立法會
Legislative Council

LC Paper No. CB(1)1469/12-13

Ref. : CB1/SS/5/12

Paper for the House Committee

Third 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 third batch of seven pieces of subsidiary legislation made under the new Companies Ordinance ("CO").

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. The Administration has identified at least 13 pieces[1] 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

[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.

("CJ") and subject to the positive vetting procedure of LegCo. 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 Financial Services and the Treasury Bureau and the Companies Registry ("CR") have jointly published documents for public consultation on the subsidiary legislation in two phases in September and November 2012. According to the Administration, the respondents were generally supportive of the proposed subsidiary legislation. The comments from respondents mainly related to the drafting aspects and were technical in nature, and where appropriate, had been taken into account when finalizing the provisions in the subsidiary legislation.

The Subcommittee

3. 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 I**.

4. The Subcommittee has completed scrutiny of the first batch of five pieces of subsidiary legislation subject to the negative vetting procedure of LegCo and reported its deliberations to the House Committee on 15 March 2013[2]. As regards the second batch of two pieces of subsidiary legislation subject to the negative vetting procedure of LegCo, the Subcommittee has studied them in April 2013 and reported its deliberations to the House Committee on 3 May 2013[3].

5. On the third batch of seven pieces of subsidiary legislation, the Subcommittee has held three meetings with the Administration in June 2013 to study them and received a submission from the Hong Kong Institute of Directors. The seven pieces of subsidiary legislation include one piece of subsidiary legislation subject to the positive vetting procedure of LegCo, and six pieces of subsidiary legislation subject to the negative vetting procedure of LegCo gazetted on 24 May 2013.

---

[2] 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. The First Report of the Subcommittee (LC Paper No. CB(1)727/12-13) was issued to Members on 19 March 2013. 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.

[3] The second batch comprises two pieces of subsidiary legislation: Companies (Revision of Financial Statements and Reports) Regulation, and Companies (Disclosure of Information about Benefits of Directors) Regulation. The Second Report of the Subcommittee (LC Paper No. CB(1)949/12-13) was presented at the House Committee meeting on 3 May 2013.

Deliberations of the Subcommittee on the third batch of seven pieces of subsidiary legislation

6. The deliberations of the Subcommittee on the third batch of seven pieces of subsidiary legislation are summarized in the ensuing paragraphs.

Companies (Unfair Prejudice Petitions) Proceedings Rules

7. Under the existing CO, the proceedings on unfair prejudice petitions are regulated by the relevant provisions in the Companies (Winding-up) Rules (Cap. 32 sub. leg. H) ("Winding-up Rules"). These provisions concern the form and the presentation of a petition, as well as the drawing up and the service of an order. However, the provisions in the Winding-up Rules are primarily designed for proceedings on winding-up petitions and not all provisions in the Rules apply to unfair prejudice petitions. Sections 723 to 727 of the new CO restate the arrangement under the existing CO for members of a company to petition to the Court of First Instance for remedies if the company's affairs are being or have been conducted in a manner unfairly prejudicial to any member of the company and expand it to cover circumstances where a proposed act or omission of the company would be so prejudicial. To facilitate petitioners for unfair prejudice remedies, the proceedings on unfair prejudice petitions are set out in a separate set of rules. Under section 727(1)(a) of the new CO, subject to the approval of LegCo, CJ may make rules for regulating the proceedings of the Court of First Instance on unfair prejudice petitions concerning the affairs of a company. The Companies (Unfair Prejudice Petitions) Proceedings Rules ("Unfair Prejudice Petitions Rules") are made by CJ for this purpose. This set of rules is a subsidiary legislation subject to the positive vetting procedure of the LegCo. According to the Administration, the Unfair Prejudice Petitions Rules mainly re-enact the procedural requirements relating to unfair prejudice petitions in the Winding-up Rules with appropriate modifications and elaborations.

An unfair prejudice petition containing an alternative application

8. The Subcommittee has examined the application of the Winding-up Rules and the Unfair Prejudice Petitions Rules to an unfair prejudice petition which contains an alternative application (i.e. the petition includes seeking an order to wind up the company concerned as an alternative remedy) and one without an alternative application. Noting that it may be possible for the petitioner of an unfair prejudice petition to seek an order to wind up a company subsequently during the proceedings of the unfair prejudice petition, some members have enquired about the application of the two sets of rules to such a petition and consider that explicit provisions may be required in both sets of rules to clarify their application to the case.

9. The Administration considers that no amendment to the two sets of rules is necessary. It explains that the application of the Unfair Prejudice Petitions Rules to an unfair prejudice petition is determined according to rule 3. The general principle is that the Winding-up Rules apply whenever the petition contains an alternative application. If the Winding-up Rules are applicable to the proceedings of a petition, they also take precedence over the Unfair Prejudice Petitions Rules in the event of any inconsistency between them. Hence, if an unfair prejudice petition does not include an alternative application, the Unfair Prejudice Petitions Rules apply to the proceedings of the petition while the Winding-up Rules do not apply (rule 3(1) of the Unfair Prejudice Petitions Rules). If an unfair prejudice petition includes an alternative application, the proceedings on the petition is subject to both the Unfair Prejudice Petitions Rules and the Winding-up Rules. However, the application of the Unfair Prejudice Petitions Rules will be qualified to the extent that only those provisions which are not inconsistent with the Winding-up Rules apply (rule 3(2) of the Unfair Prejudice Petitions Rules). If the alternative application in the petition is not proceeded with, the Winding-up Rules cease to apply and the proceedings will be subject to the Unfair Prejudice Petitions Rules only (rule 3(3) of the Unfair Prejudice Petitions Rules).

10. As regards the case that an unfair prejudice petition originally does not include an alternative application at the time of presentation but the petitioner subsequently seeks to amend the petition to add a prayer for a winding up order, the Administration advises that the amendment requires the leave of the Court. However, the typical position of the Court is to require a fresh winding-up petition be presented instead of granting the leave. It follows that the proceedings on the fresh petition will then be subject to the Winding-Up Rules only[4].

Presentation of petition

11. The Subcommittee notes that under paragraph 5.6.3 of Part II of Practice Direction 3.1 issued by the Judiciary, a hearing for directions would be held in chambers. Some members have enquired whether a hearing for directions under rule 4(2) of the Unfair Prejudice Petitions Rules (i.e. a hearing on the return day) would be held in chambers or in open court; and if it is intended that such hearings are to be held in chambers, whether this should be explicitly stated in rule 4(2). The Subcommittee is also concerned as to

---

[4] If a petition seeks only to wind up the company concerned, it is a winding-up petition presented pursuant to section 179 of the existing CO (which will be retitled as the Companies (Winding Up and Miscellaneous Provisions) Ordinance after commencement of the new CO). Such a petition falls outside of the ambit of the Unfair Prejudice Petitions Rules and the proceedings on the petition will be subject to the Winding-up Rules.

whether any practice directions will be issued for the purpose of proceedings relating to unfair prejudice petitions. The Administration advises that whether the hearing on the return day is to be held in chambers or in open court would be a matter to be decided by the Judiciary. Also, the matter may be specified in its Practice Directions if considered appropriate by the Judiciary.

Service of order

12. The Subcommittee notes that rule 8(1) of the Unfair Prejudice Petitions Rules provides that unless the Court otherwise directs, the petitioner must serve an office copy of the order on the company and on the Registrar of Companies ("the Registrar"). Some members have enquired about the reasons for not specifying a time limit in rule 8(1) for compliance by the petitioner, and whether there will be consequence(s) for non-compliance with the rule, in particular whether the order will be effective against the company if it is not served on the company.

13. The Administration advises that pursuant to section 70 of the Interpretation and General Clauses Ordinance (Cap. 1), where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay. On the effectiveness of an order, the Administration explains that by virtue of Order 45, rule 7 of Cap. 4A (which applies to an unfair prejudice petition by virtue of rule 3(5) of the Unfair Prejudice Petitions Rules), an order shall not be enforced unless a copy of the order has been duly served on the person or body corporate required to do or abstain from doing the act in question, unless service is dispensed with. It follows that if the company concerned is ordered to do or abstain from doing an act, the petitioner must duly serve the order on the company before the order is enforced. Hence, in such case, it will be in the interest of the petitioner or he will have the incentive to ensure that the office copy of the order is served on the company within a reasonable time. The Administration further points out that the Unfair Prejudice Petitions Rules do not prescribe any criminal consequences for non-compliance with the service of order requirement, which reflects the existing position in rule 36(3) of the Winding-up Rules.

<u>Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013 (L.N. 75)</u>
<u>Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013 (L.N. 76)</u>

14. FS has made the Companies (Revision of Financial Statements and Reports) Regulation (L.N. 34 of 2013) and the Companies (Disclosure of Information about Benefits of Directors) Regulation (L.N. 35 of 2013) which were gazetted on 22 March 2013 and scrutinized by the Subcommittee under the

second batch of subsidiary legislation in April 2013. In response to the views of the Subcommittee and the Legal Adviser of the Subcommittee, the Administration has proposed to make a number of amendments to L.N. 34 and L.N. 35 pursuant to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) at the Council meeting of 15 May 2013, i.e. the last sitting before the expiry of the extended scrutiny period. However, since the motion for extension of the scrutiny period could not be dealt with at the Council meeting of 24 April 2013, it was no longer possible to amend L.N. 34 and L.N. 35 pursuant to section 34(2) of Cap. 1. The Administration subsequently informed the Subcommittee that it would introduce the proposed amendments to L.N. 34 and L.N. 35 by way of amendment regulations. The Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013 is made by FS under section 450 of the new CO, and the Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013 is made by FS under sections 451 and 452(2) of the new CO to effect the proposed amendments to L.N. 34 and L.N. 35 respectively. The two Amendment Regulations will come into operation on the day on which L.N. 34 and L.N. 35 come into operation.

15. The Administration recapitulates that the major proposed amendments to L.N. 34 are to amend section 20(4)(a) of L.N.34 such that the maximum period of imprisonment will be 12 months (instead of two years); to introduce a new provision, section 20(4A), to stipulate that a person may be sentenced to imprisonment only if the offence relating to the auditor's report on revised financial statements under section 20(3) was committed wilfully; and to make minor textual amendments to some provisions in the Chinese text of L.N.34. As regards L.N. 35, the proposed amendments include a number of minor textual amendments to both the English text and the Chinese text of L.N. 35. The Subcommittee has considered the proposed amendments during scrutiny of L.N. 34 and L.N. 35 in April 2013. No member raised any objection[5].

16. The Subcommittee notes that after reviewing the proposed amendments to L.N. 35, the Administration has made a minor textual amendment to section 7(2)(a) (which is on information about consideration provided to or receivable by third parties for making available directors' services) of the Chinese text instead of the original proposed amendment to section 6(2)(a) of the Chinese text. The Administration has confirmed that the rest of the proposed amendments in the two Amendment Regulations are the same as those originally proposed to L.N. 34 and L.N. 35. Members have no objection to the two Amendment Regulations.

---

[5] Details of the Subcommittee's deliberations on the proposed amendments to L.N. 34 and L.N. 35 of 2013 are in the Second Report of the Subcommittee (LC Paper No. CB(1)949/12-13).

Companies (Model Articles) Notice (L.N. 77)

17. Standard articles of association[6] are contained in Schedule 1 to the existing CO. They apply to companies that do not have their own articles excluding or modifying the statutory standard articles. Parts I and II of Table A to Schedule 1 provide a set of standard articles for public and private companies limited by shares, while companies limited by guarantee may rely on the form of articles set out in Table C to Schedule 1. Section 78 of the new CO empowers FS to prescribe model articles for companies. The Companies (Model Articles) Notice is made by FS under section 78 for this purpose. The Notice will come into operation on the day on which section 78 of the new CO comes into operation. Three distinctive sets of model articles prescribed in the Notice are:

(a) Schedule 1 consists of 105 articles for public companies limited by shares;

(b) Schedule 2 consists of 84 articles for private companies limited by shares; and

(c) Schedule 3 consists of 57 articles for companies limited by guarantee.

Application of the model articles

18. The Subcommittee has enquired about the purposes of providing model articles for companies and the application of model articles to existing companies. The Administration explains that a company on its incorporation in Hong Kong is required to have articles prescribing its regulations. A company may design its own articles subject to no contravention of the requirements under the CO. Section 79 of the new CO provides that a company may adopt any or all of the provisions in the model articles prescribed for the type of company to which it belongs. Section 80 of the new CO provides that on the incorporation of a limited company, the model articles form part of the company's articles of association if the company's registered articles do not prescribe any regulations for the company or in so far as the company's registered articles do not exclude or modify the model articles. The

---

[6] Currently, the constitutional documents of a company formed in Hong Kong are the Memorandum of Association ("MA") and Articles of Association ("AA"). The MA used to contain the objects clause and the authorized capital of the company, whereas AA are a set of rules for regulating the internal management of a company which also serves as a principal source of shareholders' rights. With the reduced significance of the objects clause and the removal of the authorized capital following the migration to no par, as well as to align with other common law jurisdictions such as Australia and New Zealand requiring companies to have only a single constitutional document, the requirement for an MA for companies was abolished under the new CO.

Administration clarifies that the model articles will have no impact on existing companies, including those which have adopted the standard articles currently provided in Schedule 1 to the existing CO. However, an existing company may amend its articles to follow the model articles at its volition.

Improvement to the model articles

19. The Subcommittee has studied the improvement made to the model articles provided under the Notice. The Administration points out that to make the model articles more user-friendly, three sets of model articles are provided as set out in paragraph 17 above. Moreover, compared with the existing standard articles, the model articles have been substantially re-organised to enhance clarity, coherence and ease of reference. For instance, articles concerning similar matters are grouped together under different broad headings with topics covered in the following sequence –

(a) directors and company secretary, and in particular how directors are to make decisions;

(b) members' rights and the proceedings at general meetings;

(c) shares and distributions; and

(d) miscellaneous matters, including communications to and by the company.

20. The Subcommittee notes that in terms of contents, the major changes introduced in the model articles are to provide more detailed procedures for the administration of company business or to align with requirements under the new CO. For example in respect of decision-making by directors, new articles have been added to provide for the detailed procedures for written resolutions and the appointment and removal of alternate director; and in respect of the proceedings at general meetings, an article is added on the rights of directors and anyone who is not a member of the company to attend and speak at general meetings.

Alternate directors

21. The Subcommittee notes that all the three sets of model articles contain articles concerning alternate directors[7]. A director may appoint (a) another director of the company, or (b) any person other than a director of the company

[7] These refer to (i) articles 30 to 32 in Schedule 1 (for public companies limited by shares); (ii) articles 28 to 30 in Schedule 2 (for private companies limited by shares); and (iii) articles 26 to 28 in Schedule 3 (for companies limited by guarantee) to the Notice.

(subject to the approval by resolution of the directors) as his alternate (hereafter referred to as "internal alternate" and "external alternate" respectively). Some members question the rationale to allow appointment of an internal alternate as there would be overlaps in roles if a director also acts as an alternate for other directors. Some members point out that it is unclear from the relevant provisions in the model articles how an internal alternate or an external alternate is to be counted for quorum of meetings and signing of written resolutions. In particular, there is concern about whether the following extreme situation may arise: a single director, who was appointed as the internal alternate by the rest of the directors, can constitute a quorum for a directors' meeting and make decisions on company affairs in the absence of other directors. The Subcommittee considers that the Administration should clarify the policy intent in the appointment of alternate directors, and the rights, responsibilities and powers of internal and external alternates.

22. The Administration explains that the appointment of alternate directors will provide a company with flexibility in operation, and allowing the appointment of an internal alternate will give directors a choice of appointing another director as an alternate having regard that an existing director is likely to be more familiar with the company's business than an outsider. A company may choose to adopt other arrangements for the appointment of alternate directors and modify the relevant model articles to suit its needs and operation, subject to other applicable statutory requirements. The Administration further advises that model articles treat both an internal alternate and an external alternate equally, except that the appointment of the latter must be approved by resolution of the directors (article 30(1) in Schedule 1 and other relevant provisions in Schedules 2 and 3 to the Notice). Other than that, the model articles do not in substance distinguish external alternates from internal alternates in terms of their rights, responsibilities and powers.

23. For the adoption of a director's written resolution, the Administration explains that article 18 of Schedule 1 (also relevant provisions in Schedules 2 and 3 to the Notice) requires the signature of all directors who would have been entitled to vote on the resolution at a directors' meeting. It is appropriate to subject a written resolution to such a requirement since there is no directors' meeting for the minority to persuade the majority to change their position in the course of decision-making. As such, the policy intention is that, for an external alternate, he is only allowed to sign for one of his appointers. For an internal alternate, he is only allowed to sign for himself or for one of his appointers. This would ensure that sufficient minds are being put to the issue to be resolved by written resolution.

24. Likewise, for the counting of quorum, an alternate director (whether internal or external) is to be counted once only. The intention is to ensure that a single alternate director cannot alone constitute a quorum for a director's meeting and make decisions in the absence of other minds.

25. While the Subcommittee notes the Administration's explanation given above and supports the policy intention, some members consider that there is room for improvement in the present drafting of the relevant provisions in order to reflect the policy intent more clearly. Having considered members' views, the Administration agrees to amend article 31(4) in Schedule 1, article 29(4) in Schedule 2 and article 27(4) in Schedule 3. The relevant amendments are given in **Appendix II**. The Subcommittee has no objection to the Administration's proposed amendments.

26. The Subcommittee further notes that the Administration, after reviewing the Chinese text of the Notice, will propose minor textual amendments to articles 16(6)(b), 54, 66(1)(a), 67(2)(a), 69(7)(b) and 78(2)(b) of Schedule 1 (as well as their equivalent provisions (if any) in Schedules 2 and 3) for improving consistency and to better align with the English text. The relevant amendments are set out in **Appendix II**. The Subcommittee has no objection to the Administration's proposed amendments.

Company Records (Inspection and Provision of Copies) Regulation (L.N. 78)

27. Sections 356 and 657 of the new CO provide that FS may make regulations to prescribe the place where companies keep their records, the specific requirements concerning the inspection, provision of copies of company records as well as the offences and the penalties in the case of contravention etc. The Company Records (Inspection and Provision of Copies) Regulation is made by FS under sections 356 and 657 of the new CO for the above purposes. It will come into operation on the day on which section 356 of the new CO comes into operation. The Regulation applies only to those company records which the new CO has identified and stipulated as being subject to the Regulation. For example, it does not apply to accounting records which are governed by sections 373 to 378 of the new CO.

28. On the place of keeping of company records, the Administration points out that the Bills Committee on the Companies Bill has proposed during scrutiny of the Bill that companies should be allowed to keep their records and registers in more than one place as many companies in Hong Kong would prefer to keep such records in warehouses. The Subcommittee notes that this Regulation gives effect to the aforesaid proposal by allowing the keeping of company records at any place in Hong Kong if, under the relevant provisions in the new CO, that type of company records may be kept at a place prescribed by

regulation made under section 356 or 657 thereof. The Subcommittee also notes that for any company records not kept at the registered office of the company and subject to inspection in accordance with this Regulation, the company is required under the new CO to notify the Registrar of the location where they are kept. Such information will be accessible to members of the public through the Companies Register.

Inspection arrangement and provision of copies of company records

29. As regards the inspection arrangement for company records subject to this Regulation, members note that section 7 requires companies to make company records available for inspection during business hours subject to any reasonable restrictions imposed by the company by resolution, as long as at least two hours per day are allowed for inspection. As for provision of copies of company records, section 11 provides that a company is required to provide copies of the records within five business days after the date of receipt of a request or payment of the prescribed fee (whichever is the later). Some members have enquired about the arrangements for inspection and provision of copies of company records outside business days in response to requests made under urgent circumstances.

30. The Administration explains that restrictions, if any, imposed by a company on the inspection arrangement must be passed by resolution. The arrangement aims to cater for circumstances of individual company which may have genuine need to impose restrictions on inspection arrangement having regard to its mode of operation. The minimum requirement of "at least 2 hours per day" for inspection of company records follows the requirement under the existing CO. A company may, as it sees fit, exercise flexibility to cater for urgent requests for inspection of and provision of copies of company records outside the business days/hours.

31. On the provision of copies of company records, some members consider the requirement of five business days under section 11 a short duration and will be difficult for companies to comply with, in particular small and medium-sized enterprises ("SMEs") which have limited resources and may need to handle a large number of requests involving huge volume of records in a short period of time. Some members further point out that as "business day" (as defined in section 11(5) of the Regulation) includes Saturdays, a company not conducting business on Saturdays will in fact have a shorter working period to respond to a request and the requirement will be particularly stringent for SMEs. Noting that the lead time for provision of copy of information under the existing CO ranges between seven to 20 calendar days depending on the types of records, and the relatively heavy penalty of a level 4 fine (i.e. $25,000) under section 11(4)), the subcommittee requests the Administration to consider providing a lead time of ten business days for provision of copies of company records.

32. The Administration explains that the proposed period of five business days seeks to strike a balance between minimizing the compliance burden to the company and facilitating the requestor to obtain copies of company records within a reasonable period. The Administration advises that in response to industry's feedback from the public consultation, "business day" has been adopted as the counting basis in lieu of calendar day as in the original proposal. Moreover, the daily default fine for an offence related to provision of copies of company records under section 11(1) and (4) of this Regulation, which is applicable under the existing CO, has been removed. Nonetheless, having considered the Subcommittee's view that ten business days should be allowed for fulfillment of a request for provision of copies, the Administration agrees to amend section 11(1) by repealing "5 business days" and substituting "10 business days". The Subcommittee welcomes the Administration's proposed amendment in this regard.

Prescribed fees for provision of copies of company records

33. In respect of the prescribed fees for provision of copies of company records under section 12 of the Regulation, the Subcommittee notes that the fees are to be calculated by reference to the number of entries in the case of a register (at $5 for every ten entries within the first 2 000 entries requested, to be followed by $1 for every 100 entries thereafter) or otherwise the number of pages in the case of records other than registers (at $5 per page). Whereas the typical approach for calculation of fees adopted under the existing CO is the number of words. The Administration explains that the change in the calculation basis has taken into account the industry's feedback that the approach under the existing CO is cumbersome and impractical. The Administration further clarifies that there is no requirement on the page size of company records requested to be copied in the case of records other than registers.

34. Some members note that it is provided under section 8 of the Regulation that a company must permit a person to make a copy of the whole or any part of those records in the course of inspection. They are concerned if a company allows inspection of its records through electronic means, e.g. via the company's computer system, whether the company can refuse the person's request for copying the company's record through a portable storage device since there may be security concerns on access to the company's computer records during the copying process. The Administration advises that this Regulation does not prescribe the means through which a person can make copy of the company records during inspection. Nor is there any obligation on the company to assist the person to make any copy of the records. The company will be entitled to exercise its means to control access to files on a computer when allowing inspection of the records in electronic form. Alternatively, the company may assist the person concerned to save the softcopy of the requested record in the

portable storage device provided by the person although the company is not obliged to do so.

35. As regards the fees for provision of copies of company records in electronic form, the Administration advises that the prescribed fees in section 12 of the Regulation do not distinguish the forms of company records, i.e. hardcopy or softcopy. Apart from the cost of making a copy (e.g. photo-copying charge and paper cost), the prescribed fees are meant to cover the administrative costs incurred by the company, such as retrieval of the requested company records, which apply to both hardcopy and softcopy.

36. The Subcommittee notes that section 657(2)(c) of the new CO provides that the regulations made under section 657 may require a company to inform a person of the most recent date on which alterations were made to a register or an index ("the requirement"). However, the requirement is not contained in L.N. 78. The Administration points out that the requirement, which is not present in the existing CO, would lead to additional compliance costs for the companies concerned. As the Administration is not aware of any strong demand for the introduction of the requirement, the relevant provision has not been included in finalizing L.N. 78. The company may, having regard to its individual circumstances, meet request from persons for such information at its volition.

Companies (Non-Hong Kong Companies) Regulation (L.N.79)

37. Part 16 of the new CO contains provisions for non-Hong Kong companies ("NHKCs"), being companies incorporated in a place outside Hong Kong that have established a place of business in Hong Kong. The Companies (Non-Hong Kong Companies) Regulation is made by FS under sections 804 and 805 of the new CO to provide for the various particulars and documents to be provided to the Registrar in respect of a NHKC as required under the relevant provisions of the new CO. The Regulation will come into operation on the day on which sections 804 and 805 of the new CO come into operation. According to the Administration, the Regulation basically restates the existing requirements and arrangements (with minor changes where appropriate) applicable to NHKCs as set out below:–

(a) the particulars and documents required to accompany (i) application for registration of a NHKC; (ii) annual returns; and (iii) returns on change of particulars or termination of authorization of the authorized representative of a registered NHKC under sections 333, 333B, 334 and 335 of the existing CO;

(b) the eligibility and detailed requirements set out in the Companies Registry External Circular No. 1/2001 concerning the registration of certified translations of the domestic name (or one of the domestic names) of a NHKC; and

(c) the requirements applicable to the revised accounts of a registered NHKC in sections 20 to 21 of the Companies (Revision of Accounts and Reports) Regulation (Cap. 32 sub.leg. N).

38. Some members have enquired about the requirements under section 3(1)(a) of the Regulation in relation to the domestic name of a NHKC. The Administration advises that, if the domestic name of a NHKC is not in Roman script or Chinese, say in the Russian language, the NHKC is required under section 776(5) of the new CO to provide the certified translation of its domestic name in English or Chinese given that the CR may not be able to register a domestic name which is in Russian for technical reasons. Moreover, the Chinese name referred to in section 3(1)(a) of the Regulation includes a name in simplified Chinese characters. As regards the parties authorized to certify copies of the specified documents required for registration of a NHKC, the Administration advises that they are set out in section 775 of the new CO, which include a practising lawyer, notary public, professional accountant, etc. On the certified translation of the documents to be provided, the Administration confirms that either English or Chinese translation will need to be provided.

39. Members notes that in the light of comments of the Legal Adviser of the Subcommittee, the Administration will propose amendments to the Chinese text of sections 4(4)(a), 9(1)(h)(i), 9(1)(k), and 14(2)(a) of the Regulation to improve the drafting of the provisions concerned and to maintain consistency with the English text. The relevant proposed amendments are provided in **Appendix II**. The Subcommittee supports the Administration's proposed amendments.

Companies (Fees) Regulation (L.N.80)

40. The Companies (Fees) Regulation is made by FS under sections 26 and 909 of the new CO providing for the fees payable to the Registrar in respect of the performance of Registrar's functions under the new CO or the provision of services or facilities by the Registrar[8], as well as miscellaneous fees. The fees are set out in four schedules to the Regulation: (a) Schedule 1 – fees for the registration of a company or registration of documents; (b) Schedule 2 – fees for inspection or obtaining documents or information on the Companies Register; (c)

[8] Including services and facilities provided by the Registrar under the Companies (Winding Up and Miscellanenous Provisions) Ordinance (Cap. 32).

Schedule 3 – fees payable for obtaining the Registrar's approval or licence under the new CO; and (d) Schedule 4 - miscellaneous fees.

41. The Subcommittee notes that the fees items under this Regulation are in line with the corresponding items or fee levels as stipulated in the existing CO, with elaboration or clarification where appropriate. However, companies limited by guarantee will be subject to an escalating scale for late filing of annual returns (i.e. item 6 of Part 2 of Schedule 1). The Administration explains that under the existing CO (and the new CO for this matter), a company limited by shares is required to file its annual return within 42 days of its return date and pay an annual registration fee. To encourage compliance with the statutory filing requirement, the annual registration fee is subject to an escalating scale in the case of late filing. The escalating scale for companies limited by shares was introduced in 1988 and was extended to NHKCs in 2007. In light of the relatively low compliance rate of companies limited by guarantee with the filing requirement and increasing public expectation of corporate transparency of such companies, the Administration considers it appropriate to subject companies limited by guarantee to an escalating scale for late filing of annual returns as that applicable to private companies limited by shares so as to encourage compliance with the statutory filing requirements. Furthermore, members note that certain existing fee items, for example those concerning an increase in nominal share capital or shares issued at a premium, have become obsolete and are not included in this Regulation.

Commencement of the new Companies Ordinance

42. The Subcommittee has scrutinized the subsidiary legislation made under the new CO introduced by the Administration. Members note that to complete the full process for making all relevant subsidiary legislation for the purpose of bringing the new CO into operation in the first quarter of 2014, the Administration plans to table the commencement notice and two other notices for updating and/or consequential amendment purposes at LegCo in October 2013. The Administration proposes that for the benefit of continuity in the final stage of the relevant legislative work before commencement of the new CO, it would be desirable for the Subcommittee to take up the scrutiny work for the abovementioned three notices. The Subcommittee considered the Administration's proposal at the meeting on 20 June 2013 and no members raised objection. The Subcommittee notes that the matter is to be decided by the House Committee and invites the House Committee to consider the Administration's proposal.

Advice sought

43. The Subcommittee will not move amendments to the seven pieces of subsidiary legislation. The Subcommittee supports the Secretary for Financial Services and the Treasury ("SFST") to move motions at the Council meeting of 17 July 2013 to make the proposed amendments to the Companies (Model Articles) Notice, the Companies Records (Inspection and Provision of Copies) Regulation and the Companies (Non-Hong Kong Companies) Regulation as stated in paragraphs 25, 26, 32 and 39 above respectively. The Subcommittee also supports SFST to move a motion at the Council meeting of 17 July 2013 to seek LegCo's approval of the Companies (Unfair Prejudice Petitions) Proceedings Rules.

44. The Chairman of the Subcommittee gave a verbal report on the deliberations of the Subcommittee at the House Committee meeting on 28 June 2013. Members are invited to note the contents of this written report.

Council Business Division 1
Legislative Council Secretariat
10 July 2013

Appendix I

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, GBS, 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 (up to 28 May 2013) 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： 18 members)
Clerk	Ms Connie SZETO
Legal Adviser	Mr Timothy TSO Miss Winnie LO

Proposed Amendments to Companies (Model Articles) Notice

(Note : Except for article 31(4) of Schedule 1, article 29(4) of Schedule 2 and article 27(4) of Schedule 3, the amendments to other provisions are confined to Chinese text only)

****

Schedule 1 Model Articles for Public Companies Limited by Shares

16. 利益衝突的補充條文

(6) 本公司的董事可以是下述公司的董事或其他高級人員，亦可以在其他情況下，在下述公司中具有利益 —

(a) 本公司發起的公司；或

(b) 本公司~~或~~作為股東或以其他身分於其中具有利益的公司。

31. Rights and responsibilities of alternate directors

(4) ~~No~~ An alternate director ~~may~~ must not be counted or regarded as more than one director for ~~the purposes mentioned in paragraph (3).~~determining whether—

(a) a quorum is participating; or

(b) a directors' written resolution is adopted.

31. 候補董事的權利與責任

(4) ~~就第(3)款所述的事情而言，不得將候補董事算作多於1名董事。~~在 —

(a) 斷定參與會議的董事是否達到法定人數時；或

(b) 斷定董事書面決議是否獲採納時，

同一名候補董事，不得算作或被視為多於1名董事。

54. 代委任代表的成員，簽立~~執行~~代表委任文書

如代表通知書未經認證，它須隨附書面證據，證明簽立~~執行~~有關代表~~的~~委任文書的人，有權代作出有關~~該項~~委任的成員，簽立~~執行~~該文書~~項委任~~。

66. 綜合股份證明書

(1) 成員可以向本公司提出書面要求，要求 —

(a) 以一份綜合證明書，取代該成員的分開的~~個別~~證明書；或

(b) 以分開的2份或多於2份代表該成員所指明的股份比例的證明書，取代該成員的綜合證明書。

67. 作替代的股份證明書

(2) 某成員如有權獲發作替代的證明書，並行使此權利，則 —

(a) 可同時行使獲發單一證明書、分開的~~個別~~證明書或綜合證明書的權利；

(b) 須將遭塗污或破損的須予替代的證明書，歸還予本公司；及

(c) 須遵從董事所決定的、在證據、彌償及支付合理款項方面的條件。

69. 執行公司的留置權

(7) 凡某董事或公司秘書作出法定聲明，聲明自己是董事或公司秘書，以及某股份已於指明的日期售出，以體現本公司的留置權，該聲明即 —

(a) 對所有聲稱有權擁有該股份的人而言，屬該聲明所述事實的確證；及

(b) 在本《章程細則》或法律規定的任何其他正式轉讓手續獲符合的前提下，構成該股份的妥善所有權。

78. 沒收股份後的程序

(2) 凡某董事或公司秘書作出法定聲明，聲明自己是董事或公司秘書，以及某股份已於指明的日期遭沒收，該聲明即 —

(a) 對所有聲稱有權擁有該股份的人而言，屬該聲明所述事實的確證；及

(b) 在本《章程細則》或法律規定的任何其他正式轉讓手續獲符合的前提下，構成該股份的妥善所有權。

****

Schedule 2 Model Articles for Private Companies Limited by Shares

17. 利益衝突的補充條文

(6) 本公司的董事可以是下述公司的董事或其他高級人員，亦可以在其他情況下，在下述公司中具有利益 —

(a) 本公司發起的公司；或

(b) 本公司~~或~~作為股東或以其他身分於其中具有利益的公司。

29. Rights and responsibilities of alternate directors

(4) ~~No~~ An alternate director ~~may~~ must not be counted or regarded as more than one director for ~~the purposes mentioned in paragraph (3).~~determining whether—

(a) a quorum is participating; or

(b) a directors' written resolution is adopted.

29. 候補董事的權利與責任

(4) ~~就第(3)款所述的事情而言，不得將候補董事算作多於1名董事。~~在 —

(a) 斷定參與會議的董事是否達到法定人數時；或

(b) 斷定董事書面決議是否獲採納時，

同一名候補董事，不得算作或被視為多於1名董事。

50. 代委任代表的成員，簽立~~執行~~代表委任文書

如代表通知書未經認證，它須隨附書面證據，證明簽立~~執行~~有關代表~~的~~委任文書的人，有權代作出有關~~該項~~委任的成員，簽立~~執行~~該文書~~項委任~~。

61. 綜合股份證明書

(1) 成員可以向本公司提出書面要求，要求 —

(a) 以一份綜合證明書，取代該成員的分開的~~個別~~證明書；或

(b) 以分開的 2 份或多於 2 份代表該成員所指明的股份比例的證明書，取代該成員的綜合證明書。

62. 作替代的股份證明書

(2) 某成員如有權獲發作替代的證明書，並行使此權利，則 —

(a) 可同時行使獲發單一證明書、分開的~~個別~~證明書或綜合證明書的權利；

(b) 須將遭塗污或破損的須予替代的證明書，歸還予本公司；及

(c) 須遵從董事所決定的、在證據、彌償及支付合理款項方面的條件。

****

Schedule 3 Model Articles for Companies Limited by Guarantee

16. 利益衝突的補充條文

(6) 本公司的董事可以是下述公司的董事或其他高級人員，亦可以在其他情況下，在下述公司中具有利益 —

(a) 本公司發起的公司；或

(b) 本公司~~或~~作為股東或以其他身分於其中具有利益的公司。

27. Rights and responsibilities of alternate directors

(4) ~~No~~ An alternate director ~~may~~ must not be counted or regarded as more than one director for ~~the purposes mentioned in paragraph (3).~~determining whether—

(a) a quorum is participating; or

(b) a directors' written resolution is adopted.

27. 候補董事的權利與責任

(4) ~~就第(3)款所述的事情而言，不得將候補董事算作多於1名董事。~~在 —

(a) 斷定參與會議的董事是否達到法定人數時；或

(b) 斷定董事書面決議是否獲採納時，

同一名候補董事，不得算作或被視為多於 1 名董事。

49. 代委任代表的成員，簽立~~執行~~代表委任文書

如代表通知書未經認證，它須隨附書面證據，證明簽立~~執行~~有關代表~~的~~委任文書的人，有權代作出有關~~該項~~委任的成員，簽立~~執行~~該文書~~項委任~~。

****

Proposed amendment to
Company Records (Inspection and Provision of Copies) Regulation

****

11. Provision of copy of company records

(1) If by making a request and paying the fee prescribed in section 12, a person is entitled under a relevant provision to be provided with a copy of the whole or any part of any company records of a company, the company must, within 10~~5~~ business days after the date of receipt of the request or payment (whichever is the later), provide the copy to the person.

11. 提供公司紀錄的文本

(1) 如某人藉提出要求和繳付第 12 條訂明的費用，而根據相關條文有權獲提供某公司的公司紀錄的全部或任何部分的文本，該公司須在收到該要求或付款的日期(以較後者為準)後的 10~~5~~ 個辦公日內，向該人提供該文本。

****

Proposed amendments to Companies (Non-Hong Kong Companies) Regulation

****

4. 註冊申請須隨附的文件

(4) 為施行第(1)(c)及(d)款，如 —

(a) 某非香港公司成立為法團的日期，是在根據本條例第 776(4)條~~規定須~~交付申請的日期前的 18 個月內；及

(b) 該公司須發表的帳目並未擬備，

則該公司須將指明該事實的陳述書，交付處長登記，以代替交付該公司最近期發表的帳目的經核證副本，而該陳述書須符合指明格式。

9. 周年申報表須載有的詳情

(1) 為施行本條例第 788(2)(b)條，註冊非香港公司的周年申報表，須載有以下資料 —

(h) 就每名在該申報表的日期當日屬該公司的獲授權代表的人而言，以下詳情 —

(i) 該代表的姓名或名稱及地址；及

(ii) 如該代表是自然人 —

(A) 該代表的身分證號碼；或

(B) (如該代表沒有身分證)該代表所持有的任何護照的號碼及簽發國家；

(k) (如該公司成立為法團的日期，是在根據本條例第 788(1)條~~規定須~~交付該申報表的日期前的 18 個月內，而該公司須發表的帳目並未擬備)一項符合指明格式的、指明該事實的陳述；

14. 本條例第 791 條所指的申報表須隨附的文件

(2) 為施行本條例第 791(3)(c)條，以下文件須隨附根據本條例第 791(1)條交付的申報表 —

(a) 有關公司的憲章、法規或章程大綱(包括章程細則(如有的話))在上述更改後的經核證副本，或對該公司~~在上述更改後~~的組織作出規定的其他文書在上述更改後的經核證副本；或

(b) (如有關公司的憲章、法規或章程大綱(包括章程細則(如有的話))或對該公司的組織作出規定的其他文書既非採用中文，亦非採用英文)該憲章、法規、章程大綱或文書的經核證中文或英文譯本。

****

Source: Annex of CB(1)1383/12-13(02)
Annex A, B of CB(1)1341/12-13(02)