Bills Committee on Companies Bill

Part 2 and Part 12 of the Companies Bill

PURPOSE

This paper explains the major proposals and policy issues in Part 2 (Registrar of Companies and Companies Register) and Part 12 (Company Administration and Procedure) of the Companies Bill. It also outlines relevant overseas experience, public views received during earlier public consultations on the major proposals and our responses.

DETAILS

2. Details for each Part are contained in the Annexes -

Annex A - Part 2 (Registrar of Companies and Companies Register)

Annex B - Part 12 (Company Administration and Procedure)

ADVICE SOUGHT

3. Members are invited to note the contents of the paper and provide their views.

Financial Services and the Treasury Bureau
Companies Registry
11 April 2011

Annex A

Bills Committee on Companies Bill

Part 2 – Registrar of Companies and Companies Register

INTRODUCTION

Part 2 (Registrar of Companies and Companies Register) of the Companies Bill ("CB") contains provisions relating to the Registrar of Companies ("Registrar"), the Companies Register and the registration of documents by the Registrar.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 2 contains initiatives that aim at improving regulation, facilitating business and modernising the law, namely, -

(a) Clarifying the Registrar's powers in relation to the registration of documents (paragraphs 5 to 10 below);

(b) Clarifying and enhancing the Registrar's powers in relation to the keeping of the Companies Register (paragraphs 11 to 16 below);

(c) Providing expressly for removing information on the Companies Register (paragraphs 17 to 21); and

(d) Withholding residential addresses of directors and company secretaries and full identification numbers of individuals from public inspection (paragraphs 22 to 33 below).

3. Apart from the above major proposals, Part 2 also includes a number of other minor proposals. These include:

(a) empowering the Registrar to issue guidelines to provide

guidance on the operation of any provision in the CB (**clause 23**). The guidelines are not subsidiary legislation, but may be admissible in evidence in any legal proceedings if they are relevant to determine a matter in issue. There is no such provision in the Companies Ordinance ("CO") at present although the Registrar issues guidelines as an administrative measure;

(b) providing that the Registrar may enter into agreement with a company on the delivery of documents by electronic means (**clause 31**). This allows the Registrar to agree with a company the detailed arrangements (e.g. delivery of specified types of documents) for the electronic delivery of documents to the Registrar;

(c) providing a new power for the Financial Secretary to make regulations to require delivery of documents to the Registrar by electronic means (**clause 32**). This allows for flexibility for introduction of electronic filing of company documents ;

(d) providing a new power for the Registrar to certify delivery or non-delivery of documents (**clause 56**). The certificate is admissible as prima facie evidence of the fact of delivery or non-delivery of the document in question in any proceedings. If a person disputes the delivery or non-delivery of documents as certified, the person would have the burden to provide evidence to the contrary; and

(e) introducing new rules to deal with discrepancies between an original document in a language other than English or Chinese and its certified translation (**clause 59**). Under clause 59, the company cannot rely on the translation where there is a discrepancy as against a third party whereas a third party may rely on the translation if he or she had actually relied on the translation and had no knowledge of the true contents of the document. The new rules aim at promoting the accuracy of translations submitted by companies and protecting members of the public from being misled by any discrepancy in a translated

document on the register.

4. The details of the major proposals in Part 2 are set out in paragraphs 5 to 33 below.

Clarifying the Registrar's powers in relation to the registration of documents (Clauses 29, 33 to 36)

Current position

5. Currently under section 348 of the CO, the Registrar may refuse to register a document if it is manifestly unlawful or ineffective, or is incomplete or altered; or if any signatures on the document, or digital signature accompanying the document is incomplete or altered. The grounds for refusal of registration are not entirely clear. For example, it is not certain whether they could cover cases where the information contained in a document is internally inconsistent or inconsistent with the information already on the Companies Register.

Proposal and key provisions in the Bill

6. We propose that the grounds of refusal should be clarified to empower the Registrar to refuse to register an unsatisfactory document or to withhold registration of a document pending further amendments or provision of further particulars.

7. **Clause 29** sets out the situations where a document is considered to be unsatisfactory. It consolidates and clarifies the existing grounds on which the Registrar may refuse the registration of a document. For example, it is expressly provided that a document is unsatisfactory if it is internally inconsistent or inconsistent with the information already on the Companies Register. **Clause 33** makes it clear that if the Registrar refuses to accept a document, has not received a document or refuses to register a document, the document is to be regarded as not having been delivered to the Registrar as required under the Bill. **Clause 34** further provides that the Registrar may withhold the registration of an unsatisfactory document and request the person who delivered the document to take certain remedial actions within a specified period, such

as producing further information or evidence, amending or completing the document or applying for a court order.

Overseas experience

8. In formulating the proposal, we have made reference to the provisions in the United Kingdom Companies Act 2006 ("UKCA 2006") and the Australian Corporations Act 2001 ("ACA"). In particular, the provision on Registrar's requirement as to form, authentication and manner of delivery of documents is modeled on relevant provisions in UKCA 2006 (section 1068). The provisions on Registrar's refusal to register or withholding registration of unsatisfactory documents are modeled on relevant provisions in ACA (section 1274).

Public consultation

9. During our earlier public consultation on the draft CB, there were concerns about the Registrar's power to refuse to register unsatisfactory documents, including whether altered documents or documents containing unnecessary material should be considered as unsatisfactory. There were views that the Registrar must provide reasons for the decision to refuse the registration of a document. If a person lodges an appeal, no penalty for failing to register the document should be payable until the time for appeal had lapsed.

10. We have refined our proposal having considered the comments received. In particular, a document will be considered as unsatisfactory if it is altered without proper authority (clause 29(1)(g)) but not in the case that it contains unnecessary information. In addition, the Registrar will provide reasons for her decision to refuse the registration of a document. The Companies Registry ("CR") will not take enforcement action pending the hearing of an appeal against the Registrar's decision.

Clarifying and enhancing the Registrar's powers in relation to the keeping of the Companies Register (Clauses 37 to 42)

Current position

11. At present, the Registrar adopts administrative measures in appropriate cases to accept the filing of "amended" documents to rectify documents which contain errors and to annotate the information in the Companies Register so as to provide supplementary information.

Proposal and key provisions in the Bill

12. It would be preferable for such powers to be put on an express statutory footing. It is proposed that the following powers be provided for expressly:

(a) power to annotate information on the register to provide supplementary information such as the fact that the document in question has been replaced or corrected; and

(b) power to request companies or their officers to resolve inconsistencies in information on the register or to provide updated information.

13. **Clause 37** enables the Registrar to notify a company of an apparent inconsistency in the information on the Companies Register and to require it to take steps to resolve the inconsistency within a specified period. **Clause 38** empowers the Registrar to require a person to update his or her information on the Companies Register. Under both clauses, failure of the company and every responsible person concerned to comply with the Registrar's requirements is an offence.

14. **Clause 39** gives the Registrar power to, either on her own initiative or on an application by a company, rectify a typographical or clerical error contained in any information on the Companies Register. If the rectification is made upon an application by a company, the Registrar may rectify the error by registering a document showing the rectification delivered by the company. **Clause 42** provides that the

Registrar may make a note in the Companies Register for the purpose of providing information in relation to such a rectification.

Overseas experience

15. We have made reference to the relevant provisions in Australia, Singapore and the UK in formulating the proposal. The provisions on the Registrar's power to require a company to resolve inconsistencies in information on the Companies Register and to annotate the Companies Register are modelled on relevant provisions in UKCA 2006 (sections 1093 and 1081). The provisions on the power to require individuals to update information and on the power to rectify typographical and clerical errors are modelled on relevant provisions in ACA (section 1274) and the Singapore Companies Act (section 12B).

Public consultation

16. There were no substantive comments raised on this proposal.

Providing expressly for removing information on the Companies Register (clause 40)

Current position

17. At present, there is no express provision in the CO on the court's power to order the Registrar to remove inaccurate or forged information from the Companies Register. However, it has been decided by the court that in an appropriate case, the court may direct the Registrar to remove a document from the Companies Register or to accept a document for registration[1].

Proposal and key provisions in the Bill

18. We propose to introduce an express provision to provide that the court may order the removal of any information from the Companies Register.

[1] See *Re Tongda Group Holdings Ltd* HCMP 1356 of 2004.

19. **Clause 40** provides that the court may, on application by any person, direct the Registrar to rectify any information on the Companies Register or to remove any information from it if the court is satisfied that the information is inaccurate or forged, or derives from anything that is invalid or ineffective or that has been done without the company's authority. When making an order of removal of any information from the Companies Register, the court may make any consequential order that appears just with respect to the legal effect, if any, to be accorded to the information by virtue of its having appeared on the Companies Register.

Overseas experience

20. The proposal is similar to section 1096 of the UKCA 2006.

Public consultation

21. There were no substantive comments raised on this proposal.

Withholding residential addresses of directors and company secretaries and full identification numbers of individuals from public inspection (Clauses 47 to 54)

Current position

22. At present, directors and company secretaries of companies incorporated in Hong Kong and registered non-Hong Kong companies are required by the CO to provide their residential addresses and identification numbers ("ID numbers") to the CR for incorporation and registration purposes. The ID numbers of other persons may also be required by the CO to be provided to the CR for registration purposes (e.g. the ID number of a liquidator). Such information is available on the Companies Register and can be inspected and copied by the public. There are concerns over protection of data privacy and possible misuse of personal data.

Public consultation

23. We consulted the public on the issue during the first phase consultation of the draft CB. The majority opined that directors' residential addresses should not be disclosed and certain digits of the ID numbers should be masked on the public register, mainly for reasons of privacy and risk of abuse. On the other hand, some respondents did not see any strong grounds for changing the current regime given that cases of abuse have been rare in Hong Kong. They also cited reasons that directors' residential addresses were useful for law enforcement authorities and creditors, and that full ID numbers were needed as unique identifiers of directors/company secretaries.[2]

Proposal

24. While there is little evidence that the current disclosure of residential addresses on the public register has caused any major personal safety problems, we note the rising concerns over the protection of personal privacy and information as reflected in the views of the majority of respondents. We propose to introduce new provisions in Part 2 for restricting access to the residential addresses of directors and company secretaries and full ID numbers of individuals.

25. For directors, the Bill requires the provision of correspondence addresses in addition to residential addresses. Only specified public authorities and other specified persons will be allowed access to the directors' residential addresses kept on a confidential record of the CR. The directors' correspondence addresses will be shown on the Companies Register. There are similar provisions regarding the ID numbers of individuals. Certain digits in the ID numbers will be masked on the public register. Access to the full ID numbers will similarly be restricted to specified public authorities or other specified persons. We believe that the remaining digits of the ID numbers (together with the name) should be sufficient to identify individual persons. Certain

[2] Further details of the public comments can be found in paragraphs 19 to 23 of the consultation conclusions of the first phase consultation issued on 27 August 2010, available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccfp_conclusion_e.pdf .

related provisions are set out in Parts 3, 12 and 16 of the CB.[3]

26. Under the Bill, company secretaries are no longer required to disclose their residential addresses and are only required to provide correspondence addresses for incorporation and registration purposes.[4]

27. In view of the huge volume of existing records bearing residential addresses and ID numbers filed with the CR, the information already on the register before the commencement of the CB will only be withheld from public inspection upon application and payment of a fee.

Key provisions in the Bill

28. **Clause 49** provides that for specified categories of documents delivered to the Registrar for registration, the Registrar must not make the directors' residential addresses contained therein available for public inspection. **Clause 49** also covers the protection of full ID numbers of all persons in a similar manner as that for directors' residential addresses.

29. **Clauses 50 and 51** provide that, in case communication with a director at the director's correspondence address is not effective, the Registrar may, after considering the representations of the director and the company concerned, put the director's residential address on the Companies Register as the director's correspondence address and thereby make it available for public inspection. The effect of the Registrar's decision of putting the director's residential address on the Companies Register will last for five years.

30. To ensure that the residential addresses of directors and the full ID numbers of individuals protected pursuant to clause 49 ("protected information") will continue to be accessible by those who have a legitimate need, **clause 53** permits the use or disclosure of the protected information by the Registrar for specified purposes:

---

[3] Parts 3, 12 and 16 contain provisions which specify the addresses of directors and company secretaries to be provided in documents delivered to the Registrar for incorporation and registration purposes.

[4] As company secretaries do not usually have management power of directors, they do not owe fiduciary duties to the company in the same manner as directors and are not personally subject to legislation relating to disqualification.

(a) for communicating with the director or individual;

(b) for the performance of the Registrar's functions; or

(c) for disclosure to entities prescribed by regulations made under clause 53 upon the payment of a fee. These entities would include specified public authorities (e.g. Labour Department, Police, etc.) and regulators, liquidators and provisional liquidators. The purpose is to enable these authorities/ persons to carry out their functions (e.g. law enforcement).

31. Further, **clause 54** provides that a creditor or member of the company concerned or any other person having a sufficient interest may have access to the protected information by applying to the court for an order for disclosure by the Registrar of the protected information.

32. For residential addresses of directors and company secretaries and the full ID numbers of individuals contained in existing records, **clause 47** provides that they will only be withheld from public inspection upon application in accordance with specified procedures and upon payment of a fee.

Overseas experience

33. Our proposal broadly follows the approach for protection of directors' residential addresses in the UK[5]. In Australia, a director may apply to substitute his/her residential address in the public register by an alternative address, if the director or his/her family members' personal safety is at risk.[6] The Australian approach appears to offer less effective protection as directors may only apply for substitution of residential addresses after the risks to personal safety are established.

[5] See in particular sections 240 to 246 and 1088 of the UKCA 2006.
[6] See section 205D(2) of the Australia Corporations Act 2001 (ACA).

PUBLIC COMMENTS

34. We have consulted the public on the draft CB in two phases of public consultation held from December 2009 to March 2010 and May to August 2010 respectively. Part 2 was covered by the first phase consultation. The public comments on our major proposals are discussed above. As for the comments on other provisions in Part 2 and our response, they are set out in Appendix III to the consultation conclusions of the first phase consultation of the draft CB issued on 27August 2010.

Financial Services and Treasury Bureau
Companies Registry
11 April 2011

Annex B

Bills Committee on Companies Bill

Part 12 – Company Administration and Procedure

INTRODUCTION

Part 12 (Company Administration and Procedure) of the Companies Bill ("CB") governs resolutions and meetings, keeping of registers, company records, registered offices, publication of information relating to companies and annual returns.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 12 contains initiatives that aim at enhancing corporate governance, facilitating business and modernising the law. The initiatives that aim at enhancing corporate governance include –

(a) Introducing a comprehensive set of rules for proposing and passing a written resolution (paragraphs 6 to 10);

(b) Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, Annual General Meetings ("AGMs") (paragraphs 11 to 16); and

(c) Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights (paragraphs 17 to 20).

3. The initiatives that aim at facilitating business include –

(a) Permitting a general meeting to be held at more than one location by using audio-visual technology (paragraphs 21 to 24); and

(b) Allowing companies to dispense with AGMs by unanimous shareholders' consent (paragraphs 25 to 29).

4. The initiatives that aim at modernising the law include –

(a) Clarifying the rights and obligations of proxies and enhancing the right to appoint proxies (paragraphs 30 to 33);

(b) Providing that the court must refuse to compel compliance with a request for inspection or a copy of the register of members, directors or company secretaries if the right is being abused (paragraphs 34 to 37); and

(c) Empowering the Financial Secretary ("FS") to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications (paragraphs 38 to 42).

5. The details of the major proposals in Part 12 are set out in paragraphs 6 to 42 below.

Introducing a comprehensive set of rules for proposing and passing a written resolution (clauses 538 to 551)

Current position

6. Section 116B of the Companies Ordinance ("CO") provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting and without any previous notice, by a resolution signed by all members of a company. There is widespread use of such written resolutions, especially by small and medium-sized enterprises ("SMEs"), for their decision-making process. However, there are no established statutory rules for proposing and passing a written resolution, for example, who may propose a written resolution, and how a written resolution is to be circulated among the members.

Proposal and key provisions in the Bill

7. **Subdivision 2 of Division 1 of Part 12** provides for the procedures for proposing, passing and recording written resolutions. **Clause 539** provides that the directors of a company or the members of a company representing not less than 2.5% of the total voting rights or a lower percentage specified in the company's articles may propose a resolution as a written resolution. In addition, members of the company who propose the resolution may also require the company to circulate with the resolution a statement of not more than 1 000 words on the subject matter of the resolution (**clause 541**). Once a written resolution is proposed, the company has a duty to circulate the resolution to every member for agreement. The circulation may be effected by sending the copies in hard copy form or electronic form or by making the copies available on a website (**clauses 542 and 543**). It is proposed that the period for agreeing to the proposed written resolution be 28 days or such period as specified in the company's articles (**clause 548**). Members may signify their agreement to a proposed written resolution and send it back to the company either in hard copy or electronic form (**clause 546**). If a resolution is passed as a written resolution, the company must send a copy of the written resolution to all members and the auditor within 15 days (**clause 549**).

8. The new procedures facilitate the use of written resolutions for decision-making, which is often more expeditious and less costly than passing a resolution in a general meeting. The procedures will not replace the common law doctrine of unanimous consent or so-called *Duomatic* principle[1] that, if all the members of a company actually agree on a particular decision which can be made at a general meeting, the decision is binding and effective without a meeting (**clause 537(3)** which restates the current law). In addition, a company's articles may also set out alternative procedures for passing a resolution without a meeting, provided that the resolution has been agreed by the members unanimously (**clause 551**).

[1] See *Re Duomatic Ltd* [1969] 2 Ch 365.

Overseas experience

9. The majority of the provisions are modelled on provisions in the United Kingdom Companies Act 2006 ("UKCA 2006") (chapter 2 of part 13, and section 502). The provision imposing a duty on a company to notify members and the auditor when a written resolution has been passed (clause 549) is modelled on section 184E of the Singapore Companies Act ("SCA").

Public consultation

10. One respondent commented that the requirement for a company to send to its auditors every written resolution passed would create unnecessary administrative burden for both the company itself and the auditors. It was argued that as a company was already required to maintain all resolutions in its book of minutes, subsequent inspection by the auditors during their audit work should suffice. However, we are of the view that auditors should be kept informed of all written resolutions. In fact, a similar requirement already exists in section 116BA of the CO. The proposal should not create significant additional burden on companies.

Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for AGMs (clauses 570 to 572, 605 and 606)

Current position

11. Section 115A of the CO enables members representing at least 2.5% of the total voting rights of a company or 50 or more members who have paid up an average sum of not less than $2,000 per member, to request the company to circulate a proposed resolution for the next AGM or a statement of not more than 1 000 words relating to any proposed resolution or business to be dealt with at any general meeting. Under section 115A(1), members making the requisition need to bear the expenses unless the company resolves otherwise. This may hinder minority shareholders from making such requisition.

Proposal and key provisions in the Bill

12. To enhance the right of minority shareholders, we propose that the expenses of circulating members' proposed resolutions for AGMs, and members' statements relating to the proposed resolution or other business to be dealt with at AGMs will be borne by the company, if such documents are received in time for sending with the notice of the meeting.

13. **Clause 570** provides members a power to request circulation of statements concerning the business to be dealt with at general meetings along the lines of section 115A of the CO. **Clause 571** imposes a duty on the company to circulate members' statements in the same manner as the notice of meeting. Under **clause 572**, if the meeting concerned is an AGM and a members' statement is received in time for sending with the notice of the meeting, the expenses will be borne by the company. Otherwise, the expenses will be paid by the members concerned.

14. **Clauses 605** and **606** contain similar provisions in respect of members' proposed resolutions for AGMs. A circulation request must be received by the company not later than 6 weeks before the AGM, or if later, before the time at which notice of meeting is given. The company is obliged to circulate the resolution at the company's expense, which is a new requirement.

Overseas experience

15. The proposal to require the company to bear the expenses for circulating members' statements and proposed resolutions is in line with sections 316 and 339 of the UKCA 2006.

Public consultation

16. There was a concern over exempting the requesting shareholders from bearing the expenses of circulating members' statements relating to business of, and proposed resolutions for, AGMs. It was suggested that the requesting shareholder should bear 50% of the relevant expenses. In this regard, we do not consider it appropriate to

require members to bear any of the expenses of circulating their statements and proposed resolutions if such documents are received in time for sending with the notice of the meeting. There are already safeguards in the Bill to prevent abuse, including the threshold for circulation of members' statements in clause 570 and the mechanism in clause 573.

Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights (clause 581)

Current position

17. Under section 114D of the CO, members have the right to demand a poll and such a right cannot be excluded by the articles. It may be exercised on any question, except the election of the chairman of the meeting or the adjournment of the meeting, if the demand is made by −

(a) not less than 5 members having the right to vote at the meeting;

(b) members representing not less than 10% of the total voting rights; or

(c) members holding not less than 10% of the total paid up share capital of the company carrying the right to vote at the meeting.

A proxy has the same right as the member for whom he is proxy to join in demanding a poll.

Proposal and key provision in the Bill

18. In line with the provision in section 113 of the CO that shareholders holding not less than 5% of the voting rights are able to requisition an extraordinary general meeting, the threshold requirement for demanding a poll is lowered from 10% to 5% of the total voting rights under **clause 581**.

Overseas experience

19. The threshold for demanding a poll is 10% of the total voting rights in the UK (section 321(2)(b) of UKCA 2006) and in Singapore (section 178(1)(b)(ii) of SCA). In Australia, it is 5% of members' votes (section 250L(1) of the Australian Corporation Act 2001 ("ACA")). We are of the view that our proposal to lower the threshold from 10% to 5% would facilitate members' participation in companies' business and hence enhance corporate governance.

Public consultation

20. There were no substantive comments raised on this proposal.

Permitting a general meeting to be held at more than one location by using audio-visual technology (clause 574)

Current position

21. With the development of electronic communications, it is not uncommon for a company to hold its general meeting at two or more venues with audio-visual links. However, the CO does not have express provision permitting a general meeting to be held at two or more places.

Proposal and key provision in the Bill

22. To keep up with technological development and subject to any provision of the company's articles, **clause 574** permits a company to hold a general meeting at two or more places using any audio-visual technology that enables the members of the company to exercise their right to speak and vote at the meeting. A company may set out rules and procedures for holding a dispersed meeting.

Overseas experience

23. The provision is modeled on 249S of the ACA. There is a provision to similar effect in the UK Companies (Shareholders' Rights) Regulations 2009 (regulation 8).

Public consultation

24. There were no substantive comments raised on this proposal.

Allowing companies to dispense with AGMs by unanimous shareholders' consent (clauses 602 to 604)

Current position

25. Every company is required to hold AGMs under section 111 of the CO. A company may however dispense with holding AGMs if everything that is required or intended to be done at the meeting is done by written resolutions in accordance with section 116B of the CO, and a copy of each of the documents (including any accounts or records) which under the CO would be required to be laid before the meeting is provided to each member of the company (section 111(6)). For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome.

Proposal and key provisions in the Bill

26. To simplify the decision-making process, **clause 603** allows a company to dispense with the requirement for holding of AGMs by passing a written resolution or a resolution at a general meeting by all members. After passing such a resolution, the company will no longer be required to hold any subsequent AGMs. However, the financial statements and reports originally required to be laid before an AGM will still need to be sent to the members under **clause 421(3)** of Part 9. Also any member may request the company to convene an AGM for a particular year. The company may revoke the resolution by passing an ordinary resolution to that effect, in which case, the company will be required to hold subsequent AGMs. For a single member company, **clause 602(2)(a)** provides that such a company is not required to hold an AGM at all.

27. In practice, it is unlikely for a public or a guarantee company to dispense with holding an AGM by unanimous members' consent but the

possibility could not be ruled out. The written resolution procedure under section 111(6) of the CO is therefore retained in **clause 602(1)** in case a company might wish to dispense with an AGM on a specific occasion by a written resolution. This provision also provides flexibility for private companies which do not wish to dispense with AGMs indefinitely under clause 603.

Overseas experience

28. Our proposal is in line with section 175A of the SCA. In the UK, the requirement for private companies to hold AGMs has been abolished while public companies are required to hold AGMs without power to dispense with the requirement. We have not adopted the UK approach as we see merit in retaining AGMs as a default rule. Our proposal seeks to provide flexibility for companies to dispense with AGMs provided that there is unanimous consent among members.

Public consultation

29. There were some concerns that dispensation of AGMs might work against good corporate governance. On the other hand, a respondent suggested that unanimous consent should be replaced by consent of members representing 75% of the total voting rights with no member objecting. In this regard, we consider that our proposal has struck a reasonable balance. To prevent abuse, dispensation would require members' unanimous consent, in line with the threshold for passing written resolutions. An AGM will be convened if any member so requested. Also financial statements and reports will still need to be circulated to members if AGMs are not held.

Clarifying the rights and obligations of proxies and enhancing the right to appoint proxies (clauses 578, 581, 586, 592 to 595)

Current position

30. The system of proxy voting helps ensure that the views of members who are unable to attend a meeting in person will still be voiced and considered. There are a number of limitations in the current CO

provisions concerning proxies −

(a) unless the articles otherwise provide, a proxy is not entitled to vote on a show of hands (section 114C(1A)(a));

(b) there is no statutory provision expressly providing that a proxy may be elected as a chairman of a meeting;

(c) there is no requirement for a proxy to vote on a poll according to the terms of appointment;

(d) there is no express provision for the revocation of the appointment of a proxy if the appointor attends and votes at the meeting;

(e) members of companies limited by guarantee may have a right to appoint a proxy only if it is provided in the company's articles (section 114C(1A)). It is noted that some guarantee companies may wish to exclude non-members from attending their meetings and from being appointed as proxies; and

(f) unless the articles otherwise provide, the number of proxies that may be appointed by a shareholder to attend on the same occasion is limited to two (section 114C(2)). Such a default cap on the maximum number of proxies that a shareholder may appoint on the same occasion is considered to be unnecessarily restrictive.

Proposal and key provisions in the Bill

31. Part 12 clarifies the rights and obligations of a proxy in the following manner −

(a) **Clause 586(1)** provides that a proxy may exercise all or any of the member's rights to attend and to speak and vote at a general meeting (i.e. including voting on a show of hands (multiple proxies excepted) and **clause 581(3)** authorises a proxy to demand a poll;

(b) **Clause 592** expressly provides that a proxy may be elected as the chairperson of the general meeting, subject to any provisions of the company's articles;

(c) Where a proxy put forward by a company is appointed by a member to be his proxy, **clause 593(2)** requires the proxy to vote in the way specified in the appointment of the proxy. This is to overcome the possibility of a shareholder being disenfranchised by a person, who is put forward by the board as a proxy, deliberately failing to vote in accordance with the shareholder's instructions;

(d) **Clause 595(1)** provides that the appointment of a proxy will be revoked if the appointor attends in person and votes at the meeting;

(e) **Clause 586** provides that a member of a company is entitled to appoint a proxy and **clause 586(2)** provides that a company limited by guarantee may confine proxies to members of the company in its articles; and

(f) **Clause 586(3)** allows multiple proxies without imposing any cap on the number of proxies that may be appointed. Multiple proxies can only vote on a poll. They are not entitled to vote on a show of hands because it would go against the basis upon which the show of hands mechanism was premised, thus distorting the result (**clause 578(2)**).

Overseas experience

32. The provisions giving effect to the above proposals are largely modeled on sections 324, 328 and 329 of the UKCA 2006. The provision requiring a company-sponsored proxy to vote in the way specified in the appointment of the proxy is modeled on section 250A of ACA. The provision on the revocation of proxy when the appointor attends and votes at the meeting is a codification of the common law position.

Public consultation

33. There was concern about the proposal to allow multiple proxies, which may increase the cost of AGMs. It was suggested that the provision about multiple proxies should be made subject to the articles of association of a company. Nevertheless, we prefer retaining our proposal which is recommended by the Standing Committee on Company Law Reform ("SCCLR") and which helps pave the way for scripless holding and voting by beneficial owners.

Clarifying that the court must refuse to compel compliance with a request for inspection or a copy of the register of members, directors or company secretaries if the right is being abused (clauses 621(8), 633(7), 640(7) and 648(4)(e))

Current position

34. Under section 98(1) of the CO, the register of members of a company and the index of members' names are open to inspection by any member without charge and by any other person on a payment of a fee. Upon receipt of a request for a copy of the register of members, the company must send the copy within 10 days after the date on which the request is received. In a recent court case[2], the court held that it had discretion not to make an order under section 98(4) of the CO to compel inspection or production if it considered that the purposes of the request amounted to abuse.

Proposal and key provisions in the Bill

35. For the sake of clarity, **clause 621(8)** expressly states that the court must not make an order directing a company to provide a copy of the register of members or index of members' names to the person requesting it, if it is satisfied that the right to request the copy is being abused. There are similar provisions in respect of the register of directors and the register of company secretaries (**clauses 633(7) and 640(7)**). The court's obligation not to direct inspection of company

[2] *The Democratic Party v The Secretary for Justice* [2007]2 HKLRD 804.

records where there is abuse will be set out in the regulations to be made by the FS under **clause 648(4)(e)**.

Overseas experience

36. We have considered but decided against introducing changes along the lines of sections 116 to 118 of the UKCA 2006. Under section 117, a company may apply to the court for an order directing the company not to comply with a request for inspection or a copy of the register of members if the request was not made for a proper purpose. We believe such a proposal would unnecessarily increase the compliance costs of companies, especially SMEs, as companies would have to apply to court every time they wanted to refuse a request. Under the proposed arrangement, the burden rests with the person making the request to apply to the court if his request is refused. In addition, in case a company refuses a request for inspection, the enquirer could still search for the information in relation to members in the annual return filed by the company with the Companies Registry ("CR"), if the company is neither a company limited by guarantee nor a listed company. For a listed company, we have proposed to only require it to file with the CR particulars of members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return.

Public consultation

37. There were no substantive comments raised on this proposal.

Empowering the FS to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications (clause 650)

Current position

38. Under section 93(1) of the CO, every company must display its name on the outside of every office or place in which its business is

carried on and mention its name in the documents specified in that section (e.g. business letters, notices, official publications, and contracts).

Proposal and key provisions in the Bill

39. The SCCLR has recommended some changes to the rules on publication of company names –

(a) every company should also display its name on the company's website and the outside of the company's registered office;

(b) basic rules for electronic display of company names should be set along the lines that where an office is shared by more than six companies, each of such companies is only required to display its registered name in such a manner that it can be read for at least twenty continuous seconds at least once in every four minutes or, where impracticable, the electronic system used for the display should be capable of calling up such information on request within four minutes; and

(c) every company should also be required to mention its company registration number in its public documents, in addition to the current requirement of mentioning its registered name in such documents.

40. As the rules involve technical details and may change with developments in technology, they should be stated in subsidiary legislation to facilitate future amendments. **Clause 650** empowers the FS to make the relevant regulations, subject to negative vetting by the Legislative Council.

Overseas experience

41. Our proposal to set out the details in regulations is in line with section 82 of the UKCA 2006.

Public consultation

42. There were no substantive comments raised on this proposal.

PUBLIC COMMENTS

43. We have consulted the public on the Draft Bill in two phases of public consultation held from December 2009 to March 2010 and May to August 2010 respectively. Part 12 was covered in the first phase public consultation. The comments on our major proposals and our response are discussed above.

44. Other significant comments on Part 12 received and our response are as follows –

Major Comments	Administration's Response
Notice Required of General Meeting	
Serving of notice of a general meeting of a company to the auditors does not serve any material purpose, unless the business to be transacted at the general meeting has a direct relationship to the auditors.	The clause (clause 565) is based on the current section 141(7) of the CO and aligns with the requirement to notify auditors of written resolutions under clause 549. The requirement can enhance auditors' knowledge of the company's affairs and facilitate preparation of the audit report and the proper carrying out of auditors' duties.
Inspection of Voting Document	
There is a concern on why the normal secrecy of the balloting process in relation to the voting on a poll should be departed from and there is no apparent abuse in this regard (concerning the requirement	We consider that the concern about secrecy of ballot is valid and have dropped the proposal to give members a right to inspect voting documents.

Major Comments	Administration's Response
for a company to make available voting documents for inspection by members in the Draft Bill). This is particularly relevant in relation to certain companies which act as self-regulatory organisations, clubs and other non-commercial organisations where secrecy of the balloting process is normal and expected by members to avoid problems and retain freedom of choice among persons casting votes.	

45. Other comments on Part 12 and the Administration's response are set out in Appendix III to the consultation conclusions issued on 27 August 2010.[3]

Financial Services and the Treasury Bureau
Companies Registry
11 April 2011

[3] Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccfp_conclusion_e.pdf.