Bills Committee on Companies Bill

Part 15 and Part 19 of the Companies Bill

PURPOSE

This paper outlines the major proposals and policy issues in Part 15 (Dissolution by Striking off or Deregistration) and Part 19 (Investigations and Enquiries) of the Companies Bill. It also covers relevant overseas experience and public views received during earlier public consultation on the major proposals and our responses.

DETAILS

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

Annex A - Part 15 (Dissolution by Striking off or Deregistration)

Annex B - Part 19 (Investigations and Enquiries)

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
13 June 2011

Annex A

Bills Committee on Companies Bill

Part 15 – Dissolution by Striking Off or Deregistration

INTRODUCTION

Part 15 (Dissolution by Striking Off or Deregistration) of the Companies Bill ("CB") contains provisions on striking off and deregistration of defunct companies, restoration of companies that have been struck off the Companies Register or deregistered by the Registrar of Companies ("Registrar") , and related matters, including treatment of the properties of dissolved companies.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 15 contains initiatives that aim at facilitating business and improving regulation, namely –

(a) extending the voluntary deregistration procedure to guarantee companies (paragraphs 4 to 8 below);

(b) imposing additional conditions for deregistration of defunct companies (paragraphs 9 to 13 below);

(c) introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar (paragraphs 14 to 19); and

(d) streamlining the procedures for restoration of dissolved companies by court order (paragraphs 20 to 23 below).

3. The details of the major proposals in Part 15 are set out in paragraphs 4 to 23 below.

Extending the voluntary deregistration procedure to guarantee companies (Clause 737)

Current position

4. At present, only a private company may make application to the Registrar for deregistration under section 291AA of the Companies Ordinance ("CO"), provided that certain conditions are met, namely –

(a) the company has not commenced operation or business or has not been in operation or carried on business for three months;

(b) it has no outstanding liabilities; and

(c) all the members agree to the deregistration.

Under this voluntary deregistration procedure, a company can be dissolved without going through the winding-up process.

5. Non-private companies and certain categories of businesses[1] are not allowed to apply for voluntary deregistration to avoid prejudicing the public interest. There has been a suggestion that non-private companies, particularly guarantee companies which are social or community organisations, should be allowed to deregister voluntarily if they satisfy the above conditions. It would be costly for them to commence a members' voluntary winding-up instead.

Proposal and key provisions in the Bill

6. We propose to extend the deregistration procedure to guarantee

[1] These include –
(a) an authorized institution as defined in the Banking Ordinance (Cap 155);
(b) an insurer as defined in the Insurance Companies Ordinance (Cap 41);
(c) a corporation licensed under Part V of the Securities and Futures Ordinance (Cap 571) to carry on a business in any regulated activity within the meaning of Schedule 5 to that Ordinance and an associated entity of the corporation within the meaning of Part VI of that Ordinance;
(d) an approved trustee as defined in the Mandatory Provident Fund Schemes Ordinance (Cap 485);
(e) a company having a subsidiary that falls within any of the categories specified above;
(f) a company that has fallen within any of the categories specified above at any time during the preceding 5 years.

companies. Public companies and certain categories of businesses[2] will continue to be excluded (**clause 737**). The conditions for applying voluntary deregistration (**clause 738(2)**), particularly the requirement of agreement by all members would prevent any possible abuse of the procedure (see also paragraphs 10 and 11 below).

Overseas experience

7. Under the United Kingdom Companies Act 2006 ("UKCA 2006"), all companies can apply for voluntary striking off, subject to certain conditions being met[3].

Public consultation

8. In the first phase consultation on the draft CB held from December 2009 to March 2010, we proposed to extend the voluntary deregistration procedure to public non-listed companies and guarantee companies, except for certain categories of regulated businesses. Some respondents were concerned that the proposed extension to cover public non-listed companies would be too wide as some of them were large commercial undertakings with a significant public interest dimension. We note the concern and have decided to continue to exclude all public companies (listed or otherwise) from applying for voluntary deregistration in the CB.

Imposing additional conditions for voluntary deregistration of defunct companies (Clauses 738 to 739)

Current position

9. Under the CO, a company only needs to satisfy the three conditions as set out in paragraph 4 above in applying for voluntary deregistration. However, there have been cases where some companies applying for deregistration were parties to legal proceedings or were in

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[2] The categories of businesses are the same as in CO (see footnote 1), with the addition of trust companies under Part VIII of the Trustee Ordinance (Cap 29) and their holding companies.

[3] Sections 1003 to 1005 of UKCA 2006.

possession of immovable property in Hong Kong with high maintenance costs or encumbrances attached. As a consequence, deregistration proved to have adverse impact on third parties or the Government (as the immovable property would be vested in the Government as bona vacantia following dissolution of the company under section 292 of the CO).

Proposal and key provisions in the Bill

10. We propose to impose additional conditions on companies applying for deregistration so as to prevent any potential abuse of the deregistration procedure, such as where a company applying for deregistration is a party to legal proceedings or is in possession of immovable property in Hong Kong with high maintenance costs or encumbrances attached.

11. **Clauses 738 to 739** mainly restate the existing deregistration provisions under the CO with two additional conditions for deregistration, namely that the applicant must confirm that the company is not a party to any legal proceedings and that it has no immovable property in Hong Kong (**clause 738(2)(d) and (e)**). Any person who knowingly or recklessly gives false or misleading information in a material particular to the Registrar in an application commits an offence[4].

Overseas experience

12. The proposal is formulated taking into account local circumstances.

Public consultation

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

[4] The person is liable on conviction on indictment to a fine of $300,000 and to imprisonment for 2 years or on summary conviction to a fine at level 6 and to imprisonment for 6 months (clause 738(7)).

Introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar (Clauses 748 to 750)

Current position

14. At present, where the Registrar has reasonable cause to believe that a company is not carrying on business or in operation, she may adopt the procedure set out in section 291 of the CO and strike the name of the company off from the register. Under section 291(4), the procedure may also be used where a company is being wound up and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator (under sections 239 and 248 of the CO) have not been made for a period of six consecutive months. Under section 291(7), the company, a member or creditor may apply to the court before the expiration of 20 years from dissolution for the company to be restored.

15. There have been some cases where a company which has been struck off seeks to be restored on the ground that, contrary to the Registrar's belief, it was actually in operation or carrying on business at the time of striking off. This may occur because a company fails to file its annual returns, moves without notifying the Companies Registry of a change of registered office and is unaware of the proposed strike-off despite relevant notice has been published in the Gazette prior to the striking off action. While restoration is often straightforward in such circumstances as it is unlikely to be contested, it still requires an application to the court.

Proposal and key provisions in the Bill

16. We propose to introduce a simplified restoration procedure to allow companies to be restored to the register in straightforward cases without the need for recourse to the court. **Clauses 748 to 750** enable the Registrar to restore a company which has been struck off under **clause 734 or 735** (where it appears that the company is not in operation or carrying on business or, in the case of a company being wound up but with outstanding matters unattended to). The Registrar may, on an

application by a director or member of a company, restore such a company. Three conditions must be met:

(a) the company must be in operation or carrying on business at the time its name was struck off;

(b) if the company has any immovable property situated in Hong Kong which has become vested in the Government as bona vacantia, the Government has no objection to the restoration; and

(c) the applicant must bring up to date the company's records kept by the Registrar.

17. The above administrative restoration procedure does not apply to companies which were deregistered upon applications to the Registrar under clause 739 (or section 291AA of the CO). For those cases, application for restoration should be made to the court under **Clause 753 to 754.**

Overseas experience

18. The proposal is in line with sections 1024 to 1027 of the UKCA 2006.

Public consultation

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

Streamlining the procedures for restoration of dissolved companies by court order (Clauses 753 to 755)

Current position

20. At present, there are two routes available for companies which have been struck off or deregistered to be restored or reinstated to the register by application to the court. They are respectively under sections

291(7) and 291AB(2) of the CO, and are very similar in nature.

Proposal and key provisions in the Bill

21. We propose to merge the two existing procedures into one for simplicity. **Clauses 753 to 755** provide for a restoration procedure by court order. Where a company has been struck off the register by the Registrar or deregistered upon its own application, and thereby dissolved, any director or member or creditor of the company or any interested person, including the Government, may make an application to the court for restoration of the company.

Overseas experience

22. The proposal is in line with sections 1030 to 1032 of the UKCA 2006.

Public consultation

23. In the first phase consultation of the draft CB, we proposed to shorten the time of application for restoration or reinstatement from the existing 20 years to six years after the company's dissolution. However, there was a concern that, in practice, there might be cases where it would be necessary to restore a company after a longer period than six years following the dissolution of the company. To allow for such exceptional cases, we decide to keep the 20-year period in the CB.

PUBLIC COMMENTS

24. 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 15 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 15 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[5].

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

Annex B

Bills Committee on Companies Bill

Part 19 – Investigations and Enquiries

INTRODUCTION

Part 19 (Investigations and Enquiries) of the Companies Bill (CB) contains provisions that deal with investigations and enquiries into a company's affairs.

POLICY OBJECTIVES AND MAJOR PROPOSALS

2. Part 19 mainly reorganises the existing provisions[1] of the Companies Ordinance (CO) relating to the appointment of an inspector by the Financial Secretary (FS) to investigate the affairs of a company; and the power of the FS (or someone authorized by him) to inspect books and papers of a company, which will be rephrased in the CB as a power to "enquire into company's affairs" to better describe the nature of the power ("the enquiry power").

3. It is noteworthy that many of the previous investigations undertaken by inspectors involved listed companies or their related companies. The last appointment of an inspector was made in 1999, while the power to inspect books and papers (i.e. the "enquiry power" in the CB) has never been invoked. The absence of investigation by inspectors since 1999 is mainly due to developments in the regulatory framework for listed companies, namely, (a) the coming into operation of the Securities and Futures Ordinance (Cap 571) (SFO) in April 2003 which empowered the Securities and Futures Commission with greater authority to investigate into market misconduct involving listed companies; and (b) the establishment of the Financial Reporting Council in 2006 which conducts independent investigations of possible auditing and reporting irregularities in relation to listed companies.

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[1] Sections 142 to 152F of the CO.

4. Notwithstanding the above, we cannot rule out the possibility of the FS using the investigatory and enquiry powers in future cases where there are sufficient grounds to do so. We therefore consider that the provisions should be retained in the CB as "reserve" or "last resort" powers as a supplement to the powers contained in other Ordinances, including the SFO and Financial Reporting Council Ordinance (Cap 588) (FRCO).

5. Part 19 also introduces modifications to the existing provisions concerning these "reserve" or "last resort" powers by making reference to similar provisions on investigations under the SFO and FRCO, which are more up-to-date. These modifications aim at ensuring better regulation by:-

(a) Enhancing the investigatory powers of an inspector (paragraphs 7 to 9 below);

(b) Providing better safeguards for confidentiality of information and protection of informers (paragraphs 10 to 13); and

(c) Providing a new power for the Registrar of Companies (the Registrar) to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the Bill has taken place (paragraphs 14 to 16).

6. Details of the above proposals in Part 19 are set out in paragraphs 7 to 16 below.

Enhancing the investigatory powers of an inspector (Clauses 834 to 838)

Current position

7. Currently, sections 142 to 151 of the CO deal with investigations of a company's affairs by independent inspectors appointed by the FS. The FS may appoint an inspector on application by the members (100 members or members holding not less than 10% of the shares issued) or a company by special resolution or on his own initiative where there is

fraud or mismanagement involved. The FS must appoint an inspector upon an order made by the court. The inspector is vested with a range of investigatory powers. At the end of the investigation the inspector is required to make a report to the FS.

Proposal and key provisions in the Bill

8. **Clauses 834 to 838** of the Bill set out the inspector's powers. New powers are given to the inspector, for example to require a person to preserve records or documents before production to the inspector (**clause 834(1)(b)**), and to require a person to verify by statutory declaration any answer or explanation given to the inspector (**clause 836(2)**). Criminal sanctions are introduced for non-compliance with a request made by an inspector (**clause 851**). **Clause 852** introduces an express provision to allow the court to order compliance with a request made by an inspector, not just to punish for the non-compliance. These powers are necessary and incidental to the proper conduct of an investigation by the inspector and will not change the nature of the investigations. The powers under clauses 836[2], 851[3] and 852[4] are based on similar powers found in the SFO and FRCO.

Public consultation

9. We consulted the public on this issue in the second phase consultation of the draft CB[5]. Some considered that the number of members applying for appointment of an inspector should be reduced from 100 to 50. However, as the majority of those commenting on the issue supported maintaining the status quo and given the existing threshold in the CO is already lower than the related thresholds stipulated in similar provisions in the UK and Singapore (see paragraph 17 below), we are inclined not to lower the threshold. Some commented that the compliance requirements under clause 836(2) (which empowers an

[2] SFO section183(2) and (3); FRCO section 28(3) and (4).

[3] SFO section184(1) to (4); FRCO section 31.

[4] SFO section185(1)(a); FRCO section 32(2)(a).

[5] Financial Services and the Treasure Bureau, *Consultation Conclusions on Second Consultation on the Draft Companies Bill* (October 2010) (Available at http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/ccsp_conclusion _e.pdf).

inspector to require a person to verify by statutory declaration any answer or explanation given to the inspector) are not clear. We clarified that the matters to be verified are "the answer, information or explanation", or confirmation of "no-knowledge" where the person does not give any answer or information or explanation. The requirements under clause 836(2) and (3) are similar to provisions under the SFO[6] and FRCO[7].

Providing better safeguards for confidentiality of information and protection of informers (Clauses 868 to 873)

Current position

10. Currently, the CO[8] provides for secrecy of information in respect of documents relating to a company obtained under the provisions relating to inspection of companies' books and papers in an enquiry, or seized by search warrant, but there are no confidentiality or "statutory gateway" provisions concerning information obtained by an inspector in an investigation, nor is there any provision dealing with the protection of an informer's identity.

Proposal and key provisions in the Bill

11. **Clauses 868 to 870** contain confidentiality provisions relating to information obtained in both investigations of a company's affairs by an inspector under the provisions set out in Division 2 of Part 19, and enquiry into a company's affairs by the FS under the provisions set out in Division 3. **Clause 868** imposes a statutory obligation to preserve secrecy and **clause 869** defines expressly how such information may be disclosed to other regulatory authorities through the introduction of a statutory regime similar to the provisions in the SFO[9], FRCO[10] and the

6 Sections 179 (3) and (4) and 183(2) and (3) of the SFO.

7 Sections 27(3) and (4) and 28(3) and (4) of the FRCO.

8 Section 152C of the CO.

9 Section 378 of the SFO.

10 Section 51 of the FRCO.

Banking Ordinance[11] (Cap 155). **Clause 870** creates an offence for breach of the secrecy provisions.

12. We propose to include provisions to encourage persons to volunteer information to facilitate investigations and enquiries. **Clause 872**[12] introduces provisions to provide protection (by granting immunity from liability for disclosure) to persons who volunteered information to facilitate an investigation of a company's affairs or enquiry into a company's affairs. **Clause 873** [13] gives additional protection by expressly stating that the identity of an informer should be kept anonymous in civil, criminal or tribunal proceedings. These clauses are also applicable to the new power for the Registrar to obtain documents, records and information (see paragraph 14 below).

Public consultation

13. In the second phase consultation of the draft CB, respondents supported the enhanced protection for informers by keeping their identity anonymous in appropriate cases but cautioned against abuse. We explained that under clause 873 ("*Protection of informers etc.*"), there are already safeguards against abuse, e.g. the court or tribunal has discretion to require full disclosure of the identity of the informer if it is of the opinion that justice cannot be fully done without disclosure or it is satisfied that the informer knowingly made a material misstatement (clause 873(4)(a) and (b)).

Providing a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the Bill has taken place (Clauses 861 to 864)

Proposal and key provisions in the Bill

[11] Section 120 of the Banking Ordinance.

[12] Clause 872 of the CB is based on section 448A of the UKCA 2006.

[13] Clause 873 of the CB is based on section 52 of the FRCO.

14. **Clause 861** gives the Registrar a new power to require production of records or documents, to make copies of the records or documents and to require information or explanations in respect of the records or documents, for the purposes of ascertaining whether any conduct that would constitute an offence under **clause 738(7)** or **clause 883(1)** relating to the giving of false or misleading information in documents delivered to the Registrar has taken place. **Clause 863** provides criminal sanctions for non-compliance with the Registrar's request.

15. We consider that this new power will help safeguard the integrity of the register of companies and the quality of information disclosed to the public and will strengthen enforcement, thus ensuring better regulation.

Public consultation

16. In the second phase consultation of the draft CB, the majority of respondents supported or did not object to the proposed new powers. A few respondents disagreed with the proposal and were concerned about allegedly excessive powers (such as criminal sanctions for non-compliance and the right to delegate power to any public officer). In response to the concern about "excessive powers", we clarified that the Registrar may invoke the enquiry powers only if she has reason to believe, and certifies such in writing, that an offence has been committed; the record, document, information or explanation is relevant to the enquiry; and the person is in possession of the record or document (clause 861(2)). The new powers are, therefore, clearly defined and confined. Given the foregoing and in view of the majority support of the respondents, we will take forward the proposal.

OVERSEAS EXPERIENCE

17. Similar powers to investigate companies' affairs are found in comparable common law jurisdictions such as the UK, Australia and Singapore. In the UK, similar power is vested with the Secretary of State, except that the threshold for application by members is higher than

the CO (see paragraph 7 above) in that the application has to be made by not less than 200 members or members holding 20% of shares issued. In Singapore, similar power is vested with the concerned Minister, except that the threshold for application by members is higher than the CO and the same as in the UK. The Minister might also appoint an inspector on the grounds of protection of shareholders/ creditors and to assist overseas regulators. In Australia, the Australian Securities and Investments Commission (ASIC) may investigate specified misconduct, e.g. contravention involving mismanagement, fraud, or dishonesty relating to a body corporate or financial products, etc. The ASIC may also be directed by the Minister to undertake an investigation. There is no statutory provision for a company or its members to apply for an investigation.

PUBLIC COMMENTS

18. We have consulted the public on the draft Bill in two phases in December 2009 to March 2010 and May to August 2010 respectively. Part 19 was covered by the second phase consultation. The public comments on our major proposals are set out above. For other comments on Part 19 and our response, they are set out in Appendix III to the consultation conclusions issued on 25 October 2010[14].

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[14] See footnote 5.