27. In the light of the comments received, the Administration proposes and the Bills Committee agrees to maintain the current arrangement of registering material contracts with CR. The Administration will move CSAs to remove related provisions in clauses 7, 19, 25 and 26 of Schedule 1 of the Bill.

Powers of SFC to grant exemption from prospectus-related requirements

Statutory grounds on which SFC may grant exemptions

28. Under the existing Ordinance, SFC may grant exemption from compliance with any of the specified prospectus-related requirements on the ground that compliance with such requirement(s) would be either irrelevant or unduly burdensome. The Bill proposes to expand the existing exemption power of SFC under sections 38A and 342A of the Ordinance by providing SFC with an additional ground of exemption: that the exemption would not prejudice the interest of the investing public.

29. The Bills Committee is of the view that in principle, any exemption granted by SFC must not prejudice the interest of the investing public. In other words, the proposed additional ground should be a necessary condition of any exemption rather than one of the grounds for exemption. The Bills Committee however appreciates that apart from the circumstance where compliance with any or all of the specified requirements would be irrelevant or unduly burdensome, there may be other circumstances where compliance is unnecessary or inappropriate. The Administration concurs with the Bills Committee and will move CSAs to amend sections 38A(1) and (2) and sections 342A(1) and (2) accordingly.

Publication of particulars of exemptions granted on a case basis

30. Under both the existing and proposed provisions, SFC is empowered to grant exemption in any case of public offer of shares or debentures, from compliance with specified prospectus-related requirements. To ensure transparency of SFC's operations, the Bill proposes to add the provisions (proposed sections 38A(6) and 342A(6)) that SFC shall publish on-line the particulars of exemptions granted as it considers appropriate. The Bills Committee concurs with the view of a deputation that SFC should also publish the reasons for the exemptions apart from the particulars of the exemptions granted. The Administration advises that SFC's plan is to set up a designated webpage on SFC's website setting out all the relevant prospectus-related provisions in the Ordinance in respect of which an exemption has been granted to an applicant, the statutory grounds on which it is granted and the reasons therefor. The same information will also be published in the relevant prospectus.

31. Concern has been raised that since the proposed sections 38A(6) and 342A(6) only require SFC to publish the particulars of exemptions on-line "as it considers appropriate", the provisions may fall short of ensuring the transparency of SFC's exercise of the exemption power. The Administration and SFC's response is that the flexibility afforded by the expression "as it considers appropriate" is important for pragmatic reasons. In some instances, the application for exemption may relate to, or be supported by, confidential or commercially sensitive information, and thus it is not appropriate to publish full particulars of the exemption. In other cases, the text of

the exemption itself may be complex and lengthy, and the use of summary language to explain clearly the nature of, and reasons for, the exemption would facilitate investors' understanding. In these and other instances, publication of all particulars of an exemption would not be in the interests of the applicant or the market. The Administration also advises that the same issue was considered in detail during the passage of section 309(5) of SFO (governing the transparency of exemptions granted by SFC from the disclosure regime) through the Legislature. It was then agreed that a reasonable degree of flexibility must be preserved.

Public consultation on legislative proposals in respect of SFC's exemption powers

32. Under proposed sections 38A(2) and 342A(2), SFC may, by notice published in the Gazette, exempt -

(a) any class of companies; or

(b) any class of prospectuses issued by companies,

from any or all the requirements of the "relevant provisions" as defined in proposed sections 38A(4) and 342A(4). Under proposed sections 38A(5) and 342A(5), SFC may, by order published in the Gazette, amend sections 38A(4) and 342A(4).

33. The Bills Committee notes that while the relevant notices and orders published in the Gazette would be subject to negative vetting of LegCo, the Bill does not require public consultation on the class exemption or amendment proposals. This differs from the requirement in proposed section 360(7) where SFC is required to consult the public on proposals to amend specified schedules relating to certain prospectus requirements. The Bills Committee considers that in exercising its exemption or amendment powers on class exemption, SFC should be subject to a similar requirement, i.e. to consult the public before the relevant orders/notices of exemptions/amendments are published in the Gazette.

34. The Administration explains that SFC's power to exempt a class of companies or prospectuses is not a new one. Although there is no statutory requirement for public consultation in the existing Ordinance, it is SFC's practice to consult relevant stakeholders in respect of proposals to introduce class exemptions. Nevertheless, in light of the Bills Committee's comments, the Administration agrees to move CSAs to the effect that SFC will conduct public consultation on draft proposals/orders under proposed sections 38A(2), 38A(5), 342A(2) and 342A(5) in a manner similar to that provided for under proposed sections 360(7), (8) and (9).

35. In response to the concern on whether a minimum period of consultation should be stipulated in the legislation, the Administration explains that since different issues involve different levels of complexity, it is inappropriate to specify a single minimum period for consultation which is applicable in all cases. Moreover, some proposals may involve critical investor protection issues and legislative amendments

may have to be put in place within a short period of time to accommodate the needs of a rapidly changing market. SFC would ensure that the consultation period would be of an appropriate length taking into account the complexity of issues involved and other factors such as investor protection and market development.

SFC's statutory power to make rules and statutory duty to conduct consultation

36. Apart from the power to grant "class exemption" and to amend the list of "relevant provisions" (from which exemption may be granted) as defined in proposed sections 38A(4) and 342A(4) by order published in the Gazette, the Bill also proposes to empower SFC to update certain regulatory requirements by way of subsidiary legislation for more timely response to market developments, including the detailed information required in a prospectus as specified in the Third Schedule to the Ordinance (the power to amend the Third Schedule is currently vested in the Chief Executive in Council) and the new schedules proposed in the Bill. As a safeguard, SFC would be obliged to consult the public before making any such subsidiary legislation.

37. Concern has been raised that although under the existing Ordinance and SFO, SFC already has powers to make subsidiary legislation, the appropriateness of empowering SFC to make subsidiary legislation as proposed in the Bill is questionable with the implementation of the Accountability System for Principal Officials in Hong Kong. Dr Hon Eric LI points out that in empowering SFC to make subsidiary legislation, LegCo is in effect delegating powers to SFC to make subsidiary legislation. Under the current system, there is no constitutional relationship between LegCo and SFC, and when the proposed subsidiary legislation is to be debated at a Council meeting, it would be the responsible Principal Official rather than the Chairman of SFC who would account for the proposed subsidiary legislation. It is therefore questionable that the Administration, instead of SFC, should make subsidiary legislation and to conduct prior consultation on the draft legislation.

38. The Administration explains that SFC is an independent statutory regulator responsible for maintaining and promoting the fairness and efficiency of the securities and futures market. Regulatory experiences indicate that there is a practical need for SFC to be vested with the power to make subsidiary legislation prescribing detailed and technical requirements, and to perform the duty to consult on the contents of the draft subsidiary legislation so made. This arrangement is in line with public expectation and international practices. The Administration also emphasizes the need to maintain regulatory independence of SFC, pointing out that under the regulatory structure enshrined in SFO, the Administration does not, and should not, interfere with SFC's performance of day-to-day regulatory functions. The Administration therefore considers it inappropriate for the Administration to take over these roles from SFC. The Administration also advises that it is international trend that rules prescribing detailed and technical requirements for conducting financial services are made by the relevant market regulators. The approach proposed in the Bill is in line with international practice.

39. The Administration also advises that under the existing Ordinance, SFC has already been empowered to issue class exemption notice. There has been no objection to the proposed arrangements for SFC to initiate subsidiary legislation in relation to class exemption during the public consultation on the Bill. The market also has no objection to the proposal to transfer the power to amend the Third Schedule from the Chief Executive in Council to SFC (by deletion of existing section 38(7) and introduction of new section 360(6)). Under SFO, SFC is vested with the power to make subsidiary legislation which is in line with the primary legislation and seeks to enable SFC to implement the primary legislation in accordance with its regulatory objectives. No complaints or adverse comments about the existing arrangement have been received from market users and the general public.

40. Some members consider it necessary to maintain the independence of SFC in performing its regulatory functions. Whilst they appreciate the difficulty in drawing a very clear line between policy and technical matters (the former fall within the purview of the Principal Official and the latter fall within the purview of SFC), they concur that SFC should be empowered to make subsidiary legislation prescribing detailed and technical requirements. These members therefore accept the proposed provisions to empower SFC to make subsidiary legislation and require SFC to conduct prior public consultation on the draft legislation. It is further pointed out by a member that requiring SFC to be directly accountable to LegCo may subject the independent regulator to political influence and this will not be conducive to the healthy development of the market.

Guidelines published by SFC in relation to compliance with requirements on prospectuses consisting of one document or more than one document

41. The Bill originally proposed that SFC be empowered (under proposed new sections 39A(2), 39B(3), 342CA(2) and 342CB(3)) to publish guidelines in relation to compliance with requirements on amendments to prospectuses and requirements relating to programme offerings of shares or debentures. Noting that SFC has already been empowered generally under section 399 of SFO to publish codes and guidelines to provide guidance for the furtherance of SFC's regulatory objectives and in relation to any of the functions of SFC, the Bills Committee has sought clarification on how the proposed new provisions to empower SFC to publish guidelines under the Ordinance relate to the general empowering provisions in section 399 of SFO.

42. The Administration, after re-examination of the above provisions, advises that the objective of the proposed new sections in the Ordinance to empower SFC to publish guidelines can be adequately achieved by the existing section 399 of SFO and hence the proposed new sections can be dropped. The Administration therefore proposes CSAs to remove proposed new sections 39A(2) and (3), 39B(3) and (4), 342CA(2) and (3), 342CB(3) and (4) from the Bill. The Administration also confirms that the guidelines under section 399 of SFO are not subsidiary legislation

and a breach of these guidelines is not a breach of the law. A failure to comply with the guidelines will not render a person liable to any judicial or other proceedings, but may be used as evidence that provisions of the sections have been contravened if it appears to the court to be relevant.

Amendments to prospectuses

43. Regarding amendments to prospectuses, it is proposed that if any company contravenes the relevant statutory requirements, the company and every officer of the company who is in default shall be liable to a fine at level 6. The Bills Committee notes that the mode of prosecution in respect of these offences would be summary offences. The Administration also confirms that these arrangements are in line with those applicable to other offences of similar nature under the existing Ordinance.

44. Some members have raised concern on whether the scope of persons (i.e. the company and every officer of the company who is in default) liable for the contravention is too wide, and sought clarification on whether "reasonable excuse" and "negligence" would be defence.

45. The Administration is of the view that imposing a fine on the company concerned only for the contravention does not have sufficient deterrent effect. The additional punishment on every officer of the company who is in default will achieve greater deterrent effect and better investor protection. The Administration further explains that under existing section 351 of the Ordinance relating to provision for punishment and offence, "officer who is in default" means any officer of the company, or any shadow director of the company, who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in such provision. Given the defined scope of "officer who is in default" under section 351, a specific intent is required for conviction of the offences relating to amendments to prospectuses. Mere negligence is not sufficient for securing a conviction. As for "reasonable excuse", if the court is satisfied that an officer has "knowingly and wilfully" authorised or permitted the default, there will simply be no room of any reasonable excuse.

46. In connection with the proposed mechanism to facilitate amendments to prospectuses, the Bills Committee notes that in Australia, there are provisions specifying the detailed arrangements to deal with the consequences of material deficiencies in a prospectus to safeguard investors' interest. Upon becoming aware of material deficiencies in the disclosure document or of significant new matters, the offeror must deal with applications made under the disclosure document that have not resulted in an issue, or transfer of the securities by repaying the money received from the applicants, or giving the applicants one month to withdraw their application and be repaid.

47. The Bills Committee has therefore sought reasons for not providing similar provisions in the Bill to safeguard investors' interest. The Administration explains that unlike the arrangement in Hong Kong, there is no pre-vetting of prospectuses by the regulatory authority in Australia. The Australian model under which there are specific provisions on the detailed arrangements to deal with the consequences of material deficiencies to safeguard investors' interest is thus not readily applicable to the Hong Kong situation. SFC affirms that under the existing arrangements of SFC pre-vetting amendments to prospectus, SFC may impose conditions in its authorization to oblige the issuer to allow investors to withdraw their applications for shares/debentures or to return the shares/debentures obtained and thus safeguard investors' interest. At the Bills Committee's request, SFC agrees to review in its Phase III review on offers of shares and debentures whether issuers should have the statutory obligation to inform and refund shareholders/applicants for shares or debentures when there is an amendment to published prospectus.

Proposed amendment to the definition of "prospectus"

48. In section 2 of the Ordinance, "company" means a company formed and registered under the Ordinance or an existing company. In the proposed new definition of "prospectus" in section 2 of the Ordinance, the term "company" is specified as "including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong". Noting that there is already a definition of "company" in the Ordinance and the definition does not cover companies incorporated outside Hong Kong, the Bills Committee has requested the Administration to consider whether the word "company" should be used in the new definition of "prospectus". In this connection, the Bills Committee also notes a suggestion that instead of using the word "company" in the proposed new definition of "prospectus", the phrase "body corporate or corporation" be used instead.

49. The Administration points out that section 2 of the Ordinance provides that the interpretations of the terms specified in the section may vary where the context otherwise requires. The Administration confirms that the current drafting of the definition of "prospectus" is consistent with the other provisions relating to prospectuses in the Ordinance, and is sufficiently clear in reflecting the intended scope of application of the provisions on prospectuses.

50. As regards the suggestion of replacing the word "company" with the phrase of "body corporate or corporation" in the proposed new definition of "prospectus", the Administration advises that the phrase may have the effect of applying relevant prospectus provisions in the Ordinance to corporations which are currently outside the prospectus regime under the Ordinance. Examples of these corporations are bodies incorporated by statute or charter. The Administration also acknowledges that the exact scope of coverage of the expressions "body corporate" and "corporation" may be vague in the existing Ordinance when read together with section 103 of SFO. However, the Administration assures members that the construction of the current provisions containing the term "company" in the Ordinance

together with the proposed amendments in the Bill would not give rise to any gap in the prospectus regulatory regime under the Ordinance.

51. As rationalization of the definitions of the expressions "company", "body corporate" and "corporation" would involve reviewing a substantial number of provisions in the Ordinance as well as provisions in other related laws, and this would go far beyond the scope of the Bill, the Administration suggests and the Bills Committee agrees not to tackle this issue in the context of this Bill. The Administration and SFC undertake to examine the matter in the Phase III review on offers of shares and debentures. The Administration also agrees to make a remark on this issue at the resumption of the Second Reading debate of the Bill.

Amendments relating to group accounts (Schedule 2 of the Bill)

52. The Administration will move CSAs to delete Schedule 2 of the Bill and the related consequential amendments in Part 2 of Schedule 5 of the Bill.

Amendments relating to oversea companies (Schedule 3 of the Bill)

53. Schedule 3 of the Bill seeks to amend the Ordinance to achieve the following purposes -

(a) replacing the existing term "oversea company" by "non-Hong Kong company";

(b) simplifying the registration requirements of non-Hong Kong companies;

(c) enhancing the disclosure requirements of non-Hong Kong companies; and

(d) introducing other miscellaneous amendments to the Ordinance to:

(i) enable electronic incorporation of a company and streamline the incorporation procedures;

(ii) replace the existing term "subscriber" by "founder member";

(iii) state the purposes for which documents kept or maintained by the Registrar of Companies under the Ordinance may be made available for public inspection; and

(iv) remove the upper limit on the number of partners in a partnership.

The term "place of business" in relation to non-Hong Kong companies

54. The term "oversea companies" in the Ordinance, means companies incorporated outside Hong Kong which, after the commencement of the Ordinance, establish a place of business in Hong Kong, and companies incorporated outside Hong Kong which have, before the commencement of the Ordinance, established a place of business in Hong Kong and continue to have a place of business in Hong Kong at the commencement of the Ordinance. The Bill proposes to replace the term "oversea company" by "non-Hong Kong company" and to revise the definition of the term "place of business" to remove the elements of "share transfer or share registration office" and "place used for the manufacture or warehousing of goods" [2].

55. Some deputations have raised concern that the proposal to remove the element of share transfer/registration office from the definition of "place of business" could have a significant impact on the amount of information available in respect of companies listed in Hong Kong which are not incorporated in Hong Kong and do not have any operations in Hong Kong except for the maintenance of a share registration office. For example, most H-share companies would no longer be required by the Ordinance to register under Part XI of the Ordinance if the proposal is adopted. The deputations also point out that there is no requirement under the Listing Rules of the Hong Kong Exchanges and Clearing Limited (HKEx) 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 "place of business" under the new definition.

56. The Administration's position is that there is already a body of case law on what constitutes an established place of business. Adequate precedents exist to determine when and how a business may be caught by the definition without the need to spell out specific criteria or examples in the definition. The two primary criteria for determining that a company has established a place of business are -

(a) It has a specified or identifiable place at which it carries on business which has more than a fleeting character; and

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[2] Under existing section 341 of the Ordinance (Interpretation of Part XI), *"place of business" includes a share transfer or share registration office and any place used for the manufacture or warehousing of any goods, but does not include a place not used by the company to transact any business which creates legal obligations.* The proposed new interpretation is that *"place of business" does not include an office specified in the Twenty-fourth Schedule* (i.e. a local representative office established or maintained with the approval of the Monetary Authority under section 46 of the Banking Ordinance (Cap. 155) by a bank as defined in section 46(9) of the Ordinance).

(b) There is some visible sign or physical indication of the company having a connection with particular premises.

However, in view of the concerns raised, the Administration, after consultation with SFC and HKEx, agrees to move a CSA to retain the element of "share transfer or share registration office" in the definition of "place of business".

Registration of charges

57. Existing sections 91(1) and (3) of the Ordinance extend the application of provisions on registration of charges for companies incorporated in Hong Kong (Part III of the Ordinance) to oversea companies. However, there is no express provision that the oversea companies must be registered under Part XI before a charge is registrable. To provide certainty about the application of the two sections, the Bill proposes that the registration requirement would apply only to charges created by oversea companies registered under Part XI of the Ordinance. The Bill also proposes that a charge which applies to property situated outside Hong Kong at the time of creation or acquisition of the charge but which is subsequently brought into Hong Kong should be required to be registered.

58. It has been pointed out by a deputation that the concept of a property being "brought into Hong Kong" is unclear, and it would be rather difficult to monitor as to when the property is "brought into Hong Kong". The Bills Committee shares this concern and considers that the concept may give rise to uncertainties about the registration requirement under various possible scenarios, such as where only part of the relevant property or only the title documents of the relevant property is brought into Hong Kong.

59. According to the Administration, the concept of property being "brought into Hong Kong" originated from UK. The UK Companies Act 1989 contained provisions similar to proposed section 91 in the Bill but they have never been brought into force. The concept was then raised again by the UK Company Law Review Steering Group in its consultation paper entitled "Registration of Company Charges" issued in October 2000. The Law Commissions in UK are now examining the system for registering company charges and are expected to produce their reports on the issue in late 2004. In view of the concerns of the Bills Committee and the deputation, the Administration proposes to put on hold the introduction of the concept but undertakes to review the provisions on the registration of charges in the light of developments in UK. The Administration therefore will move CSAs to remove the proposed registration requirement on a charge which applies to property situated outside Hong Kong at the time of creation or acquisition of the charge but which is subsequently brought into Hong Kong. A new provision will also be added to clarify that an oversea company is not obliged to register a charge if the relevant property is not in Hong Kong when it creates the charge, or when it acquires the property in Hong Kong subsequent to the creation of the charge. Where an oversea company has property outside of Hong Kong over which it creates a charge and then brings that property into

Hong Kong, there is no obligation to register such a charge. [proposed CSAs to section 14 of Schedule 3].

Protection of personal data made available for public inspection at the Companies Registry

60. In the interest of protection of personal data in public registers, the Bill proposes to add a provision (proposed new section 305(1A)) to set out the purposes for which documents kept or maintained by the Companies Registry under the Ordinance may be made available for public inspection. Noting that only the directors, former directors and other officers of a company are explicitly covered in the purpose statement in proposed section 305(1A), the Privacy Commissioner for Personal Data has raised concern on whether the purpose statement is sufficient to cover other persons who act in relation to the corporation and whose personal particulars are contained in the documents available for public inspection at the Companies Registry. In response to this concern, the Administration agree to move a CSA to amend proposed section 305(1A) to clarify beyond doubt that the purpose statement covers persons other than directors and other officers whose data are kept for public inspection, so that it will also cover searches in respect of mortgagees, liquidators, provisional liquidators, receivers and managers who act in relation to a company.

Continuing obligation in respect of authorized representative

61. Existing section 333A(1) stipulates that an oversea company shall at all times keep registered under section 333(1) the name and address of a person resident in Hong Kong who is authorized to accept service of process and notices on its behalf until the expiration of three years from the date on which the oversea company ceases to have a place of business in Hong Kong. Existing section 333A(2) provides that where the registered authorized representative ceases to be able to act on behalf of the company whether by reason of death or incapacity or other unforeseen reason, the company shall be deemed to comply with section 333A if, not later than 6 weeks from that time, the company registers the particulars of another person as its authorized representative (AR). The Bills proposes to delete existing sections 333A(1) and 333A(2) and put in place a new section 333A. The registration requirement under the new section 333A resembles that under existing section 333A(1) but shortens the period for keeping the particulars of an AR registered from three years to one year.

62. A deputation has pointed out that with the deletion of existing section 333A(2), there is no provision to specify the obligation to appoint a replacement within a certain timeframe when the AR ceases to be able to act. Similarly, while proposed section 333B provides for the termination of registration of an AR, there is no concurrent obligation to appoint a replacement within a certain timeframe. Hence, under proposed sections 333A and 333B, an oversea company could easily find itself technically in breach of the continuing obligation to maintain an AR.

63. The initial response of the Administration is that the issue raised by the deputation can be adequately covered by proposed new section 335(1) which provides that where there is any alteration in the directors, secretaries or authorized representative of a non-Hong Kong company, the company shall, within 21 days after the date of the alteration register the particulars of the alteration. Both the deputation and the Bills Committee find that there appears to be a hiatus in the proposed provisions in that proposed section 335(1) is silent about the interval between the cessation of office of one AR and the appointment of a new AR. Moreover, the relationship among the registration requirements under proposed sections 333A, 333B and 335(1) is unclear.

64. After further review of the provisions, the Administration proposes to add section 333A(2) to make it clear that where the AR of a company ceases to be the AR, the company shall be deemed to comply with section 333A(1) (i.e. the obligation of keeping the particulars of an AR registered at all times) if, within one month after the AR ceases to be such representative, the company register the particulars of another person as AR in accordance with 335(1)(b). Also, to avoid causing confusion about the registration requirements, the Administration proposes to standardize the time limits for registration under 333A(2), 333B(2) and 335(1) such that under all these provisions, the time limit for registration will be one month from the relevant triggering event. The Bills Committee accepts these amendments.

Filing of annual return

65. An oversea company is currently required to file an annual return confirming that there has been no alteration in the original information filed by the company other than any alteration notified under the Ordinance. This arrangement makes it necessary for members of the public to search many documents relating to an oversea company in order to find out details of changes relating to the company. In the interest of making full and more timely disclosure, the Bill proposes that all oversea companies should be required to file an annual return. The return should state the various particulars as specified under proposed section 334. An annual return in the form of a "certificate of no change" may be filed where there has been no change in the information of the company since the filing of the last annual return which was filed in full format.

66. With regard to members' concern as to whether under the proposed new arrangement, oversea companies would be required to file more information compared with the existing requirement, the Administration advises that the purpose of the proposed arrangement is to require oversea companies to deliver consolidated annual returns and to provide for the use of a specified form for that purpose. The only additional information required to be filed under the annual return when compared to the existing filing arrangement is the date of registration of the company under Part XI.

Accounts of oversea companies

67. The Bill proposes that every oversea company which is required by the law of the place of its incorporation to publish its accounts or file its accounts for public inspection should be required to deliver to the Registrar of Companies copies of the accounts. Where the law of the place of incorporation does not impose a requirement to file accounts, but the laws of any other jurisdictions where the oversea company is registered as a company or the rules of any stock exchange or similar regulatory bodies in those jurisdictions impose such a requirement, the company would also be required to submit a certified copy of its latest published accounts that comply with the rules/laws of the relevant jurisdiction.

68. The Bills Committee notes that the above proposed requirement is different from the respective requirements adopted in UK, Australia and Singapore. The Administration advises that the proposed arrangement is to enhance the disclosure requirements on oversea companies and to make the requirement more understandable to them. The proposed arrangement would remove the existing distinction between private and public oversea companies for the purposes of filing of accounts as a private oversea company will be required to file its accounts if it is required to publish or file its accounts in its place of incorporation. Moreover, in view of the special circumstances in Hong Kong where over 80% of the listed companies in Hong Kong are oversea companies, the Administration considers it desirable to extend the account filing requirement to catch those listed oversea companies which are not required by the law of the place of its incorporation or origin to publish annual accounts but are required to do so in any other jurisdictions where the company is registered or the rules of any stock exchange in those jurisdictions.

Notice of commencement of liquidation and of appointment of liquidator

69. Under the present provisions in the Ordinance, an oversea company and its officers in Hong Kong are required to notify the Registrar of Companies the commencement of any proceedings for the liquidation of the company in the country in which it is incorporated and the appointment of a liquidator. To enhance the disclosure requirement on oversea companies, the Bill proposes that the notification requirements should apply to all oversea companies regardless of whether the proceedings are initiated in their places of incorporation or otherwise. The Bill also proposes that the obligation to deliver the notice to the Registrar should be imposed on the company alone as opposed to the company and its officers, and that the time limit for delivering the notice to the Registrar should be 14 days after the date of commencement of any proceedings for the liquidation of the company [3].

[3] Under the existing provision, the notice is required to be delivered within 7 days after the date on which such notice could, in due course of post and if dispatched with due diligence from the country in which the company is incorporated, has been received in Hong Kong.

70. The Bills Committee supports the policy intent of enhancing the disclosure requirement on oversea companies in regard to commencement of liquidation proceedings on the companies wherever that may have been instituted. However, members are concerned that in some circumstances, the service of the notice of commencement of liquidation proceedings on the oversea company concerned may not enable it to comply with the 14-day notification requirement. In particular, members note that the manner in which the notice of commencement of liquidation proceedings is served on the company concerned varies among different jurisdictions. In view of these concerns, the Administration agrees to move a CSA to provide an alternative time limit for notification so that an oversea company may notify the Registrar of the liquidation proceedings on the company within 14 days after the notice of commencement of such proceedings has been served on the company according to the law of the place of which such proceedings are commenced.

Removal of the upper limit on the number of partners in a partnership

71. The Bill proposes to repeal the existing section 345 in the Ordinance which prohibits partnerships with more than 20 members except for certain specified circumstances as such prohibition is no longer appropriate. The Bills Committee has sought clarification on the effect(s) of the proposed amendment. According to the Administration, where there is a group of over 20 persons carrying on any business that has for its object the acquisition of gain by the partnership before the repeal of section 345 and who are caught by section 345(1), the law does not recognise the existence of such "partnership". After the repeal of section 345, if the facts and circumstances, including the rules listed in section 4 of the Partnership Ordinance (Cap. 38) indicate that as between those persons of the group, a partnership has been formed or exists on or after the repeal of section 345 , there is nothing in the law that prohibits formation or existence of such partnership.

Change in company secretary where all the partners in a firm are joint secretaries

72. The Bill proposes to add a new section (section 14A) to provide for the use of a specified form for incorporation of a company. The Bills Committee notes that, under proposed section 14A(2)(i), where all the partners in a firm were joint secretaries, the name and principal office of the firm may be substituted for the particulars of individual partners of the firm. The Bills Committee has sought clarification on the legal status of the firm vis-à-vis the partners of the firm and whether a change in the partners of the firm requires notification to the Registrar of Companies. The Administration advises that the provision of proposed section 14A(2)(i) is intended for administrative convenience. Legally, and the fact remains that, each partner of the firm is appointed in his personal capacity and jointly with other partners as the company secretary. Where one partner resigns as a partner in future, this would be regarded as a change of company secretary and the company would have to notify the Registrar of Companies as required under section 158(4).

The Administration also confirms that the public may ascertain the particulars of the partners of such a firm by making searches at the Business Registration Office.

73. Members however point out that if a change in the partners does not involve any change in the name and principal office of the firm, which are the only particulars in respect of the "joint secretaries" required to be stated in the incorporation form, the company concerned would reasonably believe that there is no need to notify the Registrar of the change in the partners. This may give rise to uncertainty about the requirement to notify changes in company secretary where all the partners in a firm are joint secretaries. In response, the Administration advises that proposed section 14A(2)(i) was modelled on existing section 158(3) of the Ordinance (which provides the requirement on a company to maintain a register of its directors and secretaries) and the existing arrangement under section 158(3) has not given rise to particular problems. The Administration also advises that the situation where all the partners in a firm are joint secretaries is rare nowadays.

74. Taking note of the Administration's advice and the presence of other similar provisions in the Ordinance, the Bills Committee suggests and the Administration agrees that the issue should be examined in the overall review of the Ordinance to be undertaken by the Administration in the near future.

Notification of changes in shareholders

75. Hon Miriam LAU considers it unsatisfactory that changes in shareholders of a company incorporated in Hong Kong are currently reported when the company file its annual return under section 107(2)(f) and (g). Members also note that there is no requirement on oversea companies to report changes in shareholders. Ms LAU considers that there should be an improved mechanism to require more timely reporting of changes in shareholders so that an updated record of the company concerned would be available for public inspection. The Bills Committee suggests and the Administration agrees that this issue should be examined in the next exercise of reviewing the Ordinance.

Enhancing shareholders' remedies (Schedule 4 of the Bill)

76. The proposed amendments to enhance shareholder remedies seek to implement part of the recommendations made by the Standing Committee on Company Law Reform (SCCLR) in Phase I of its Corporate Governance Review. According to the Administration, the proposals were included in the Consultation Paper on Proposals made in Phase I of the Corporate Governance Review published by SCCLR in July 2001 for public consultation and the submissions received indicated support for such proposals.

Inspection of specified corporations' records by members

77. In its Corporate Governance Review (Phase I), SCCLR recommends that a statutory method by which shareholders can obtain access to company records should be provided, subject to the following conditions -

(a) the procedure should be by application to court;

(b) the applicant must satisfy the court that he is acting in good faith and the inspection is for a proper purpose;

(c) generally only authorized persons as the court may order (e.g. solicitors and auditors of the applicant at the applicant's expense) should be able to inspect the documents and to make copies under this court order; and

(d) a person who inspects books on behalf of an applicant must not disclose information obtained during the inspection unless the disclosure is made to relevant authorities.

78. The Bill proposes to add new sections 152FA to 152FE in the Ordinance to implement the above recommendation of SCCLR.

Scope of records subject to an order for inspection

79. On the scope of records that a member may seek to inspect, some deputations have raised concern about the lack of a defined scope of records that are subject to inspection. They point out that this would leave the door open to an order allowing for inspection of electronic records such as emails as well as other documents containing information of a confidential or price-sensitive nature not only pertaining to the relevant specified corporation[4] but potentially other third parties.

80. The Administration has explained that while the term "records" is defined in very wide terms (which can cover electronic records such as electronic emails), there is effective control through the operative provision (i.e. the proposed section 152FA(1)) which refers to "records of the specified corporation", not "records in the possession of the specified corporation". Therefore, even though the court is satisfied that an application for an inspection order is made in good faith and the inspection applied for is for a proper purpose, it can authorize an inspection of the records of a specified corporation only. Moreover, under the proposed provisions, the court may specify the records that may be inspected.

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[4] For the purposes of the amendments under Schedule 4 of the Bill, the Bill proposes to add a new term "specified corporation" under section 2 of the Ordinance and the new term means a Hong Kong company or a non-Hong Kong Company.

Criteria for application for an inspection order

81. Taking note of the Administration's explanations, the Bills Committee agrees that there is no need to define the scope of records that may subject to an inspection order. The Bills Committee, however, is concerned whether the two conditions, i.e. that the application is made in good faith and for a proper purpose, for the grant of an inspection order are sufficient to safeguard companies against unscrupulous shareholders accessing company records for frivolous reasons, harassment or other ulterior purposes.

82. Noting that proposed section 152FA(2), in which the two conditions are specified, is modelled on the corresponding provision in the Australian Corporations Act 2001, the Bills Committee has examined the relevant court cases in Australia. According to the information provided by the Administration, the following purposes have been regarded as proper purposes in some court cases in Australia in very broad terms -

(a) to determine the value of shares;

(b) to investigate whether legal proceedings might be appropriate to challenge certain transactions which adversely affect shareholders' investment in the company; and

(c) to decide whether or not a shareholder's rights in respect of a company might or ought to be exercised.

The following purposes have been regarded as improper purposes -

(a) to ascertain whether a company is solvent;

(b) to assist in the preparation of a take-over bid for a company; and

(c) to assist in challenging the directors in their daily management of a company.

83. The Bills Committee considers that, based on the interpretation of "proper purpose" in the Australian court cases cited by the Administration, one cannot draw precise conclusions as to what circumstances would justify an application for an inspection order and/or the extent of evidence required to establish a proper purpose. Members, on the other hand, appreciate the difficulty of defining "proper purpose" in the law, and that the court may interpret this term on the merits of each case. After deliberation, the Bills Committee is of the view that to strike a proper balance between the rights of minority shareholders and the interests of companies, it is appropriate to impose a minimum shareholding requirement or a minimum number of shareholders requirement, in addition to the criteria of "good faith" and "proper purpose", so as to

establish that the member making an application for an order to inspect a company's records has a substantive interest in the company.

84. With reference to the minimum shareholding requirement under existing section 115A of the Companies Ordinance relating to the circulation of a members' resolution and having considered other relevant factors, the Administration proposes and the Bills Committee agrees to amend the new section 152FA to the effect that an application for an inspection order can only be made by [section 152FA(2) in the proposed CSAs] -

(a) any number of members representing not less than one-fortieth of the total voting rights of all members having at the date of the application a right to vote at a general meeting of the specified corporation;

(b) any number of members holding shares in the specified corporation on which there has been paid up an aggregate sum of not less than $100,000; or

(c) not less than 5 members.

85. The original provision providing for the "proper purpose" criterion read "the inspection applied for is for a proper purpose having regard to the interests of both the relevant specified corporation and the applicant". The Bills Committee notes that, whilst the provision is modelled on the equivalent Australian provision, the phrase "having regard to the interests of both the relevant specified corporation and the applicant" is added in the proposed provision. In response to the Bills Committee's comment that the added phrase is vague in meaning and may give rise to a misunderstanding that an application must be in the interest of both the applicant and the company, the Administration agrees to delete the phrase [section 152FA(3)(b) in the proposed CSAs].

Safeguards against improper use or disclosure of information

86. The Bills Committee has also raised concern on whether there are adequate safeguards against improper use or disclosure of information or documents obtained as a result of an inspection order. Members note that, under the proposed provisions, the court may make an order limiting the use of the information or documents. Moreover, the applicant or the person authorized to inspect records shall not, without the previous consent in writing of the specified corporation, disclose the information or documents obtained, except to other members applying as applicant or to the applicant, subject to certain exceptions. In response to the suggestions of the Bills Committee, the Administration has agreed to move CSAs to strengthen the safeguards against improper use or disclosure of information. These CSAs include -

(a) a new provision to make it clear that the court may make an order regarding the disclosure of information or documents obtained as a result of an inspection order [section 152FB(d) in the proposed CSAs];

(b) a new provision to make it clear that the information or documents obtained as a result of an inspection order should be used only in relation to the purpose for which it was sought unless the court orders otherwise [section 152FC(2) in the proposed CSAs]; and

(c) an offence provision for improper use of information or document obtained as a result of an inspection order [section 152FC(3) in the proposed CSAs].

87. The Bills Committee also notices that, among the proposed exceptions to the non-disclosure requirement, the exception whereby "the information or document obtained as a result of an inspection order may be disclosed with a view to or for the purpose of any investigation carried out in Hong Kong in accordance with law" is not precise in meaning nor clear and may be susceptible to abuse. In response, the Administration agrees to move a CSA to amend proposed section 152FC(1)(a) to delete the exception.

Saving provision

88. The Bill originally proposes to provide saving for solicitors under proposed section 152FD. The Bills Committee has examined the propriety of extending the saving to bankers along the lines of existing section 152F(2), which provides that the Financial Secretary shall not require production by a person carrying on the business of banking of a document relating to the affairs of his customers unless certain specified conditions are met. In this regard, the Administration advises that the Banking Ordinance (Cap. 155) does not contain any provision which governs the disclosure of information by banks relating to the affairs of bank customers. However, banks in Hong Kong are subject to the common law duty to protect information on customers (both corporations and individuals) and are also required to comply with the requirements of the Personal Data (Privacy) Ordinance (Cap. 486) in relation to the protection of their customers' personal data. The Administration also points out that the saving under existing section 152F(2) is in relation to an inspection order made by the Financial Secretary whilst the inspection order under proposed section 152FA will be made by the court. For a court order, the possibility of abuse of power for administrative expediency should not be a concern. A member has also pointed out that, if saving is provided for banks, it would be difficult to argue against providing saving for other comparable trades.

89. Whilst the Bills Committee agrees not to extend the saving to banks or other comparable trades, it considers that, instead of providing saving only for "solicitors", the saving should be extended to cover any records that contain a privileged communication made by or to a legal professional for the purpose of obtaining or giving legal advice. The Administration concurs with the Bills Committee and agrees to amend the saving provision to stipulate that nothing in sections 152FA and 152FB, or any order made under any of those sections, shall authorize a person to inspect any records containing information that is subject to legal professional privilege[5] [section 152FD in the proposed CSAs].

90. In response to other concerns of the Bills Committee, the Administration also agrees to move the following CSAs -

(a) to add a provision to make it clear that a person will not incur any civil liability from his disclosure of information in compliance with an inspection order [section 152FA(5) in the proposed CSAs]; and

(b) to add a provision to make it clear that the court may require an applicant to pay the expenses reasonably incurred by a specified corporation in the inspection [section 152FB(c) in the proposed CSAs].

Unfair Prejudice Remedies

91. Section 168A of the Ordinance provides for a statutory remedy against unfair prejudice. Its underlying premise is that the member's personal right should be treated fairly. The remedy entitles a member to make an application to the court for appropriate orders where members' interests are unfairly prejudiced. To qualify for this remedy, the conduct complained of must be both unfair and prejudicial to members' interests. The available remedies are set out in section 168A(2). One major observation of SCCLR is that, despite the width of existing section 168A(2), it is not clear if this section would allow the court to make an order for damages to be awarded to members and, in relation to listed companies, it is not clear that the remedies available under this section are necessarily adequate since it may not be practicable in all circumstances, for instance, for the court to require a buy-out of minority shareholders.

92. The Bill therefore proposes to amend existing section 168A in the Ordinance to provide that the court may award damages to the members (including past members) of a company where it is found that their interests have been unfairly

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[5] The Bills Committee notes that according to Halsbury's Laws of England (para. 571, fourth edition), legal professional privilege is confined to the legal profession; it extends to barristers, solicitors, licensed conveyancers, recognised bodies and legal executives in their employ, whether in private practice or employed full-time as salaried legal advisers by government departments or by commercial concerns, provided they are acting in their capacity as legal advisers, to the Director of Public Prosecutions and to foreign legal advisers.

prejudiced, and to award such interest on the damages awarded as the court thinks fit. As recommended by SCCLR, the unfair prejudice remedy is proposed to be extended to oversea companies.

Rationale for introducing the relief of "damages"

93. The Bills Committee notes that there is no explicit provision on the award of damages in the "unfair prejudice" provisions in the UK, Singapore and Australia (on which comparative information has been provided to the Bills Committee by the Administration) and that, based on past court cases in Hong Kong as provided by the Administration, it is unclear whether the court would award damages under the proposed new provisions.

94. In response, the Administration explains that, the existing section 168A does not explicitly empower the court to award damages as relief. Whilst there is no explicit provision on the award of damages in the "unfair prejudice" provisions in the UK, Singapore and Australia, the court's power to give relief in respect of the matters complained of in these jurisdictions seems to include an element of compensation in the valuation of a petitioner's shareholding for the purpose of a purchase order. Furthermore, section 174 of the New Zealand Companies Act 1993 provides that if, on an application by a prejudiced shareholder of a company, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including an order to require the company or any other person to pay compensation to a person.

Reflective loss of the company

95. It has been pointed out by some deputations that, under common law, a shareholder cannot sue for a loss which is merely reflective of the company's loss, unless the company has no claim or where the loss which the shareholder suffered is additional to, and different from, that suffered by the company. The deputations also point out that the proposed provisions do not seem to prohibit the company concerned from taking a legal action based on a cause of action in reliance of which a member has been awarded damages on the ground of unfair prejudice. As such, the wrongdoers may be penalized twice by having to pay damages to the petitioner and later on to the company (problem of "double recovery").

96. The Bills Committee shares the concern of the deputations and notes the common law position that, under unfair prejudice claims, a shareholder can not recover a loss which is merely reflective of the company's loss to prevent double recovery or the shareholder being awarded damages at the expense of the company's other shareholders and creditors. In response, the Administration agrees to add a doubt-avoidance provision to make it clear that the proposed amendments will not have the effect of entitling any member to recover by way of damages any loss which only the specified corporation is entitled to recover under common law [section 168A(2CA) in the proposed CSAs]. A similar doubt avoidance provision is also

added for the injunction order in section 350B [section 350B(8) in the proposed CSAs.]

Relationship between statutory derivative action and statutory unfair prejudice remedy

97. Noting that, under the existing section 168A, a derivative action is one form of relief for unfair prejudice which may be ordered by the court, the Bills Committee sought clarification on the relationship between the proposed provisions on the unfair prejudice remedy and statutory derivative action. The Administration advises that certain corporate wrongs such as misappropriation of company assets have also be held by the court to constitute unfair prejudice under existing section 168A, which is drafted to protect the "interests" of the members and not just their rights. The proposed provisions on the unfair prejudice and statutory derivative actions would not themselves affect the existing relationship between an action under section 168A and a common law derivative action. It remains the court's decision as to whether these actions should be joined together having regard to the relevant facts and circumstances. If some common questions of law or fact would arise in a derivative action and an action under section 168A, and all rights to relief claimed in the actions are in respect of the same transaction or series of transactions, then the two kinds of actions can be joined with the leave of the court under Order 15 of the Rules of the High Court, provided that the court does not consider that the joiner of causes of action or of parties, as the case may be, may embarrass or delay the trial or is otherwise inconvenient.

Entitling a past member of a company to the relief of "damages"

98. Regarding the proposal to provide a statutory action for a past member to seek unfair prejudice remedy in respect of the affairs of a company at the time when he was a member, the Bills Committee notes that such statutory remedy is not available to a past member in the United Kingdom and Singapore whereas, in Australia, the scope of "past member" eligible for the remedy is confined to a person whose application relates to the circumstances in which he ceased to be a member. In this regard, the Administration has explained that unfairly prejudicial conduct may arise out of circumstances in which a person ceases to be a member or may have occurred while the former members were still members but comes to light subsequently and after their membership has ceased. There would be a lacuna in relation to standing if a past member, who had actually been unfairly prejudiced while he was a member, could have no remedy at all just because he had, for some reasons, ceased to be a member. The Administration also points out that, under the New Zealand Companies Act 1993, a former shareholder of a company is allowed to seek an unfair prejudice remedy.

99. The Bills Committee has also examined whether a unfair prejudice action taken by a past member would be subject to the Limitation Ordinance (Cap. 347), and whether there should be a statutory limitation period for a past member to

take such an action. According to the Administration, where the cause of action does not fall within the prescribed classes of actions in the Limitation Ordinance and there is no separate provision for limitation period in any other enactment, there is no statutory limitation period for such actions. The Administration confirms that the relief available under the proposed section 168A(2B) or the existing section 168A of itself is not a prescribed class of actions in the Limitation Ordinance. There is also no separate provision for a limitation period for the remedy under section 168A in the Companies Ordinance. The Administration also advises that in both Australia and New Zealand, where there are explicit provisions in their companies acts to allow former shareholders to seek unfair prejudice remedy, there is no statutory limitation period under such acts for a former shareholder to bring an action for the remedy.

100. As regards the relevant common law principle, the Administration advises that there are precedent cases showing that the court would take into account delay and acquiescence when deciding whether a conduct has prejudiced a shareholder unfairly. As such, the Administration affirms its position that there should be no need to stipulate a limitation period for a past member to seek the unfair prejudice remedy.

Extension of unfair prejudice remedy to unregistered companies

101. The Bills Committee notes the view of a deputation that the application of section 168A remedy should be extended not only to oversea companies but also to the other forms of entities such as foreign corporations without a local place of business which also fall within the meaning of "unregistered companies" in section 326 of the Ordinance. Existing section 327 in the Ordinance provides the remedy of winding up unregistered companies. The deputation points out that there are numerous off-shore asset holding companies held by Hong Kong residents or Hong Kong registered or oversea companies without a place of business in Hong Kong. The winding up of a company may not benefit its minority shareholders since the break-up value of the assets may be small or the only available purchasers may be the very majority whose oppression has driven the minority to seek redress. Accordingly, it does not make sense for the legislation to provide an aggrieved member with the extreme remedy of winding up an unregistered company by means of section 327 but deny him a less drastic relief under section 168A.

102. The Administration agrees that it appears logical to dovetail the scope of sections 168A and 327 in view of their connection and thus, extend the application of section 168A further to unregistered companies. However, it is noted that in UK, while the winding up provisions have applied to unregistered companies since 1980, the unfair prejudice remedy provisions do not apply to these companies. The Administration considers that, given the lack of practical experience about the possible implications of extending the unfair prejudice provisions to unregistered companies, both the SCCLR and relevant stakeholders should be consulted before a

decision is taken on this matter. The Administration agrees to deal with this issue in the next exercise of reviewing the Ordinance.

Court's power to make an order as to costs

103. The Bills Committee concurs with the observation of a deputation that the criteria laid down in proposed section 168A(2D), i.e. that there is no evidence of bad faith of the member petitioning for the remedy and the petition is made on reasonable grounds, are lower than the existing threshold for awarding costs in favour of an unsuccessful litigant. As the courts always have discretion to make any order as to costs in any proceedings, unless the policy intention is to provide a lower threshold for the award of costs in favour of the petitioning member, there is no discernable necessity for introducing the new section. In response, the Administration agrees to move a CSA to delete section 168A(2D) so that the court should continue to exercise its existing discretionary power to make any order as to the costs of proceedings under section 168A.

Statutory derivative action

104. Where a wrong has been done to a company, the general principle is that only the company can sue. This principle was established in the case of Foss v Harbottle (1843) ("Foss v Harbottle rule"). However, under common law, minority shareholders are allowed under limited circumstances to sue on behalf of the company. Such an action is called a "derivative action". These limited circumstances are exceptions to the rule in Foss v Harbottle. The most important of these exceptions is an act which constitutes a "fraud on the minority" (where the wrong in question is one that cannot be validly ratified by the majority) and the "wrongdoers are in control of the company" (wrongdoer control).

105. In the context of its Corporate Governance Review (Phase I), SCCLR recognizes that difficulties lie in discerning from the case law clear principles under which a wrongdoing may be ratified by the majority shareholders and circumstances under which they may not. Furthermore, the concept of wrongdoer control may be difficult to apply. In practice, it would normally be difficult to show that there are controlling or ill-motivated shareholders who are preventing litigation from taking place. There are also some other practical difficulties for and disincentives to shareholders commencing a derivative action in Hong Kong. For example, the shareholder bringing the action is potentially liable for the costs of the action, even though he has no corresponding right to the potential damages, and the shareholder is likely to find that he is effectively prevented from taking action because he is unable to access information in order to commence a proper action. In view of these difficulties, SCCLR proposes to introduce a statutory derivative action (SDA). The SCCLR has specifically recommended that it should be made clear in the SDA provisions that there will be no "trial within a trial" for the purpose of determining the standing of an applicant to commence a derivative action on behalf of a company, and

that ratification by general meeting would not be a bar to the commencement of a SDA.

106. The Bill proposes to include new sections (168BA to 168BI) in the Ordinance to provide for a SDA whereby a member of a company may -

(a) without leave of the court, bring proceedings before the court on behalf of the company; or

(b) with the leave of the court, intervene in any proceedings before the court to which the company is a party for the purposes of continuing, discontinuing or defending those proceedings on behalf of the company.

107. While there is no leave requirement for bringing an SDA, the Bill provides a striking-out mechanism, whereby the court may, on application by any party to the proceedings, make an order to strike out the proceedings on the grounds that the proceedings are not in the best interest of the company, the proceedings have not been brought by the relevant member in good faith, or proper notice has not been served on the company concerned.

108. The two major issues which the Bills Committee has examined are the scope of circumstances to which the proposed SDA should apply and whether there should be a leave requirement for bringing an SDA. At an early stage of the deliberations on the proposed SDA provisions, the Bills Committee, having regard to the Administration's explanations on its policy intent and the legislation in other common law jurisdictions on SDA, accepted that it was not necessary to make express provisions to stipulate the circumstances to which the SDA should apply. As regards to the leave requirement, a majority of the members of the Bills Committee agreed that there should be a leave requirement such that there would be a preliminary hearing mechanism for the court to determine whether it was proper to continue with the SDA proceedings and, if the court considers appropriate, to also make an order as to the costs of the SDA. With the introduction of a leave requirement, the striking-out mechanism should be removed. Having regard to the Bills Committee's views, the Administration prepared a set of draft CSAs on the proposed SDA in March 2004.

109. At that juncture, the Bills Committee considered that as substantial changes had been made to the proposed SDA provisions in the Bill, in particular the addition of the leave requirement, and that concerns had been raised over some other related issues, further consultation with SCCLR and other relevant parties was required. The Bills Committee resumed discussion on the proposed provisions on SDA in May 2004 when the Administration was ready with a revised set of CSAs which had been drawn up taking into account the views received during the consultation exercise.

110. The Bills Committee notes that, among the respondents to the Administration's consultation, there are diverse views on whether the scope of the SDA should be defined and whether the bringing of an SDA should be subject to a leave requirement. After discussion, the Bills Committee agrees that the scope of the application of the SDA should be defined along the lines suggested by SCCLR. As regards the leave requirement, a majority of the Bills Committee members consider that the leave requirement should be maintained but, as the scope of the SDA has been defined, the conditions that have to be satisfied for the grant of leave by the court should be meaningfully low. Hence, members have critically reviewed the conditions for the grant of leave.

111. The detailed deliberations of the Bills Committee on the various issues relating to the proposed SDA are set out in the ensuing paragraphs.

Scope of application of the proposed SDA

112. On the scope of the proposed SDA, concern has been raised by a deputation that the proposed provisions in the Bill appears to have abolished entirely the Foss v Harbottle rule by allowing any member of a company to bring proceedings on its behalf without any qualification or condition. Moreover, the proposed provisions will permit a member to intervene in any form of proceedings to which the company is a party. Notwithstanding the requirement to have leave from the court for intervention, the arrangement will undermine the common law rule that a third party has no right to intervene in any proceedings to which he is not a party and in which he has no interest.

113. In response, the Administration has explained that the SDA provisions in the Bill are proposed on the basis of the SCCLR's recommendations and having due regard to the legislation providing for SDA in comparable jurisdictions like Australia and Singapore. As in the legislation of the comparable jurisdictions, no reference is made to the exceptions to the Foss v Harbottle rule in the proposed SDA provisions as it would be difficult, if not impossible, to codify such exceptions. In fact, it is precisely because of the difficulties and uncertainties of the exceptions that it has been considered necessary to have SDA in those jurisdictions. However, the proposed SDA provisions provide certain guiding principles for the court to consider either under the striking-out mechanism (applicable to the bringing of an SDA) or the leave mechanism (applicable to the intervention of proceedings on behalf of a company) when processing a SDA. These principles include "good faith" of the member bringing the action, whether the action is in the "best interests of the company", and the effect of approval or ratification by the members of the company.

114. In response to the Administration's consultation on the SDA, some respondents are of the view that, given the Administration's intention to abolish the requirement for the plaintiff to prove that his action is within the exceptions to the Foss v Harbottle rule, it would seem not necessary to restrict the types of actions that could be brought under the SDA. However, SCCLR affirms its view that the scope of

proceedings actionable under the SDA should be expressly limited to the grounds stated in its consultation paper which include fraud, negligence, default in relation to any law or rules and breach of any duty whether fiduciary or statutory. The SFC points out that an unlimited scope for the SDA would enable a minority shareholder to take action against any third party for a wrong done against a company arising out of contract or tort. The focus should be on those wrongs as suggested by SCCLR. Furthermore, the Hong Kong Bar Association opines that there should be express provisions to make it clear that the SDA should apply to proceedings where the cause of action is vested in the company and the relief, if any, is sought on behalf of the company. In light of these views, the Administration proposes and the Bills Committee agrees that the scope of the proposed SDA should be defined as suggested by the SCCLR and to add express provisions about the applicability of the SDA in response to the Hong Kong Bar Association's comments. [section 168BAA in the proposed CSAs]

Leave requirement

115. On the original proposal in the Bill that a member of a company may bring proceedings on behalf of the company without the leave of the court, a deputation has raised concern that this arrangement may run against the proper plaintiff rule under which it should be the member who intends to bring action on behalf of the company to show why he should be so allowed, rather than putting the burden on the defendant to persuade the court why the action should be halted. The Administration's response at the early stage of the scrutiny of the proposed SDA was that the "no leave" arrangement was to implement the SCCLR's recommendation that there should not be a "trial within a trial" for the purpose of determining the standing of an applicant to bring the proceedings. At present, there was no requirement in Hong Kong for a preliminary hearing to be held for such determination. Hence, imposing a leave requirement for bringing an SDA would go against the policy intention to implement the SCCLR's recommendation. The Administration also pointed out that the proposed striking-out mechanism, in addition to the one under the Rules of the High Court, could serve as a useful balancing measure.

116. Notwithstanding the Administration's explanations, some members have queried the arrangement of placing the burden on the defendant (which in most cases would be the management of the company) to persuade the court to strike out the action. The members consider that the onus should be on the member bringing the action to prove before the court that there is a serious question to be tried and that the action is brought in the interest of the company. Otherwise, companies would be susceptible to frivolous or vexatious actions taken in their names under the SDA procedure.

117. In this regard, the Bills Committee notes that in the legislation of Australia and Singapore, a shareholder is required to obtain leave from the court to bring a SDA. In UK, although there is no SDA, the Civil Procedure Rules which took effect in 1999 provide a definition of "derivative claim" and set out the relevant

procedures, which include the requirement to seek permission from the court to continue proceedings on a derivative claim, and the court's power to make orders as to costs.

118. Some members have pointed out that practically, upon the bringing of a derivative action by a shareholder, the court would very likely order a preliminary hearing for it to determine whether it is proper for the SDA proceedings to continue. Moreover, in view of the possible high costs that the shareholder may incur for bringing the action, the shareholder would probably seek a court order as to the costs of the action at a very early stage of the SDA. Hence, whilst the members fully appreciate the worry of SCCLR about having "a trial within a trial" with the leave requirement, they consider it appropriate to provide for a preliminary hearing mechanism, by way of the leave application procedure, to deal with the above issues.

119. Hon Emily LAU has expressed concern that imposing a leave requirement would create additional disincentives to and placing additional hurdles before minority shareholders in bringing derivative actions. She supports the SCCLR's recommendation of not imposing a leave requirement for bringing a SDA.

120. Taking note of members' views, the Administration has stated that it is open-minded as to whether the bringing of an SDA should be subject to the leave requirement or the striking-out mechanism as proposed in the Bill, so long as a proper balance between the interests of shareholders and companies can be achieved. Since a majority of Bills Committee members have agreed that the bringing of an SDA should be subject to a leave requirement, the Administration has proposed CSAs accordingly.

121. As regards the conditions for the grant of leave, before the Administration's consultation on the SDA, the Administration had proposed that the following conditions should be included -

(a) it is in the best interest of the company that leave be granted;

(b) the applicant is acting in good faith;

(c) there is a serious question to be tried; and

(d) it is probable that the concerned company will not itself bring the proceedings or properly take responsibility for them.

122. The views in response to the Administration's consultation on the SDA are very diverse in regard to the proposed leave requirement and conditions for the grant of leave. The SCCLR maintains its view that a leave requirement would, in effect, be a "trial within a trial". The SCCLR is of the unanimous view that, if a leave requirement is considered necessary, the threshold must be set at a meaningfully low level. It also suggests that the Bills Committee should review the conditions of "good faith" and "best interest of the company" as these conditions may force the court to

enter into the merits of the claims, in cases where there are conflicting evidence and serious dispute of facts. Some respondents comment that, instead of the "best interests of the company" test, a lower test that the action is "prima facie in the interests of the company" should be used. The condition that "it is probable that the concerned company will not itself bring the proceedings" is also difficult to prove. Instead, the fact that the company has not brought such proceedings should be sufficient.

123. In light of the views received, the Administration has revised the conditions for the grant of leave and the revised conditions are -

(a) it appears to be prima facie in the interests of the company that leave be granted;

(b) the applicant is acting in good faith;

(c) if the applicant is applying for leave to bring proceedings on behalf of the company, there is a serious question to be tried and the company has not brought the proceedings;

(d) if the applicant is applying for leave to intervene in proceedings on behalf of the company, the company has not diligently continued, discontinued or defended the proceedings; and

(e) except where leave is granted by the court, the applicant has served a written notice on the company in accordance with the specified requirements.

124. The Bills Committee considers it appropriate to lower the threshold for the leave requirement given the decision to define the scope of the SDA. Some members have raised doubt about the need to retain the conditions of "good faith" and "interest of the company" (i.e. conditions in (a) and (b) above), as "good faith" should not be a necessary condition for commencing an SDA and that the new provisions to define the scope of the SDA may already adequately restrict the SDA to actions taken in the interest of the company. In response, the Administration agrees to drop the "good faith" condition but considers it necessary to retain the condition of "interest of the company" on the ground that the very purpose of a derivative action is to seek relief for the company. Taking note of the Administration's explanation, the Bills Committee subsequently agrees to retain the condition that it appears to be prima facie in the interests of the company that leave be granted. [section 168BB in the proposed CSAs]

125. To address members' concern about the importance of early determination by the court about the costs of the action, the Administration has agreed to amend proposed section 168BG to make it clear that the court can make an order as to the costs of a SDA upon (instead of <u>after</u>) granting the leave to commence the action. The order may be made in relation to the leave application proceedings and/or

the proceedings to be brought/intervened upon the grant of leave. [section 168BG in the proposed CSAs]

Co-existence of SDA and common law derivative action

126. Proposed section 168BB(4) provides that the SDA provisions shall not affect any common law right of a shareholder of a company to bring proceedings on behalf of the company. The Bills Committee notes that the proposal to allow the co-existence of the common law derivative action (CDA) and SDA is different from the laws in other jurisdictions which either expressly or by necessary implication abolish the right to CDA upon the enactment of SDA provisions.

127. According to the Administration, Hong Kong is unique in the sense that there are a large number of companies incorporated outside Hong Kong but controlled by Hong Kong residents. The proposed SDA will apply to Hong Kong incorporated companies and non-Hong Kong companies. For companies incorporated outside Hong Kong, the law of the place of incorporation governs the right of a shareholder to bring a CDA. There may be different rules of internal management in the law of the place of incorporation compared with those applying to Hong Kong incorporated companies. To abolish the common law right in respect of non-Hong Kong companies might deprive shareholders of those companies of rights otherwise available to them. Hence, it is considered more desirable not to abolish the CDA, thereby giving shareholders one more option to commence an action on behalf of companies.

128. Taking note of the Administration's explanation and the arrangement in other jurisdictions, members agree that the right to CDA should be maintained after the enactment of the SDA provisions subject to future review. Members however are still concerned that the co-existence of SDA and CDA may give rise to procedural problems. For instance, a shareholder may seek to take derivative actions respectively under the common law and the statute, hoping to increase his chance of success. In view of this concern and having analysed the possible scenarios given the existing rules of the court, the Administration proposes to include express provisions to empower the court to -

(a) dismiss a member's application for leave to commence a SDA if a CDA has been commenced by the same member in respect of the same subject matter [section 168BB(4A) in the proposed CSAs];

(b) to prevent a member from commencing a CDA if leave has been granted to the same member to commence a SDA in respect of the same subject matter [section 168BCA(1) in the proposed CSAs]; and

(c) to make any order and give any direction it considers appropriate in relation to (a) and (b) above [section 168BF(5) in the proposed CSAs].

129. The Administration has also clarified that the proposed amendments should apply only to concurrent derivative actions taken by the same member. Where a CDA and a SDA are taken by different members of a company in respect of the same subject matter at the same time, it would be up to the court to exercise its discretion as provided under relevant rules of the court to decide whether and how the parties should or should not proceed with their actions. The proposed arrangements have been included in the Administration's consultation paper on the SDA issued in April 2004. There is general support for the proposed arrangements from respondents.

Conduct of proceedings

130. Proposed section 168BB(2) provides that any SDA proceedings brought on behalf of a company shall be brought in the name of the company. Concerns have been raised about the conduct of proceedings and, in particular, the discovery of documents i.e. the shareholder, who commences the proceedings, does not have the possession or the power to gain access to company documents. This is different from the common law position in which the member will be the plaintiff and the company will be joined as a nominal defendant for the purpose of discovery of documents.

131. In response, the Administration points out that, under the CDA, although the company, being the nominal defendant, can be called upon to give disclosure of documents, it is unlikely that the company (as opposed to other defendants who are alleged to have committed the wrongdoing in respect of which the claim is brought) will take much, if any, active part in the proceedings. The Administration considers that the concerns about the conduct of proceedings under the proposed SDA can be adequately addressed by the various operative provisions in the Bill and the relevant rules of the court to facilitate the discovery of documents.

132. The Administration further explains that, while the company is named as a plaintiff in the SDA, the conduct of the proceedings would be in the hands of the member who has obtained leave to commence the SDA. If the directors of the company refuse to produce discovery, the Administration believes that the member may, on behalf of the company, make an application to the court for direction or relief, as appropriate (Rules 7, 12 and 16 of Order 24 of the Rules of High Court, Cap. 4A). Since the member has the conduct of the proceedings on behalf of the company, the Administration believes that the member would be able to take any steps in the proceedings including discovery. In addition, the member can apply under either the proposed section 168BF (which provides the court with a general power to make any order and give any direction it considers appropriate in respect of the action, including an order directing the company or an officer of the company to do or not to do any act) or the proposed section 152FA (providing for the inspection of company

documents). Lastly, the Rules Committee of the High Court may make rules of court under the proposed section 168BI in order to give effect to the proposed SDA provisions, as appears to be necessary or expedient.

133. As regards other procedural issues arising from the conduct of proceedings for a SDA such as whether the application should be made by means of an originating summons, petition or otherwise and supported by an affidavit, the Administration considers that the power in the proposed section 168BI should suffice for this purpose.

134. The issues relating to conduct of proceedings have been included in the Administration's consultation paper on the SDA issued in April 2004. While the comments from respondents are generally supportive of the Administration's position, some suggest that it would be desirable to make express provisions to make it clear that the court may make an order directing the company or its officers to provide information or assistance in relation to the SDA. The Administration agrees to amend proposed 168BF(1)(c) to this effect.

Views of the Bills Committee and individual members on the proposed SDA

135. A majority of Bills Committee members consider that the provisions on the SDA as currently proposed by the Administration are appropriate for striking a balance between the rights of minority shareholders and the interests of companies. Hon Emily LAU maintains her view that the bringing of an SDA should not be subject to a leave requirement.

136. The Bills Committee feels that, whilst it has made the best endeavour to strike a proper balance, the fact that there are divergent views amongst legal experts, the business sector, professional bodies etc. about the scope of the SDA, the propriety of imposing a leave requirement and other related issues reveal that the SDA is a complicated area of law. Moreover, there is little practical experience from which the Bills Committee can draw reference. As advised by the Administration, the laws on the SDA in other comparable common law jurisdictions were enacted in the past decade or so, and only a few reported cases on the SDA could be identified. Consequently, no substantive analysis could be made at this stage about the experience of these jurisdictions on the SDA. The Bills Committee has therefore requested the Administration to give an undertaking at the resumption of the Second Reading debate to review the operation of the SDA provisions around 2006/07. The review should take into account the relevant experience in other common law jurisdictions.

137. On the issue of the co-existence SDA and CDA, Hon Miriam LAU considers that the proposed CSAs to deal with the duplicity of SDA and CDA may not be adequate. In particular, an unscrupulous shareholder with the intention of harassing a company may easily circumvent the provisions by conspiring with another shareholder to bring a SDA/CDA concurrently in respect of the same subject matter.

She also highlights that according to the information provided by the Administration, the laws in other comparable jurisdictions either expressly or by necessary implication abolish the right to CDA upon the enactment of SDA provisions. She therefore strongly demands that the Administration, at the resumption of the Second Reading debate, make it clear that the proposed arrangement of not abolishing the common law right of a shareholder to derivative actions upon the enactment of the SDA provisions is subject to review in the light of actual experience in the operation of the SDA provisions. The Administration agrees to review this aspect of the SDA provisions when an overall review of the SDA provisions is undertaken and will make clear this position at the resumption of the Second Reading debate.

Injunctions

138. In its Corporate Governance Review (Phase I), the SCCLR proposes that the court should have a general power, on application by an affected person or a relevant authority, to grant an injunction against any contravention of the Companies Ordinance or any breach of fiduciary duties. This should extend to any attempt to contravene such provisions or attempted breach of any of the directors' duties. This should be on such terms as the court thinks appropriate, restraining the person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing. The court should, either in addition to or in substitution for the grant of the injunction, also have the power to order that person to pay damages to any other person.

139. The SCCLR considers that the availability of general powers to award injunctions (without needing to come under the unfair prejudice provisions) could help to prevent potential breaches of the law. Such cases would obviate the need to incur considerable evidence and costs. The SCCLR proposes that the courts should be given a wider power to restrain directors or other persons from entering into transactions in breach of the law under the Companies Ordinance or in relation to breaches or potential breaches of fiduciary duties.

140. The Bills proposes to add a new section 350B to implement the above proposal of the SCCLR.

141. Members have raised concern on whether the court should be empowered to require an applicant for an injunction under proposed section 350B to give an undertaking as to damages when the court grant an injunction or an interim injunction. The Administration points out that proposed sections 350B(1) and (3) provide that the court may, on the application of the Financial Secretary or an affected person, grant an injunction order, on such terms as the court considers appropriate, restraining a person from engaging in the relevant conduct or requiring that person to do certain act or thing. Proposed section 350B(5) further provides that, where the court considers appropriate, it may grant an interim injunction pending the determination of an application for an injunction under the proposed section 350B(1) or (3). The Administration therefore considers that the above provisions should be

wide enough to allow the court to require an undertaking as to damages by the Financial Secretary or the affected person as it considers appropriate when it grants an injunction or an interim injunction. Taking note of the Administration's explanation, the Bills Committee considers it preferable, for the sake of clarity, to add the phrase "on such terms as the court considers appropriate" in proposed 350B(5). The Administration agrees to move a CSA accordingly.

142. With regard to the grounds on which an injunction or interim injunction order may be granted under proposed section 350B, the Administration has advised that having reviewed the drafting of the provision in conjunction with the relevant recommendations of SCCLR, amendments should be made to clarify the policy intent that -

(a) for a director of a company, a breach of his fiduciary or other duties owed to the company will constitute a valid ground for the grant of an injunction order; and

(b) for other persons who act in relation to a company, the only type of duties that are relevant, in so far as the "injunction" remedy is concerned, are fiduciary duties.

The Bills Committee agrees to the proposed amendment [section 350B(g) and (h) in the proposed CSAs].

Committee Stage amendments

143. A set of CSAs proposed by the Administration is at **Appendix III**.

Recommendation

144. The Bills Committee recommends the resumption of the Second Reading debate on the Bill.

Consultation with the House Committee

145. The House Committee at its meeting on 18 June 2004 supported the recommendation of the Bills Committee to resume the Second Reading debate on the Bill.

Council Business Division 1
Legislative Council Secretariat
30 June 2004

Appendix I

Bills Committee on
Companies (Amendment) Bill 2003

Membership list

Chairman	Hon Audrey EU Yuet-mee, SC, JP
Members	Hon Albert HO Chun-yan
	Dr Hon Eric LI Ka-cheung, GBS, JP
	Hon CHAN Kam-lam, JP
	Hon Mrs Sophie LEUNG LAU Yau-fun, SBS, JP
	Hon SIN Chung-kai
	Dr Hon Philip WONG Yu-hong, GBS
	Hon Miriam LAU Kin-yee, JP (from 20/5/2004)
	Hon Emily LAU Wai-hing, JP
	Hon Henry WU King-cheong, BBS, JP
	(Total : 10 Members)
Clerk	Ms Anita SIT
Legal Adviser	Miss Monna LAI

Appendix II

Bills Committee on
Companies (Amendment) Bill 2003

Individuals and organizations who/which have submitted views to the Bills Committee

1. Ms Linda CHAN, Barrister
2. Mr Winston POON, QC
3. Mr Godfrey LAM, Barrister
4. Mr David Webb
5. Mr John Brewer
6. Consumer Council
7. CPA Australia Hong Kong China Division
8. Danish Business Association
9. Estate Agents Authority
10. Federation of Hong Kong Industries
11. Hong Kong Bar Association
12. Hong Kong Institute of Directors
13. Hong Kong Kwun Tung Industries and Commerce Association Limited
    The Hong Kong & Overseas Chinese Association of Commerce Limited
14. Hong Kong Small and Medium Enterprises Association
15. Hong Kong Society of Accountants
16. Linklaters
17. Mandatory Provident Fund Schemes Authority
18. Ms Alice CHAN, Lecturer, Department of Professional Legal Education, The University of Hong Kong
19. Office of the Privacy Commissioner for Personal Data, Hong Kong

20. School of Business, Hong Kong Baptist University
21. Securities and Futures Commission
22. Standing Committee on Company Law Reform
23. The Association of Chartered Certified Accountants
24. The Association of International Accountants
25. The Chinese General Chamber of Commerce
26. The DTC Association (The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)
27. The Hong Kong Association of Banks
28. The Hong Kong Capital Markets Association
29. The Hong Kong Chinese Enterprises Association
30. The Hong Kong Institute of Company Secretaries
31. The Hong Kong Mortgage Corporation Limited
32. The Law Society of Hong Kong
33. The Society of Chinese Accountants and Auditors
34. The Stock Exchange of Hong Kong Limited
35. W H Lam & Company

Appendix III

COMPANIES (AMENDMENT) BILL 2003

COMMITTEE STAGE

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

Clause	Amendment Proposed
2	(a) In the heading, by deleting "**2,**".
	(b) By deleting "2,".
3	By deleting ", 2".
4	(a) In the heading, by deleting "**2,**".
	(b) By deleting "2,".
Schedule 1, section 3	(a) In paragraph (a) -
	(i) in the proposed section 38A(1), by deleting everything after "considers

that" and substituting –

"the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements –

(a) would be irrelevant or unduly burdensome; or

(b) is otherwise unnecessary or inappropriate.";

(ii) in the proposed section 38A(2), by deleting everything after "considers that" and substituting –

"the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements, in the case of that class of companies or prospectuses, as the case may be –

(c) would be

irrelevant or unduly burdensome; or

(d) is otherwise unnecessary or inappropriate.".

(b) In paragraph (b) –

(i) in the proposed section 38A(4)(a), by deleting "38AA(1)," and ", (3A)";

(ii) in the proposed section 38A(6), by deleting ", suspended or withdrawn";

(iii) by adding –

"(7) Where the Commission proposes to issue –

(a) a notice of exemption under subsection (2); or

(b) an amendment order under subsection (5),

it shall publish a draft of the proposed notice or order, in such manner as it considers appropriate, for the purpose of

inviting representations on the proposed notice or order by the public.

(8) Where the Commission issues a notice or order mentioned in subsection (7) after a draft is published under that subsection in relation to the notice or order, it shall –

(a) publish, in such manner as it considers appropriate, an account setting out in general terms –

(i) the representations made on the draft; and

(ii) the response of the

Commission to the representations; and

(b) where the notice or order is issued with modifications which in the opinion of the Commission result in the notice or order being significantly different from the draft, publish, in such manner as it considers appropriate, details of the difference.

(9) Subsections (7) and (8) do not apply if the

Commission considers, in the circumstances of the case, that –

(a) it is unnecessary or inappropriate that such subsections should apply; or

(b) any delay involved in complying with such subsections would not be –

(i) in the interest of the investing public; or

(ii) in the public interest.".

Schedule 1 By deleting section 4.

Schedule 1, section 5

In the proposed section 38B(1)(b), by adding "prospectus or" before "proposed prospectus".

Schedule 1, section 7

(a) By deleting paragraphs (a), (b) and (c)(i).

(b) In paragraph (d), by deleting the proposed section 38D(11), (12) and (14).

Schedule 1, section 8

(a) In the proposed section 39A, by deleting subsections (2) and (3).

(b) In the proposed section 39B –

(i) by deleting subsections (3) and (4);

(ii) in subsection (6), by deleting "(1) or".

Schedule 1

By deleting section 12 and substituting –

"12. **Prohibition of allotment in certain cases unless statement in lieu of prospectus delivered to Registrar**

Section 43 is amended –

(a) in subsection (3), by adding "or any allotment of shares or debentures the subject of an offer specified in Part 1 of the Seventeenth Schedule as read with the other Parts of

that Schedule" after "company";

(b) by adding –

"(6A) For the purposes of subsection (5), "untrue statement" (不真實陳述), in relation to a statement in lieu of prospectus, includes a material omission from the statement.".

Schedule 1, section 15

By deleting paragraph (c)(ii).

Schedule 1, section 16

(a) In paragraph (a) –

(i) in the proposed section 342A(1), by deleting everything after "considers that" and substituting –

"the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements –

(a) would be irrelevant or unduly

burdensome; or

(b) is otherwise unnecessary or inappropriate.";

(ii) in the proposed section 342A(2), by deleting everything after "considers that" and substituting –

"the exemption will not prejudice the interest of the investing public and compliance with any or all of those requirements, in the case of that class of companies or prospectuses, as the case may be –

(c) would be irrelevant or unduly burdensome; or

(d) is otherwise unnecessary or inappropriate.".

(b) In paragraph (b) -

(i) in the proposed section 342A(4)(a), by deleting ", 342AB(1)" and ",

(3A)";

(ii) in the proposed section 342A(6), by deleting ", suspended or withdrawn";

(iii) by adding –

"(7) Where the Commission proposes to issue –

(a) a notice of exemption under subsection (2); or

(b) an amendment order under subsection (5),

it shall publish a draft of the proposed notice or order, in such manner as it considers appropriate, for the purpose of inviting representations on the proposed notice or order by the public.

(8) Where the Commission issues a notice or order mentioned in subsection (7) after a draft is published under that subsection in

relation to the notice or order, it shall –

(a) publish, in such manner as it considers appropriate, an account setting out in general terms –

(i) the representations made on the draft; and

(ii) the response of the Commission to the representations; and

(b) where the notice or order is issued with modifications

which in the opinion of the Commission result in the notice or order being significantly different from the draft, publish, in such manner as it considers appropriate, details of the difference.

(9) Subsections (7) and (8) do not apply if the Commission considers, in the circumstances of the case, that –

(a) it is unnecessary or inappropriate that such subsections

should apply; or

(b) any delay involved in complying with such subsections would not be –

(i) in the interest of the investing public; or

(ii) in the public interest.".

Schedule 1 — By deleting section 17.

Schedule 1, section 19

(a) By deleting paragraphs (c), (d) and (e)(i).

(b) In paragraph (f), by deleting the proposed section 342C(10), (11) and (13).

Schedule 1, section 20

(a) In the proposed section 342CA, by deleting subsections (2) and (3).

(b) In the proposed section 342CB –

(i) by deleting subsections (3) and (4);

(ii) in subsection (6), by deleting "(1) or".

(c) In the proposed section 342CC, by deleting paragraph (b)(i) and substituting –

"(i) a member of the governing body of the company;

(ia) the secretary of the company;

(ib) an agent of a member of the governing body or of the secretary of the company, authorized in writing for the purpose by the member or secretary;".

Schedule 1 — By deleting section 21.

Schedule 1, section 25 — By deleting paragraph (b).

Schedule 1, section 26

(a) By deleting the proposed entries relating to sections 38AA(4), 38D(14), 342(3), 342AB(4) and 342C(13).

(b) In the proposed entries relating to sections 39B(6) and 342CB(6), by deleting "Prospectus or amendment" and substituting "Amendment".

Schedule 1, section 27

(a) In the proposed Seventeenth Schedule, within

the square brackets, by deleting "38AA," and ", 342AB".

(b) In the proposed Seventeenth Schedule, in Part 1 –

(i) in section 3(a), by adding ", or its equivalent in another currency" after "Part 2";

(ii) in section 4(a), by adding ", or its equivalent in another currency" after "Part 3";

(iii) by deleting section 7 and substituting –

"7. An offer of shares in a company –

(a) made –

(i) for no considera-tion, to any or all holders of shares in the company; or

(ii) as an alter-

native to a dividend or other distribu-tion, to all holders of shares of a particular class in the company, provided the offer is of fully paid-up shares of the same class; and

(b) containing a statement specified in Part 3 of the Eighteenth Schedule to this

Ordinance.";

(iv) in section 9(a), by deleting everything after "述的" and substituting "屬公共性質的慈善機構或信託；或";

(v) in section 10(a), by adding ", or applicants for membership," after "members".

(c) In the proposed Seventeenth Schedule, in Part 4, in section 6(b), in the Chinese text, by adding "的人" before the dash.

(d) In the proposed Eighteenth Schedule, in Part 3 –

(i) by deleting "neither been reviewed nor endorsed" and substituting "not been reviewed";

(ii) by deleting "或批署".

(e) In the proposed Twenty-first Schedule, in Parts 1 and 2, by deleting section 9.

Schedule 2By deleting the Schedule.

Schedule 3, section 1

By adding -

"(3) Section 2(10) is amended –

(a) in paragraph (a), by repealing "subscribers of the memorandum of association of a company" and substituting "founder members";

(b) by repealing "the memorandum of association of which has only one subscriber" and substituting "that has only one founder member".".

Schedule 3, section 2

By deleting everything after "repealing" and substituting ""subscribing his or their name or names to" and substituting "signing his or their name or names on".".

Schedule 3, section 7

In the proposed section 14A(3), by adding ", or where only one founder member is named in the form, by that founder member" after "the form".

Schedule 3

By adding –

"12A. **Entries of satisfaction and release of property from charge**

Section 85(5)(a)(iii) is repealed and the following substituted –

"(iii) in the case of a non-Hong Kong company, a person who is registered under section 333 as a person authorized to accept service of process and notices on its behalf; or".".

Schedule 3, section 14

By deleting the proposed section 91 and substituting –

"**91. Application of Part III to non-Hong Kong companies**

(1) This Part extends to charges on property in Hong Kong of a non-Hong Kong company registered under Part XI that are created, and to charges on property in Hong Kong that is acquired, by the company.

(2) Notwithstanding subsection (1), this Part does not extend to charges on property in Hong Kong of a non-Hong Kong company registered under Part XI if the relevant property was not in Hong Kong at the time the charge was created by the company, or at the time it was acquired by the company subsequent to the creation of the charge.

(3) In the application of sections 88 and 89 to a non-Hong Kong company registered

under Part XI —

(a) references in those sections to the registered office of a company shall be construed as references to the principal place of business in Hong Kong of the non-Hong Kong company; and

(b) references in section 89 to charges shall be construed as references to charges of any kind mentioned in subsection (1).

(4) This Part does not apply to a non-Hong Kong company registered under Part XI if —

(a) the non-Hong Kong company sends a notice to the Registrar under section 339 of the fact that it has ceased to have a place of business in Hong Kong;

(b) the Registrar enters in the register of non-Hong Kong companies a statement under section 339AA that the company

has been dissolved; or

(c) the name of the company is struck off from the register of non-Hong Kong companies under section 339A.

(5) Where a non-Hong Kong company that is registered under Part XI after the commencement of section 14 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004) has, on the date of such registration, any property in Hong Kong that is subject to a charge created by the company or subsisting when the property was acquired, being a charge of any such kind as would, if it had been created by the company or the property had been acquired after the company has been so registered, have been required to be registered under this Part, the company shall, within 5 weeks after it is so registered, deliver to the Registrar for registration the particulars in the specified form (including any instrument or its copy by which the charge was created or is evidenced) that are mentioned in this Part as requiring registration in respect of a charge of that

kind.

(6) If default is made in complying with subsection (5), the non-Hong Kong 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.

(7) For the purposes of this section —

(a) a ship or aircraft that is registered in Hong Kong shall be treated as property in Hong Kong notwithstanding that the ship or aircraft is physically located outside Hong Kong; and

(b) a ship or aircraft that is registered in a place outside Hong Kong shall be treated as property outside Hong Kong notwithstanding that the ship or aircraft is physically located in Hong Kong.".

Schedule 3, section 17

By deleting ""認購股份"" and substituting ""在章程大綱內簽署認購股份" 而代以 "簽署章程大綱"".

Schedule 3, section 18

In the heading, by adding "**of companies other than**

private companies" after "**Directors**".

Schedule 3, section 18(1) — By deleting the proposed section 153(2) and substituting –

"(2) With effect from the date of incorporation of a company (not being a private company) mentioned in its certificate of incorporation, the first directors of the company are the persons named as the directors in the incorporation form submitted in respect of the company pursuant to section 14A.".

Schedule 3, section 18(2) — In the proposed section 153(6) –

(a) by adding "(not being a private company)" after "company";

(b) by deleting "of change of directors in respect of him" and substituting "under section 158(4AA)";

(c) by deleting "under section 158(4)".

Schedule 3 — By adding –

"18A. **Directors of private companies**

(1) Section 153A(2) is repealed and the following substituted —

"(2) With effect from the date of

incorporation of a private company mentioned in its certificate of incorporation, the first directors of the company are the persons named as the directors in the incorporation form submitted in respect of the company pursuant to section 14A.".

(2) Section 153A is amended by adding —

"(10) A person who has been deemed to be a director of a private company under section 153A(2) of the pre-amended Ordinance shall, until a notification under section 158(4AA) is sent to the Registrar, continue to be deemed as such as if section 18A(1) of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004) had not been enacted.

(11) For the purpose of subsection (10), "pre-amended Ordinance" (修訂前的本條例) means the Companies Ordinance (Cap. 32) that was in force immediately before it was amended by section 18A(1) of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004).".

Schedule 3, section 19

By deleting the proposed section 154(1AA) and substituting –

"(1AA) With effect from the date of incorporation of a company mentioned in its certificate of incorporation, the first secretary of the company is the person named as the secretary in the incorporation form submitted in respect of the company pursuant to section 14A.

(1AB) Where the name of a firm is contained in the incorporation form pursuant to section 14A(2)(*i*), all partners in the firm as at the date of the incorporation form are the first joint secretaries of the company.".

Schedule 3

By deleting section 20 and substituting -

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

(1) Section 158(4) is repealed and the following substituted —

"(4) Where there is any change in the company's directors, reserve director (if any), secretary or joint secretaries (if any) or in any of their particulars contained in the register, the company shall, within 14 days from the change,

send to the Registrar a notification in the specified form of the change and of the date on which it occurred, and such other matters as may be specified in the form.

(4AA) On the appointment of a person as director of a company otherwise than by virtue of section 153(2) or (6) or section 153A(2) or (10), the company shall, within 14 days of the appointment, send to the Registrar a notification in the specified form containing the director’s particulars specified in the register and a statement, signed by the person, that he has accepted the appointment and that he has attained the age of 18 years.".

(2) Section 158(4A) is amended by repealing "the appointment of a person as a director, secretary or joint secretary of the company or".

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

"(4B) Subsection (4A) does not apply to a nomination the relevant particulars

of which have been stated in a notification sent to the Registrar under subsection (4).".

(4) Section 158(5) is repealed.

(5) Section 158(8) is amended by repealing "(4A), (5)" and substituting "(4AA), (4A)".

(6) Section 158 is amended by adding —

"(9A) Where a company was registered immediately before the commencement of sections 18, 18A and 20 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004) and has not complied with section 158(4)(a), (4A) and (5) of the pre-amended Ordinance before the expiry of the periods mentioned in that section 158(4)(a) and (4A), then sections 153, 153A and 158 of the pre-amended Ordinance shall continue to apply to the company as if sections 18, 18A and 20(1), (2), (3), (4) and (5) of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004) had not been enacted.".

(7) Section 158(10) is amended by adding —

"(ca) the expression "pre-amended Ordinance" (修訂前的本條例) means the Companies Ordinance (Cap. 32) that was in force immediately before it was amended by sections 18, 18A and 20 of Schedule 3 to the Companies (Amendment) Ordinance 2004 (of 2004);".".

Schedule 3, section 21(b)

By deleting everything after "(b)(iii)," and substituting "by repealing the full stop and substituting "; or";".

Schedule 3, section 21(c)

In the proposed section 168C(1)(c), by deleting the semicolon and substituting a full stop.

Schedule 3, section 22(2)

By deleting ""subscribed" 而代以 "signed"" and substituting ""在章程大綱內簽署認購股份" 而代以 "簽署章程大綱"".

Schedule 3, section 23(1)

In the proposed section 305(1A) –

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

(b) in paragraph (a)(iii), by deleting "and";

(c) in paragraph (a), by adding –

"(iv) a person who has entered into possession of the property of a specified corporation as mortgagee;

(v) a person who is appointed as the provisional liquidator or liquidator in the winding up of a specified corporation; or

(vi) a person who is appointed as the receiver or manager of the property of a specified corporation; and";

(d) in paragraph (b), by deleting "for the purposes under" and substituting "or the particulars of that mortgagee, provisional liquidator, liquidator, receiver or manager, as the case may be, for the purposes of".

Schedule 3, section 23(3)

(a) By deleting paragraph (a).

(b) In paragraph (b), by renumbering the proposed section 305(1)(b)(ia) as proposed section 305(1)(b)(iia).

(c) In paragraph (b), by renumbering the proposed section 305(1)(b)(ib) as proposed section

305(1)(b)(iib).

(d) In paragraph (b), in the proposed section 305(1)(b)(iib), by deleting "or".

Schedule 3, section 23

By adding –

"(4) Section 305(5) is amended by repealing "subsection (1)" and substituting "this section".".

Schedule 3, section 28

By deleting the proposed section 333A and substituting –

"**333A. Continuing obligation in respect of authorized representative**

(1) Any non-Hong Kong company registered under this Part shall at all times, until the expiration of a period of 1 year from the date on which it ceases to have a place of business in Hong Kong, keep registered under section 333(2)(e) the name, address and, in the case of an individual, number of the identity card (if any) or, in the absence of such number, the number and issuing country of any passport, of at least one authorized representative of the company.

(2) Where one person only is registered

as an authorized representative of a non-Hong Kong company and he ceases to be such representative, the company shall be deemed to comply with this section if, within 1 month after he ceases to be such representative, it delivers to the Registrar for registration a return under section 335(1)(b) in respect of some other person so authorized.".

Schedule 3, section 29

In the proposed section 333B(2), by deleting "14 days" and substituting "1 month".

Schedule 3, section 32

In the proposed section 335(1) and (2), by deleting "21 days" and substituting "1 month".

Schedule 3, section 35

In the proposed section 337A(1), by adding "or within 14 days after the notice of commencement of such proceedings has been served on the company according to the law of the place in which such proceedings are commenced, whichever is the later," after "the company,".

Schedule 3, section 36(3)

In the proposed section 337B(3) –

(a) in paragraph (a), by deleting everything after "的名稱" and substituting "(該公司建

議在香港經營業務所採用的法人名稱除外)的陳述書交付處長登記；及";

(b) in paragraph (b), by deleting everything after "准的名稱" and substituting "(該公司的法人名稱除外)的陳述書交付處長登記，以取代以往註冊的名稱。".

Schedule 3, section 42

In the proposed section 341(1) –

(a) by deleting the definition of "director" and substituting –

""director" (董事) includes a shadow director;";

(b) in the definition of "place of business", by adding "includes a share transfer or share registration office but" before "does".

Schedule 3, section 46

By deleting ""認購股份"" and substituting ""在章程大綱內簽署認購股份" 而代以 "簽署章程大綱"".

Schedule 3, section 49(a)(i)

By deleting "91(11)" and substituting "91(6)".

Schedule 4, section 3

(a) By deleting the proposed section 152FA and substituting –

"**152FA. Order for inspection**

(1) Subject to sections 152FD and 152FE, on application by such number of members of a specified corporation as is specified in subsection (2)(in this section referred to as "applicant"), the court may make an order –

(a) authorizing the applicant or any one or more of such members applying as applicant to inspect any records of the specified corporation; or

(b) authorizing a person (whether or not a member of the specified corporation) other than the applicant to inspect any such records on behalf of the applicant.

(2) For the purposes of subsection (1), an application may be made by –

(a) any number of members

representing not less than one-fortieth of the total voting rights of all members having at the date of the application a right to vote at a general meeting of the specified corporation;

(b) any number of members holding shares in the specified corporation on which there has been paid up an aggregate sum of not less than $100,000; or

(c) not less than 5 members.

(3) The court may only make an order under subsection (1) if it is satisfied that –

(a) the application is made in good faith; and

(b) the inspection applied for is for a proper purpose.

(4) Any person who is authorized by the court to inspect the records of a specified corporation may make copies of

the records unless the court orders otherwise.

(5) A person who complies with an order made under this section or section 152FB to produce records for inspection shall not be liable for any civil liability or claim whatever to any person by reason only of that compliance.".

(b) In the proposed section 152FB –

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

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

(iii) by adding –

"(c) an order requiring the applicant to pay the expenses reasonably incurred by the specified corporation in the inspection; and

(d) an order permitting the applicant or the person who is authorized to inspect the records of a specified corporation

under section 152FA to disclose any information or document obtained as a result of an inspection under that section to such person as is specified in the order.".

(c) By deleting the proposed section 152FC and substituting –

"**152FC. Disclosure or use of information or document obtained as a result of inspection**

(1) Subject to section 152FE, the applicant or the person who is authorized to inspect the records of a specified corporation under section 152FA shall not, without the previous consent in writing of the specified corporation, disclose any information or document obtained as a result of an inspection under section 152FA to any other person, except to the other members applying as applicant or to the applicant, unless the disclosure is –

(a) required with a view to the institution of, or

otherwise for the purposes of, any criminal proceedings;

(b) permitted in accordance with an order made under section 152FA or 152FB; or

(c) permitted in accordance with law or a requirement made under law.

(2) Subject to subsection (1) and section 152FE, the applicant or the person who is authorized to inspect the records of a specified corporation under section 152FA shall not, unless the court otherwise orders, use any information or document obtained as a result of an inspection under section 152FA for purposes other than the proper purpose referred to in section 152FA(3)(b).

(3) A person who contravenes this section shall be guilty of an offence and liable to imprisonment and a fine.".

(d) By deleting the proposed section 152FD and substituting –

"**152FD. Legal professional privilege**

Nothing in sections 152FA and 152FB, or any order made under any of those sections, shall authorize a person to inspect any records containing information that is subject to legal professional privilege.".

(e) In the proposed section 152FE –

(i) by deleting "section 152FA or 152FB" and substituting "any of those sections";

(ii) by deleting "retention and" and substituting "retention or".

Schedule 4, section 4

By deleting subsection (2) and substituting –

"(2) Section 168A(2) is repealed and the following substituted –

"(2) If on any petition under subsection (1) the court is of opinion that the specified corporation’s affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members (including the member who presented the petition), whether or not such conduct consists of

an isolated act or a series of acts –

(a) the court may, with a view to bringing to an end the matters complained of –

(i) make an order restraining the commission of any such act or the continuance of such conduct;

(ii) order that such proceedings as the court may think fit shall be brought in the name of the specified corporation against such person and on such terms as the court may so order;

(iii) appoint a receiver or manager of the whole or a part of a specified corporation's

property or business and may specify the powers and duties of the receiver or manager and fix his remuneration; and

(iv) make such other order as it thinks fit, whether for regulating the conduct of the specified corporation’s affairs in future, or for the purchase of the shares of any members of the specified corporation by other members of the specified corporation or by the specified corporation and, in the case of a purchase by the specified

corporation, for the reduction accordingly of the specified corporation's capital, or otherwise; and

(b) the court may order payment by any person of such damages and interest on those damages as the court may think fit to any members (including the member who presented the petition) of the specified corporation, whose interests have been unfairly prejudiced by the act or conduct.".

Schedule 4, section 4(3)

(a) By deleting the proposed section 168A(2A).

(b) By deleting the proposed section 168A(2C) and substituting -

"(2C) If on any petition under subsection (2B) the court is of opinion that the specified corporation's affairs

were conducted in a manner unfairly prejudicial to the interests of the then members generally or of some part of the then members (including the past member who presented the petition), whether or not such conduct consists of an isolated act or a series of acts, the court may order payment by any person of such damages and interest on those damages as the court may think fit to any then members (including the past member who presented the petition) of the specified corporation, whose interests were unfairly prejudiced by the act or conduct.".

(c) By adding –

"(2CA) For the avoidance of doubt, the damages that may be ordered by the court under subsections (2)(b) and (2C) does not entitle a member, past member or then member of a specified corporation to recover by way of damages any loss that is solely reflective of the loss suffered by the specified corporation which only the specified corporation is entitled to

recover under the common law.".

(d) By deleting the proposed section 168A(2D).

Schedule 4, section 4(4) — By deleting the proposed section 168A(5C).

Schedule 4, section 4 — By adding -

"(5) Section 168A is amended by adding –

"(7) Where before the commencement of section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 (of 2004), a petition has been presented for an order under section 168A of the pre-amended Ordinance, that section of the pre-amended Ordinance shall continue to apply in relation to such a petition as if section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 (of 2004) had not been enacted.

(8) For the purpose of subsection (7), "pre-amended Ordinance" (修訂前的本條例) means the Companies Ordinance (Cap. 32) that was in force immediately before it was amended by section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 (of 2004).".

Schedule 4, section 5 — (a) In the proposed Part IVAA, in the heading, by

deleting everything after "IVAA" and substituting –

"STATUTORY DERIVATIVE ACTION".

(b) By adding –

"**168BAA. Application**

(1) This Part applies to –

(a) the bringing of proceedings in respect of misfeasance committed against a specified corporation;

(b) the bringing of proceedings in respect of any matter where a specified corporation fails to bring proceedings in respect of such matter by reason of misfeasance committed against the specified corporation; and

(c) the intervention in proceedings in respect of any matter where a specified corporation fails to diligently

continue, discontinue or defend the proceedings in respect of such matter by reason of misfeasance committed against the specified corporation,

where in relation to the proceedings brought or intervened in, the cause of action or right to continue, discontinue or defend those proceedings, as the case may be, is vested in the specified corporation and relief, if any, is sought on behalf of the specified corporation.

(2) In this section, "misfeasance" (不當行爲) means fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty.".

(c) In the proposed section 168BB –

(i) by deleting subsection (1) and substituting –

"(1) A member of a specified corporation may, with the leave of the court granted under subsection (3) -

(a) bring

proceedings before the court on behalf of the specified corporation; or

(b) intervene in any proceedings before the court to which the specified corporation is a party for the purposes of continuing, discontinuing or defending those proceedings on behalf of the specified corporation.";

(ii) in subsection (2), by deleting "subsection (1)" and substituting "subsection (1)(a)";

(iii) by deleting subsection (3) and substituting –

"(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1) if the court is satisfied that -

(a) it appears to be prima facie in the interest of the specified corporation that leave be granted to the applicant;

(b) if the applicant is applying for leave to bring proceedings under subsection (1)(a), there is a serious question to be tried and the specified corporation has

not itself brought the proceedings;

(c) if the applicant is applying for leave to intervene in proceedings under subsection (1)(b), the specified corporation has not diligently continued, discontinued or defended those proceedings; and

(d) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the

specified corporation in accordance with section 168BC.";

(iv)in subsection (4), by deleting "This" and substituting "Subject to other provisions in this Part, this";

(v)by adding –

"(4A) The court may dismiss an application for leave under subsection (3) if the applicant has, in the exercise of any common law right –

(a) brought proceedings on behalf of the specified corporation in respect of the same cause or matter; or

(b) intervened in the proceedings in question to which the

specified corporation is a party.".

(d) In the proposed section 168BC –

(i) in subsection (1), by deleting "brings or applies for leave to intervene in proceedings under section 168BB" and substituting "applies for leave under section 168BB(3)";

(ii) in subsection (3)(a), by deleting "bring or apply for leave to intervene in proceedings under section 168BB" and substituting "apply for leave under section 168BB(3)".

(e) By adding –

"**168BCA. Court's power to strike out proceedings brought or intervention in proceedings by members under common law**

(1) Where leave has been granted to a member of a specified corporation under section 168BB(3) and the member, in the

exercise of any common law right, subsequently brings proceedings on behalf of the specified corporation in respect of the same cause or matter, or subsequently intervenes in the proceedings in question to which the specified corporation is a party, the court may —

(a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings brought under the common law, or the intervention under the common law, or anything in such pleading or indorsement; and

(b) order the proceedings brought under the common law, or the intervention under the common law, to be stayed or dismissed or judgment to be entered accordingly.

(2) This section is in addition to

and does not derogate from any power of the court conferred by any enactment or rule of law.".

(f) By deleting the proposed section 168BD.

(g) In the proposed section 168BE(1) -

(i) in paragraph (b), by deleting "strike out the proceedings brought by the member, or";

(ii) by deleting "一些".

(h) In the proposed section 168BF –

(i) in subsection (1) –

(A) by adding ", at any time," after "may";

(B) in paragraph (b), by deleting ", including requiring mediation";

(C) in paragraph (c), by adding "(including the provision by the specified corporation or the officer of such information or assistance as the court may think fit for the purpose of the proceedings or application)" after "act";

(ii) in subsection (3)(a)(ii), by adding

"or application" after "proceedings";

(iii) by adding –

"(5) The court may, at any time, make any order and give any direction it considers appropriate in relation to sections 168BB(4A) and 168BCA.".

(i) By adding –

"**168BFA. Protection of personal data**

Nothing in section 168BF(1)(c) and (d) and (2) shall authorize the collection, retention or use of personal data in contravention of the Personal Data (Privacy) Ordinance (Cap. 486).".

(j) By deleting the proposed section 168BG and substituting -

"**168BG. Power of court to make orders about costs**

(1) The court may, at any time (including on granting leave under section 168BB(3)), make any order it considers appropriate about the costs incurred or to be incurred by the following persons in relation to an

application for leave made under section 168BB(3) or any proceedings brought or intervened in, or to be brought or intervened in, under section 168BB(1) -

(a) the member;

(b) the specified corporation; and

(c) any other parties to the application or proceedings.

(2) An order made under subsection (1) may require the specified corporation to indemnify out of its assets against the costs incurred or to be incurred by the member in making the application or in bringing or intervening in the proceedings.

(3) The court may only make an order about costs (including the requirement as to indemnification) under this section in favour of the member if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, making the application, or bringing or intervening

in the proceedings.".

Schedule 4, section 6

In the proposed section 350B –

(a) in subsection (1), by adding ", in relation to a specified corporation," after "has";

(b) in subsection (1)(f), by deleting "or";

(c) by deleting subsection (1)(g) and substituting -

"(g) a breach of his fiduciary duties owed to the specified corporation in any capacity other than as a director of the specified corporation; or";

(d) in subsection (1), by adding –

"(h) a breach of his fiduciary or other duties as a director of the specified corporation owed to the specified corporation,";

(e) in subsection (1), by deleting "any person" and substituting "a member or creditor of the specified corporation";

(f) in subsection (3) –

(i) by adding ", in relation to a specified corporation," after "has";

(ii) by deleting "any person" and substituting "a member or creditor of the specified corporation";

(g) in subsection (5), by adding "on such terms and conditions as it thinks fit" after "injunction";

(h) by adding –

"(8) For the avoidance of doubt, the damages that may be ordered by the court under subsection (7) does not entitle a person to recover by way of damages any loss that is solely reflective of the loss suffered by a specified corporation which only the specified corporation is entitled to recover under the common law.".

Schedule 4, section 7(1)

In the proposed entry relating to section 152FC(2) –

(a) by deleting "152FC(2)" and substituting

"152FC(3)";

(b) by adding "or using" after "disclosing";

(c) by adding "or (2)" after "152FC(1)".

Schedule 5 — By deleting Part 2.

Schedule 5, Part 3, section 2 — In the proposed paragraph 3(2)(a)(vi) and (b)(vi), by adding "professional" before "company".

Schedule 5, Part 3, section 4 — In the proposed paragraph 6(2)(a)(vi) and (b)(v), by adding "professional" before "company".

Schedule 5, Part 3 — By adding immediately after section 22 –

"**Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation**

22A. **Interpretation**

Section 2(1) of the Merchant Shipping (Local Vessels) (Certification and Licensing) Regulation (Cap. 548 sub. leg. D) is amended, in the definition of "document of identification", in paragraph (c) –

(a) by repealing "an oversea" and substituting "a non-Hong Kong";

(b) by repealing "oversea" and substituting "non-Hong Kong".

22B. **Certificate of ownership and other documents ceasing to have effect on death or dissolution of owner, etc.**

Section 24(b) is amended by repealing "overseas" and substituting "non-Hong Kong".

22C. **Notice of death or dissolution of owner, etc.**

Section 25(2) is amended by repealing "overseas" and substituting "non-Hong Kong".".

Schedule 5, Part 3, section 26

In the Chinese text, in the heading, by deleting "XI" and substituting "IX".