

Bills Committee on Companies Bill

Follow-up actions for the meetings held on 26 July and 31 August 2011

Purpose

This paper sets out the Administration's response to the issues raised by Members at the Bills Committee meeting on 26 July and 31 August 2011 relating to Part 2 of the Companies Bill ("CB"). The Administration's response to the issue in relation to companies incorporated outside Hong Kong raised at the Bill Committee meeting on 26 July 2011 and other issues raised at the meeting on 11 October 2011 will be provided in separate papers.

Administration's response

Clause 21 - Registrar's functions

2. A list of functions that the Registrar of Companies ("Registrar") will perform under the CB is at **Annex**.

Clause 23 - Registrar may issue guidelines

3. Clause 23 was drafted with reference to relevant provisions in the Financial Reporting Council Ordinance ("FRCO") (Cap. 588) and the United Kingdom Companies Act 2006 ("UKCA 2006"). In particular, clause 23(2) is modelled on section 1117(3) of the UKCA 2006, which provides for the Registrar to publicise the guidelines and to make them available to the public. Clause 23(5) is modelled on section 13(4) of the FRCO. The FRCO was passed on 13 July 2006 and came into operation on 1 December 2006. No guideline has been issued by the Financial Reporting Council so far.

4. Members expressed concerns about the purpose of clause 23(5) and possible conflict between contravention of the guidelines resulting in

no liability and allowing the guidelines to be admissible as evidence in legal proceedings. Clause 23(5) seeks to state expressly the current common law position on contravention of a guideline and the admissibility of guidelines in legal proceedings for the purpose of clarity. We do not see any conflict in the clause. However, if Members are concerned about the clause, we are prepared to remove sub-clause (5) and leave relevant issues to the court to adjudge on the facts of individual cases.

Clause 25 - Fees payable to Registrar

5. After the commencement of the CB, the Eighth Schedule under the Companies Ordinance (“CO”) will be repealed and we will introduce transitional provisions in the form of committee stage amendments (“CSAs”) to the CB to deal with fees payable under the CO.

Clause 26(9) – Specified address

6. Under the CB, a director or a company secretary will have a correspondence address on the register. For companies which already exist before the commencement of the CB, the Companies Registry (“CR”) will not have the correspondence addresses of the directors and the company secretaries. Our proposal under clause 26 is for the CR to record, at the commencement of the CB, their residential addresses as the correspondence addresses. Notification of change of correspondence address may be delivered subsequently by the company to the Registrar for registration. Having considered Members’ suggestion, we will introduce suitable CSAs so that the CR would record, at the commencement of the CB, the addresses of the companies’ registered offices (or principal places of business of registered non-Hong Kong companies), instead of the residential addresses of the directors and company secretary, as the correspondence addresses.

7. It should be noted that, even though the residential addresses would not be recorded as the correspondence addresses, the residential addresses would still appear on various documents filed with the CR before the commencement of the CB. In view of the huge volume of these existing records bearing residential addresses, these addresses will

only be withheld from public inspection upon application and payment of a fee.

8. For Members' other concerns on the protection of directors' residential addresses and individuals' identification numbers raised at the meeting on 11 October 2011, we will provide a separate paper to set out our response.

Clause 30 - Registrar may specify requirements (for section 29(1)) and Clause 31 - Registrar may agree to delivery by electronic means (for section 29(1))

Proposed arrangements for delivery and authentication of documents by electronic means after commencement of the Bill

9. The proposed arrangements for a document to be delivered to the CR under the CB by electronic means are as follows –

(i) System

A document to be delivered in the form of an electronic record to the Registrar for registration will be delivered to the CR through the e-Registry at www.eregistry.gov.hk, which is the information system designated by the CR for providing specified public services.

(ii) Format of electronic record

A document to be submitted in a form specified by the Registrar will have to be furnished by using the template available at the e-Registry. Other documents not submitted in specified forms can be in Adobe Portable Document Format (PDF).

(iii) Authentication of documents

For the purpose of authenticating a document submitted for registration, the digital signature or password of a person who has registered with the e-Registry has to be affixed to or included in the document.

10. The above arrangements are in line with the current arrangements for documents submitted to the CR for electronic company incorporation, a service which was launched in March 2011.

Progress of implementation of e-Registry service of the Companies Registry

11. The e-Registry has been in operation since January 2011. Users can register online at the e-Registry and open Company User Accounts or Individual User Accounts free of charge. Since March 2011, members of the public can incorporate a company online at the e-Registry anytime on a 24x7 basis. Particulars of new companies are also readily available for online inspection at CR's Cyber Search Centre (www.icris.cr.gov.hk) after incorporation. Local companies may also submit Notifications of Changes of Company Names at the e-Registry. In collaboration with the Inland Revenue Department, a new one-stop service for company incorporation and business registration has also been introduced at the e-Registry in March 2011.

12. The e-registry service has been running smoothly. As at 30 September 2011, there were 7 394 registered users and 11 697 companies have been incorporated online.

Clause 29 - Unsatisfactory document

Clause 37- Registrar may require company to resolve inconsistency with Companies Register

13. Clause 37 is modelled on section 1093 of the UKCA 2006, which seeks to empower the Registrar to require a company to resolve inconsistency between information in a document registered by the Registrar and other information on the Companies Register. Our intention is that both the document and the information on the Companies Register should be related to the same company. We would consider introducing CSAs to clarify our intention.

14. Members sought clarification on the meaning of "inconsistent" in clauses 29 and 37, e.g. whether two charges on a company, if

contradictory with each other, are “inconsistent” information. In this regard, “inconsistent” covers obvious discrepancies between information contained in a document and other information on the Companies Register. Examples include a document reporting the appointment of a liquidator of a company in the absence of a winding-up order registered against the company, or a document reporting the resignation of a director whose appointment has never been notified to the Registrar. For charge instruments, their legal effect is ultimately a matter for determination by the court. The Registrar would not refuse to register a charge if it falls within the categories of charges which are registrable under Part 8 of the CB.

15. We note Members’ concern about the offence under clause 37(3) in cases where it is not possible for the company or responsible person to resolve the inconsistency. We would propose to introduce suitable CSAs to the effect that it is a defence for a company to have taken reasonable steps to comply with a requirement under sub-clause (1)(b). It should be noted that, under the revised formulation of “responsible person” (see LegCo paper No. CB(1)2636/10-11(01), an officer or shadow director will only be liable if he “authorizes or permits, or participates in the contravention or failure”. The *mens rea* required will have to be actual knowledge, wilful blindness or recklessness, but not negligence.

Clause 38 - Registrar may require further information for updating etc.

16. Clause 38(1) provides that the Registrar may send a notice to “a person” requiring the person to give the Registrar certain information. Our intention is that “person” in clause 38(1) covers both a legal person and a natural person. If the person does not comply with the requirement, an offence will be committed under clause 38(2) and (3). Clause 38(2) covers the case where the “person” is a company, while clause 38(3) covers the case where the “person” is any other person (a person other than a company). We are of the view that the current drafting can reflect the policy intent. However, given members’ concern, we will review the drafting of this provision.

17. We note Members’ concern about the offences under clause 38(2)

and (3). We would propose to introduce suitable CSAs to the effect that it is a defence for a company and any other person to have taken reasonable steps to comply with a requirement under 38(1). As mentioned in paragraph 15 above, a responsible person will only be liable if he “authorizes or permits, or participates in the contravention or failure” with the required *mens rea*.

Clause 40 - Registrar must rectify information on Companies Register on order of Court

18. Members enquired about the procedures for making the application to the court. In this regard, the applications for rectification of the Companies Register will be made by originating summons. The relevant court procedures are governed by Order 102 rule 1 of the Rules of the High Court.

Clause 45 - Issue of process for compelling production of information on Companies Register

19. Clause 45 is based on section 305(2) of the CO and section 1092 of the UKCA 2006. Taking into account Members’ views that the requirement might not be necessary, we would propose a CSA to delete the clause.

Clause 47- Registrar may withhold residential address and identification number from public inspection

20. We agree with Members’ views concerning the drafting of the clause and would introduce a CSA to replace “may” with “must” in clause 47(3).

**Financial Services and the Treasury Bureau
Companies Registry
11 October 2011**

Registrar's Functions in the CB

Part 2

Clause 22 – Registrar may specify the form of any document, except the forms prescribed by the Ordinance or regulations made thereunder.

Clause 23 - Registrar may issue guidelines to indicate the manner of performing any function or exercising any power; or providing guidance on the operation of the ordinance.

Clause 24 – Registrar may authenticate a document in any manner and certify anything under the Ordinance or any other Ordinance authorizing her to do so.

Clause.26 - Registrar must keep records of companies.

Clause 28 - Registrar must keep an index of company names.

Clause 30 - Registrar may specify requirements in relation to any document required or authorised to be delivered to her.

Clause 31 – Registrar may agree to accept delivery of documents by a company or request delivery of documents to the company by electronic means; and specify such requirement in the agreement.

Clause 33 – Registrar may refuse to accept a document delivered for registration or refuse to register it and return it.

Clause 34 – Registrar may withhold registration of a document pending further particulars or compliance with her directions.

Clause 37 – Registrar may require a company to resolve the inconsistency between a document registered and other information on the Companies Register.

Clause 38 – Registrar may, by notice, require a person to give information about him, of which is included on the Companies Register.

Clause 39 – Registrar may rectify typographical / clerical error contained any information on the Companies Register.

Clause 40 – Registrar must rectify information on Companies Register on order of court.

Clause 41 – Registrar may appear in any court proceedings in regard to rectifying or removing information on the Companies Register.

Clause 42 - Registrar may make a note in the Companies Register in regard to rectification of an error or information or removal of any information.

Clause 43 - Registrar must make the Companies Register available for public inspection.

Clause 47 – Registrar may, upon application, withhold residential address and identification number contained in a document from public inspection.

Clauses 50 -51 – Registrar may make protected address available for inspection upon notice to the individual / company concerned.

Clause 53 – Registrar may use a protected address / identity number for communicating with the individual concerned.

Clause 56 – Registrar may certify the delivery or non-delivery of a document required to be delivered and issue a certificate as such.

Part 3

Clause 65(2) – Registrar may accept the statement of compliance contained in an incorporation form to be sufficient evidence of complying with the registration requirements of the Ordinance.

Clause 66 - Registrar must issue a certificate of incorporation to certify a company is incorporated under the Ordinance.

Clause 95 – Registrar’s prior approval is required for registering certain names.

Clause 98 – Registrar may, by licence, permit an association which is non-profit or charity to dispense with the word “Limited” in its name.

Clause 102 – Registrar must issue a certificate of change of name and enter the new name on the Companies Register.

Clauses 103&104 – Registrar may direct a company to change same or similar name, misleading or offensive name by notice in writing.

Clause 105 – Registrar may change a company’s name if it fails to comply with her direction.

Clause 127 – Registrar must issue a fresh certificate of incorporation to an unlimited company re-registered as a company limited by shares.

Part 4

Clause 137- Registrar shall register a return of allotment in the specified form.

Clauses 178 & 186 – Registrar shall register an order of court in regard to the variation of rights attached to any class of shares.

Clauses 179 & 187 - Registrar shall register the resolution and a notice in the specified form in regard to variation of rights attached to any class of shares

Part 5

Clause 219 – Registrar must register the return in the specified form in regard to the special resolution for reduction of share capital if no application has been made to cancel the said resolution.

Clause 220 – Registrar must register the return in the specified form in regard to the special resolution for reduction of share capital if an application has been made to the court to cancel the special resolution, but the court confirms it

Clause 224 – Registrar must register the order, minute and return if the court has confirmed the reduction of share capital.

Clause 226 – Registrar must issue a certificate of registration to certify the compliance with the reduction of share capital requirements.

Clause 285 – Registrar shall register an order of court confirming or restraining the

giving of financial assistance by a company.

Part 7

Clause 305 – Registrar shall register a notice in the specified form in regard to the register of debenture holders of a company.

Clause 309 – Registrar shall register a branch register of debenture holders of a company.

Part 8

Clause 343(2) - Registrar must issue a certificate to certify the registration of a charge.

Clause 344(4) - Registrar must process a notification of the release/satisfaction/cessation of a charge.

Part 12

Clause 612 – Registrar must register special resolution and certain resolutions and keep a record of the copy resolution.

Clause 638 - Registrar must keep an index of directors.

Part 13

Clause 673 – Registrar may issue a certificate of amalgamation in any form she thinks fit.

Clause 674 – Registrar may make a note of an amalgamation in the Companies Register in relation to each amalgamating company.

Clause 675 – Registrar must withhold registration of the documents required for the issue of a certificate of amalgamation if there is an application made to court claiming the amalgamation proposal unfairly prejudicial.

Part 15

Clauses 732 - 734 - Registrar to strike off name of company not in operation or carrying on business.

Clause 735 - Registrar must publish a Gazette notice regarding the dissolution of a company being wound up.

Clauses 737 - 739 - Registrar to process application for deregistration and publish a Gazette notice regarding the deregistration of a company.

Clause 741 –Registrar may disclaim the Government’s title to the property or right by a notice of disclaimer and register the notice and publish it in the Gazette.

Clause 745 – Registrar may act or cause to act as a dissolved company’s or liquidator’s representative.

Clauses 748-750 - Registrar may restore a dissolved company to the Companies Register on application.

Clause 751 - Registrar may restore a company deregistered by mistake to the Companies Register.

Clause 755(7) - Registrar must publish a Gazette notice in regard to the restoration of a company by an order of the court.

Clause 758 - Registrar must issue a certificate of change of name and enter the new name on the Companies Register.

Clause 759 – Registrar may direct a company to change its name under which the company is restored to the Companies Register.

Clause 760 – Registrar may change a company’s name if it has failed to comply with her direction, and notify the company as such in writing.

Part 16

Clause 765 - Registrar must register a non-HK company with a place of business in HK.

Clause 767 - Registrar must issue a fresh certificate of registration containing the current

corporate name to a registered non-HK company, and enter such name in the Companies Register.

Clause 768 - Registrar may serve a notice on a registered non-HK company to regulate its use of corporate name.

Clause 770 – Registrar to enter the approved name of a registered non-Hong Kong in the Index of Companies Names and issue a fresh certificate of registration containing the name.

Clause 771 – Registrar may withdraw a notice served on a registered non-Hong Kong company in regard to its corporate name or an approved name.

Clause 773 – Registrar, if satisfied with an application for change of an approved name, must approve the new name and enter it in the Index of Company Name, and issue a fresh certificate of registration containing the new approved name.

Clause 779 – Registrar to register a return in case of change of certain particulars.

Clause 790 - Registrar must keep an index of directors of registered non-HK companies.

Clause 782 – Registrar must register a notice served by a registered non-Hong Kong company in regard to its cessation of place of business in Hong Kong, and enter a statement in the Companies Register to such effect.

Clause 783 – Registrar must register a notice served by a registered non-Hong Kong company in regard to its dissolution.

Clauses 784-786 – Registrar to strike off registered non-Hong Kong company's name regarding cessation of its place of business in Hong Kong.

Clauses 787-789 – Registrar may accept an application for the restoration of a non-Hong Kong company to the Companies Register if it can satisfy with certain conditions.

Part 17

Clause 795 - Registrar may register an eligible company as an unlimited company or a company limited by guarantee on application.

Clause 800 - Registrar must issue a certificate of registration to every company registered as an unlimited company or a company limited by guarantee.

Part 19

Clause 861 – Registrar may, by notice in writing, require a person to produce any record or document and other information if she believes a specified act that would constitute an offence has been done, and the requested record or document is relevant to the inquiry.

Clause 862 – Registrar may delegate any or all of the powers conferred by clause 861 to any public officer.

Part 20

Clause 887 – Registrar may give a notice to a suspected offender about not instituting proceedings under certain conditions.