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Legislative Council

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Paper for the House Committee meeting on 3 May 2013

**Second Report of the Subcommittee on Subsidiary Legislation
Made under the New Companies Ordinance**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation Made under the New Companies Ordinance ("the Subcommittee") on the second batch of two pieces of subsidiary legislation made under the new Companies Ordinance ("CO") gazetted on 22 March 2013.

Background

2. The Administration launched a comprehensive rewrite of the Companies Ordinance (Cap. 32) in mid-2006 and introduced the Companies Bill into the Legislative Council ("LegCo") in January 2011 to reform provisions affecting the operation of live companies in Hong Kong. The new CO was passed by LegCo on 12 July 2012. Subsidiary legislation, which prescribes various administrative, procedural and technical matters, is required to be enacted before the new CO can be brought into operation. Apart from the consequential amendments to other ordinances and the commencement arrangement, the Administration has identified 13 pieces of subsidiary legislation that are required to implement the new CO, amongst which 12 pieces are required to be made by the Financial Secretary ("FS") and subject to the negative vetting procedure of LegCo, and one piece is required to be made by the Chief Justice and subject to the positive vetting procedure. A list of the 13 pieces of subsidiary legislation is in **Appendix I**¹.

¹ The Panel on Financial Affairs considered on 8 April 2013 the paper "New Arrangement for the Inspection of Personal Information on the Companies Register under the new Companies Ordinance" setting out the Administration's proposed way forward for the new inspection arrangement (LC Paper No. CB(1)788/12-13(01) issued by the Administration on 28 March 2013). Following the discussion at the Panel on Financial Affairs, the Administration will not make the Companies (Residential Addresses and Identification Numbers) Regulation at this stage, and will not include the relevant provisions in the new CO commencement notice to be made in the fourth quarter of 2013 for commencing the new CO.

3. The Financial Services and the Treasury Bureau and the Companies Registry have jointly published documents for public consultation on the subsidiary legislation for implementation of the new CO in two phases in September and November 2012. According to the Administration, the respondents were generally supportive of the proposed subsidiary legislation. The Administration's plan is to introduce the subsidiary legislation which is subject to the negative vetting procedure by batches beginning in the first quarter of 2013. As regards the subsidiary legislation subject to the positive vetting procedure, it will be introduced as and when ready. Subject to LegCo's scrutiny, the concerned subsidiary legislation will commence operation together with the new CO, tentatively in the first quarter of 2014.

The Subcommittee

4. At the House Committee meeting held on 8 February 2013, Members agreed to form a single subcommittee to study the 13 pieces of subsidiary legislation to be made under the new CO. The membership list of the Subcommittee is in **Appendix II**.

5. The Subcommittee has completed scrutiny of the first batch of five pieces of subsidiary legislation subject to the negative vetting procedures of LegCo and reported its deliberations to the House Committee on 15 March 2013². Two motions to amend the Companies (Directors' Report) Regulation and the Companies (Summary Financial Reports) Regulation respectively were passed by LegCo at the Council meeting of 27 March 2013.

6. The second batch of two pieces of subsidiary legislation, L.N. 34 and L.N. 35 of 2013, subject to the negative vetting procedure of LegCo was gazetted on 22 March 2013 and tabled at LegCo on 27 March 2013. To allow more time for the Subcommittee to scrutinize the second batch of subsidiary legislation, members of the Subcommittee have agreed to move a motion to extend the scrutiny period to 15 May 2013. The Subcommittee held two meetings to discuss the subsidiary legislation.

² The first report of the Subcommittee (LC Paper No. CB(1)727/12-13) was issued to Members on 19 March 2013. The first batch comprises five pieces of subsidiary legislation: Companies (Words and Expressions in Company Names) Order; Companies (Disclosure of Company Name and Liability Status) Regulation; Companies (Accounting Standards (Prescribed Body)) Regulation; Companies (Directors' Report) Regulation; and Companies (Summary Financial Reports) Regulation.

Deliberations of the Subcommittee on the second batch of two pieces of subsidiary legislation

7. The deliberations of the Subcommittee on the second batch of two pieces of subsidiary legislation are summarized in the ensuing paragraphs.

Companies (Revision of Financial Statements and Reports) Regulation (L.N. 34)

8. As in the existing CO, the new CO provides in section 449 that the directors of a company may cause the financial statements to be revised and make necessary consequential revisions to the summary financial report or the directors' report concerned (hereinafter referred to as "relevant documents"³). Section 450 of the new CO further provides for the making of subsidiary legislation to prescribe, among others, the detailed requirements concerning the revised relevant documents, the manner in which relevant provisions in the principal legislation apply to the revised relevant documents as well as the relevant offences. The Companies (Revision of Financial Statements and Reports) Regulation ("C(RFSR)R") was made by FS under section 450 of the new CO for the above-mentioned purposes and will come into operation on the day on which section 450 of the new CO comes into operation.

9. The Subcommittee has enquired about the differences in the requirements, if any, between the relevant provisions in the existing CO and C(RFSR)R. The Administration explains that pursuant to section 141E of the existing CO, after the accounts of a company have been provided to its members, the directors of the company may still revise the accounts and make necessary consequential revisions to the summary financial report or the directors' report concerned. Such revisions are confined to aspects of the accounts which do not comply with the CO and other necessary consequential revisions. The detailed requirements that apply to the revision of accounts and reports are prescribed in the Companies (Revision of Accounts and Reports) Regulation (Cap. 32 sub. leg. N). The Administration points out that C(RFSR)R basically re-enacts the existing Cap. 32 sub. leg. N with necessary modifications to align with the provisions on accounts and audit in Part 9 of the new CO. The major changes include alignment of terms, namely replacing "accounts" by "financial statements" and "balance sheet" by "statement of financial position" respectively, alignment of requirements prescribed in respect of the signing and distribution of the revised relevant documents with those under the new CO, alignment of provisions on the auditor's report on revised financial statements with the corresponding provisions (including sections 407

³ When used in the context of the existing CO, the term "relevant documents" means the company's accounts (instead of the financial statements), the summary financial report and the directors' report.

and 408) under the new CO, and alignment of offences and penalties with those in the new CO in respect of the original relevant documents.

Offences relating to contents of auditor's report on revised financial statements

10. In respect of the alignment of provisions in C(RFSR)R with the new CO regarding the auditor's report on revised financial statements, the Subcommittee has enquired about the rationale for stipulating the same offence in section 408 of the new CO concerning the liability of auditors in relation to omission of the two required statements in an auditor's report in section 16 of the Regulation. The Administration advises that section 407 of the new CO (i.e. clause 398 of the Companies Bill) requires auditors to state first, *inter alia*, his opinion if the financial statements are not in agreement with the accounting records in any material respect; and second, the fact that if he fails to obtain the necessary and material information or explanations for the purpose of the audit. Section 408 (i.e. clause 399 of the Companies Bill) imposes criminal sanction on relevant persons for knowingly or recklessly causing the omission of the required statements in the auditor's report. Since it is also necessary to prepare an auditor's report on the revised financial statements, based on the general principle that the obligations and arrangements concerning the original relevant documents also apply to the revised relevant documents, the requirements in section 407 of the new CO and the offence provision in section 408 are applied to the auditor's report on revised financial statements and the person preparing the report accordingly. Hence, section 15 of C(RFSR)R seeks to apply the requirements under section 407 of the new CO to the auditor's report on revised financial statements, and section 16 of C(RFSR)R mirrors section 408 of the new CO to impose liability on the person who prepares the auditor's report on revised financial statements.

11. Hon Kenneth LEUNG points out that the accounting profession has expressed grave concern about the offences in clause 399 during scrutiny of the Companies Bill. As the Administration has indicated during the passage of the new CO that there is room for future improvement to the drafting of clause 399 as it does not fully reflect the legislative intent and may give rise to implementation problem⁴, he considers that the Administration should first amend section 408 of the new CO and align section 16 of C(RFSR)R with the amended provision before bringing the new CO and C(RFSR)R into operation.

12. The Administration notes that during the consultation on the subsidiary legislation to be made under the new CO conducted in 2012, some respondents from the accounting sector who previously expressed concerns on clause 399 have repeated their previous views on the mirror provision of section 16 in C(RFSR)R. The Administration explains that the original clause 399 has been passed by LegCo and incorporated in the new CO as section 408. The

⁴ LC Paper No. CB(1)2287/11-12(02) dated 28 June 2012 provided by the Administration to the Bills Committee on Companies Bill which was issued on 29 June 2012.

Administration has been engaging the Hong Kong Institute of Certified Public Accountants ("HKICPA") and relevant stakeholders in the preparatory work for implementation of section 408 when the new CO is brought into operation, tentatively in the first quarter of 2014. In parallel, the Administration is also exploring with HKICPA as to whether and how the wording of the provision could be improved in the future after its implementation in light of market feedback and practical operating experience.

13. In this regard, Hon Kenneth LEUNG stresses that in order to facilitate the understanding of the accounting profession on the operation of the provisions in the new CO and C(RFSR)R regarding the liability of auditor in relation to contents of auditor's report for a company's original and revised financial statements, it is necessary for the Administration to issue guidelines/practice notes to explain the details, including the scope of the reference "employee and agent of the auditor/person who is eligible for appointment as auditor of the company" in section 408(2) of the new CO and section 16(2) of C(RFSR)R.

14. Upon members' request, the Administration has undertaken that the Companies Registry will issue, before commencement of the operation of the new CO, an External Circular on section 408 of the new CO and section 16 of C(RFSR)R to facilitate compliance with the new regulatory requirement. The External Circular would cover the major aspects of the offence, including the factors to be considered in deciding whether prosecution should be initiated against a person under the aforesaid provisions.

Penalties under the Regulation

15. Noting that different penalties are prescribed for offences relating to requirements on the contents of revised financial statements, revised directors' report and revised summary financial report under sections 4, 5 and 6 of C(RFSR)R respectively, the Subcommittee has enquired about the rationale for imposing different sanctions for the offences.

16. The Administration explains that the principle underpinning C(RFSR)R is that the obligations and arrangements concerning the original relevant documents shall also apply to the revised relevant documents. As such, the penalties in sections 4, 5 and 6 are aligned with the corresponding provisions in the new CO relating to financial statements (section 379(4) & (5)), directors' report (section 388(6) & (7)) and summary financial report (section 439(3)) respectively. According to the Administration, these are also the penalty levels currently in force under the existing CO.

17. The Subcommittee notes that section 19 of C(RFSR)R provides for the right of auditor to require a person to provide relevant information for the preparation of the auditor's report on revised financial statements, and section 20(3) provides that a person commits an offence if he makes a statement to the

auditor and knows that, or is reckless as to whether, that statement is misleading, false or deceptive in a material particular. Under section 20(4), the maximum penalty for the offence under subsection (3) is a fine of \$150,000 and imprisonment for 2 years on conviction on indictment, or a fine at level 5 and imprisonment for 6 months on summary conviction. However, it is provided under section 450(4) of the new CO that the maximum penalty that may be prescribed in C(RFSR)R for an offence committed wilfully is a fine of \$300,000 and imprisonment for 12 months, and for an offence not committed wilfully is a fine of \$300,000 only. The Subcommittee is concerned about the inconsistency between the concerned penalty provisions in the new CO and C(RFSR)R, in particular, whether section 20(4) of C(RFSR)R is outside the scope of the empowering section 450 in the new CO.

18. The Administration re-iterates that the principle underpinning C(RFSR)R is that the penalty for offences committed in respect of the revised relevant documents or the auditor's report on revised financial statements should be aligned with that imposed on the original relevant documents or the auditor's report on original financial statements under the new CO. On this basis, section 20(3) and (4) of C(RFSR)R mirrors the offence and penalty prescribed in section 413(3) and (4) of the new CO. Having considered members' concern, the Administration has proposed on this special occasion to make the following amendments (shown in **Appendix III**) to C(RFSR)R to address the inconsistency between section 20(4) of C(RFSR)R and section 450(4) of the new CO:

- (a) to amend section 20(4)(a) such that the maximum period of imprisonment will be 12 months (instead of 2 years); and
- (b) to introduce the new section 20(4A) to stipulate that a person may be sentenced to imprisonment only if the offence under section 20(3) was committed wilfully, whether or not it is a conviction on indictment or summary conviction.

19. Some members of the Subcommittee have enquired whether the revised section 20(4)(a) and the new section 20(4A) would give rise to implementation problems for section 20(3). In particular, Hon James TO is concerned about the operation of the above provisions, including how the court, in determining the conviction and sentencing of the offence in section 20(3) and the new 20(4A), would consider the mental elements of "knows", "reckless" and "wilful" of the defendant making a misleading, false or deceptive statement.

20. The Administration explains that section 20(3)(c) and section 20(4A) are about the state of mind of the defendant for the same offence but in two distinctive contexts. The former prescribes the state of mind that must be satisfied for conviction of an offence under section 20(3), whereas the latter prescribes the state of mind that must be satisfied for imposing a certain form of penalty (i.e. imprisonment) upon conviction of the offence. The addition of

section 20(4A) does not affect the operation of section 20(3), i.e. it remains that to constitute an offence, a statement must have been made by the defendant who knows or is reckless as to whether the statement is false, deceptive or misleading in a material particular. Wilfulness is not an element of the offence and, accordingly, the proposed amendment would have no impact on the court in considering the conviction for the offence. Section 20(4A) only has effect in the sentencing step and when imprisonment is being contemplated as the penalty to be imposed on the defendant.

21. The Subcommittee notes the Government's legal advice that in the present statutory context where section 20(4A) qualifies the circumstances where imprisonment can be imposed as a sentence, wilfulness should carry its primary meaning of "deliberate" or "intentional" only and should not cover recklessness as referred to in section 20(3)(c). Where the court is not satisfied that the statement was made with knowledge that the statement is misleading, false or deceptive in a material particular, then the offence is not committed wilfully. On the other hand, if the court is satisfied that the statement was made intentionally with knowledge that the statement is misleading, false or deceptive in a material particular, then the offence is committed wilfully. It therefore follows that with the inclusion of section 20(4A), the penalty of imprisonment *cannot* be imposed if the defendant has only been reckless as to whether the statement made was misleading, false or deceptive in a material particular.

22. The Subcommittee notes that with the proposed amendments in paragraph 18 above, there will be inconsistency in the penalty levels between section 413(4) of the new CO and the revised section 20(4) of C(RFSR)R. In this regard, members note that the Administration intends to review the relevant provisions in the next legislative exercise after the commencement of the new CO with a view to aligning the penalty levels.

23. The Subcommittee further notes that section 11(5) of the existing Cap. 32 sub. leg. N is also not within the scope of the empowering section under the existing CO (i.e. section 359A). The Administration advises that according to their records, there has been no conviction of the offence under that section of Cap. 32 sub. leg. N for the past three years. It should be noted that in determining the sentence for an offence, the court would take into account the penalty level stipulated in the empowering provision under the existing CO where appropriate. It is likely that the ultra vires part of the provision could be severed from the rest of the provision and it would not render the whole offence provision ultra vires. Given that there has been no operational problem on the relevant offence provision, and that Cap. 32 sub. Leg. N will be repealed upon commencement of the new CO (tentatively in the first quarter of 2014); the Administration has no plan to amend Cap. 32 sub. leg. N.

Companies (Disclosure of Information about Benefits of Directors) Regulation (L.N. 35)

24. A company is required by different sections in the existing CO to disclose information about benefits provided to its directors. The major provisions include section 161 concerning the disclosure in the company's accounts of various types of payments to directors in respect of their services, such as the aggregate amount of the directors' emoluments and that of directors' or former directors' pensions. Section 161B prescribes the particulars to be disclosed in a company's accounts for any dealings entered into by the company in favour of its directors and other relevant persons which involve loans, quasi-loans or credit transactions, as well as guarantees entered into and any security provided by the company in relation to such dealings. Furthermore, section 129D(3)(j) provides for the disclosure of information about material interests of directors in contracts in the directors' report.

25. The Subcommittee notes that instead of prescribing the details of the disclosure requirements on benefits provided to directors in the principal Ordinance, section 383 of the new CO stipulates that the notes to financial statements must contain the information concerning benefits of directors as prescribed by subsidiary legislation. Sections 451 and 452(2) provide for the making of subsidiary legislation for this purpose. The Companies (Disclosure of Information about Benefits of Directors) Regulation ("C(DIBD)R") was made by FS for such purpose, and will come into operation on the day on which sections 451 and 452(2) of the new CO come into operation.

Major changes in the disclosure regime on benefits provided to directors

26. The Subcommittee has enquired about changes in the disclosure regime on directors' benefits, including the types of benefits and information/particulars to be disclosed under the existing CO and C(DIBD)R. The Administration advises that C(DIBD)R mainly restates and consolidates the disclosure requirements on directors' benefits in the existing CO with necessary modifications for alignment with the relevant provisions on fair dealings by directors under Part 11 of the new CO and to improve the disclosure regime. Accordingly, C(DIBD)R has set out the detailed disclosure requirements on the following aspects:

- (a) directors' emoluments;
- (b) directors' retirement benefits;
- (c) payments made or benefits provided in respect of the termination of the service of directors;

- (d) loans, quasi-loans and credit transactions⁵ as well as guarantees entered into and security provided in connection with such dealings (hereafter referred to as "specified dealings") in favour of directors;
- (e) material interests of directors in transactions, arrangements or contracts which are significant to the company's business; and
- (f) consideration provided to or receivable by third parties for making available the services of a person as director.

27. The Administration points out that in respect of payments to directors for their services, C(DIBD)R mainly restates the requirements under section 161 of the existing CO with certain changes. The Subcommittee notes the following notable changes in the disclosure regime:

- (a) the disclosure requirements applicable to non-cash benefits are strengthened to require an indication of the nature of such benefits;
- (b) the references to "pensions" are replaced by references to "retirement benefits" to more adequately reflect the intention of the disclosure regime; and
- (c) C(DIBD)R prescribes the details in respect of the new requirement for the disclosure of information on the consideration provided to any third party for making available a director's services under section 383(1)(f) of the new CO.

28. For disclosure in relation to specified dealings, the Administration explains that C(DIBD)R mainly restates the requirements and arrangements prescribed under section 161B of the existing CO. The scope of application of the disclosure requirements in respect of controlled bodies corporate and connected entities of a director⁶ is widened in line with provisions under Divisions 1 and 2 of Part 11 of the new CO. The types of particulars to be disclosed in respect of a specified dealing have also been refined. For instance, in the case of a specified dealing in favour of a connected entity of a director, C(DIBD)R contains a new requirement which requires the nature of the connection between the entity and the director concerned to be stated in the notes to financial statements.

⁵ Quasi-loans and credit transactions have the meanings given by sections 493 and 494 of the new CO respectively.

⁶ Controlled bodies corporate and connected entities of a director have the meanings given by sections 492 and 486 of the new CO respectively.

29. The Subcommittee further notes that C(DIBD)R specifies the particulars to be disclosed in the notes to the financial statements in respect of material interests of directors in transactions, arrangements and contracts entered into by the reporting company which are significant to the reporting company's business. According to the Administration, the detailed disclosure requirements prescribed by C(DIBD)R are identical to those in respect of transactions, arrangements and contracts entered into by specified undertakings of the reporting company⁷ for disclosure in the directors' report as prescribed under section 10 of the Companies (Directors' Report) Regulation, the latter Regulation was included in the first batch of the subsidiary legislation.

Textual amendments to the two pieces of subsidiary legislation

30. The Legal Adviser of the Subcommittee has made enquiries and comments concerning technical and drafting matters on C(RFSR)R and C(DIBD)R. The Subcommittee has examined the written responses provided by the Administration in this respect. Members further note that after considering the views from the Legal Adviser of the Subcommittee, the Administration has proposed to make amendments to sections 3, 16 and 18 of C(DIBD)R with a view to further elucidating the requirements concerned. Related textual amendments have also been proposed to amend sections 2(1), 7(2), 8(2), 9(2) and 18 of the Chinese text of C(RFSR)R and some other sections of C(DIBD)R (namely sections 15 and 17 of the English text and sections 6, 13, 15, 17 and 22 of the Chinese text) for better flow and consistency in the two pieces of subsidiary legislation. The proposed amendments have been circulated to members of the Subcommittee and they raise no objection to these amendments.

Advice sought

31. The Subcommittee will not move amendments to the two pieces of subsidiary legislation, and notes that the Secretary for Financial Services and the Treasury plans to move motions at the Council meeting of 15 May 2013 to make the proposed amendments to the subsidiary legislation as stated in paragraphs 18 and 30 above.

32. The Chairman of the Subcommittee has given notice to move a motion at the Council meeting of 17 April 2013 to extend the scrutiny period of the subsidiary legislation to 15 May 2013 ("the extension motion"). As the Council was unable to deal with the extension motion at the Council meeting of

⁷ Specified undertakings refer to (i) the parent company of the reporting company, (ii) a subsidiary undertaking of the reporting company; and (iii) a subsidiary undertaking of the reporting company's parent company.

17 April 2013, the matter has been carried forward to the next Council meeting of 24 April 2013. Since the Council was unable to deal with the extension motion at the Council meeting of 24 April 2013, the Administration is unable to move the motions to make the proposed amendments to the two pieces of subsidiary legislation as the scrutiny period of the subsidiary legislation has expired at the Council meeting of 24 April 2013. As the subsidiary legislation has not yet commenced operation, the Administration will look into the matter and advise the Subcommittee on the way forward.

33. Members are invited to note the deliberations of the Subcommittee. The Subcommittee will continue its work to scrutinize the remaining five pieces of subsidiary legislation to be made under the new CO when they are introduced into LegCo.

Council Business Division 1
Legislative Council Secretariat
2 May 2013

A list of the 13 pieces of subsidiary legislation under the new Companies Ordinance

On company names

- (a) Companies (Words and Expressions in Company Names) Order
- (b) Companies (Disclosure of Company Name and Liability Status) Regulation

On company records

- (c) Company Records (Inspection and Provision of Copies) Regulation
- (d) Companies (Residential Addresses and Identification Numbers) Regulation

On accounts and audit

- (e) Companies (Accounting Standards (Prescribed Body)) Regulation
- (f) Companies (Disclosure of Information about Benefits of Directors) Regulation
- (g) Companies (Directors' Report) Regulation
- (h) Companies (Summary Financial Reports) Regulation
- (i) Companies (Revision of Financial Statements and Reports) Regulation

On others matters

- (j) Companies (Model Articles) Notice
- (k) Companies (Non-Hong Kong Companies) Regulation
- (l) Companies (Fees) Regulation
- (m) Companies (Unfair Prejudice Petitions) Proceedings Rules

- Note : (1) Items (a) to (l) will be made by the Financial Secretary and subject to the negative vetting procedures
- (2) Item (m) will be made by the Chief Justice and subject to the positive vetting procedures.
- (3) Refer to footnote 1 in this Report for item (d).

**Subcommittee on Subsidiary Legislation Made under
the New Companies Ordinance**

Membership list

Chairman Hon WONG Ting-kwong, SBS, JP

Deputy Chairman Hon Kenneth LEUNG

Members Hon Albert HO Chun-yan
Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, SBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Starry LEE Wai-king, JP
Hon Paul TSE Wai-chun, JP
Hon James TIEN Pei-chun, GBS, JP
Hon Steven HO Chun-yin
Hon Charles Peter MOK
Dr Hon Kenneth CHAN Ka-lok
Hon Dennis KWOK
Hon SIN Chung-kai, SBS, JP
Hon Martin LIAO Cheung-kong, JP
Dr Hon CHIANG Lai-wan, JP
Hon CHUNG Kwok-pan

(Total : 19 members)

Clerk Ms Connie SZETO

Legal Adviser Miss Winnie LO/Mr Timothy TSO

**Proposed amendment to section 20 of
Companies (Revision of Financial Statements and Reports) Regulation**

20. Offences relating to section 19

- (1) If, as respects a requirement made under section 412(2) of the Ordinance by virtue of section 19(2), section 412(3) of the Ordinance is contravened by the person to whom the requirement is made, the person commits an offence and is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.
- (2) If a person is charged with an offence under subsection (1), it is a defence to establish that it was not reasonably practicable for the person to provide the information or explanation.
- (3) A person commits an offence if—
 - (a) the person makes a statement, to a person preparing an auditor's report on revised financial statements, that conveys or purports to convey any information or explanation that the person preparing the report requires, or is entitled to require, under section 412(2) or (4) of the Ordinance by virtue of section 19(2);
 - (b) the statement is misleading, false or deceptive in a material particular; and
 - (c) the person knows that, or is reckless as to whether or not, the statement is misleading, false or deceptive in a material particular.
- (4) Subject to subsection (4A), a person who commits an offence under subsection (3) is liable—
 - (a) on conviction on indictment to a fine of \$150,000 and to imprisonment for 12 months~~2 years~~; or
 - (b) on summary conviction to a fine at level 5 and to imprisonment for 6 months.
- (4A) A court may sentence a person to imprisonment for an offence under subsection (3) only if the court is satisfied that the offence was committed wilfully.
- (5) If, as respects a requirement made under section 412(4) of the Ordinance by virtue of section 19(2), section 412(6) of the Ordinance is contravened by the company to which the requirement is made, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4 and, in the case of a continuing offence, to a further fine of \$700 for each day during which the offence continues.
- (6) If a person is charged with an offence under subsection (5) for failing to obtain any information or explanation from a subsidiary undertaking or another person, it is a defence to establish that—
 - (a) it would be an offence under the law of a place outside Hong Kong for the subsidiary undertaking or that other person to provide the information or explanation to the defendant; and
 - (b) the subsidiary undertaking or that other person did not provide the information or explanation to the defendant on that ground.
- (7) This section does not affect the right of a person preparing an auditor's report on revised financial statements to apply for an injunction to enforce any of the person's rights granted under section 412 of the Ordinance by virtue of section 19.