

For information

**Sub-committee on Subsidiary Legislation Made
under the New Companies Ordinance**

**Supplementary Information arising from the Meetings on
9 April 2013 and 16 April 2013**

Purpose

This paper provides supplementary information in response to the views expressed by members and the Legal Adviser of the sub-committee at the fifth and sixth meetings of the sub-committee on 9 and 16 April 2013 respectively.

Companies (Revision of Financial Statements and Reports) Regulation

Textual amendments to the Regulation

2. We have considered the comments by the Legal Adviser of the sub-committee and accordingly propose to make the following textual amendments in the Chinese text of the Regulation –

- (a) to correct the typo in the Chinese citation of the Companies (Disclosure of Information about Benefits of Directors) Regulation as appearing in the definition of 《有關規例》 under section 2(1);
- (b) to delete “的” after “發布或發出” in sections 7(2), 8(2) and 9(2); and
- (c) to replace “等的人” with “的人等” in the heading of section 18.

Proposed new section 20(4A)

3. Section 20(3) of the Regulation provides that in the course of preparation of the auditor’s report on revised financial statements, 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) of the Regulation;

- (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. The penalty for the offence is prescribed under section 20(4) of the Regulation. In our reply dated 15 April 2013 to the Legal Adviser of the sub-committee, we have explained that since section 450(4) of the Ordinance has provided that the Regulation may prescribe penalty of imprisonment of up to one year only in case an offence is committed wilfully, we have proposed to amend section 20(4)(a) such that the maximum period of imprisonment will be one year (instead of two years). We have also proposed to add a new provision, namely section 20(4A), to stipulate that a person may be sentenced to imprisonment only if the offence under section 20(3) was committed wilfully. Please refer to LC Paper No. CB(1)865/12-13(02) for details of the aforesaid proposed amendments, which have been considered at the sixth meeting of the sub-committee.

5. It must be noted 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.

6. In the light of members' request for elaboration on the operation of section 20(4A) in relation to section 20(3), further legal advice has

been sought on this issue. Specifically, “wilfulness” primarily has the meaning of “deliberate” or “intentional”, though the case of R v Sheppard [1981] AC 394 indicates that in some statutory contexts, wilfulness includes recklessness. 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 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.

7. As indicated in our reply dated 15 April 2013 to the Legal Adviser of the sub-committee, we intend to review the relevant provisions in the next legislative exercise after the commencement of the new Companies Ordinance with a view to aligning the penalties in relation to the similar offences imposed under the new Companies Ordinance and the Regulation.

Penalty for the offence under section 27

8. The principle underpinning this Regulation is that the penalties for offences committed in respect of the revised documents should be aligned with those imposed on similar offences relating to the original documents in the Ordinance. On that basis, section 27(3) and (5) of this Regulation mirror the penalties prescribed in sections 662(6) and (8) of the Ordinance. The Companies (Revision of Accounts and Reports) Regulation (Cap.32N) also provides for a daily default fine for a similar offence in section 16(2). According to our records, there has been no conviction of the offence under that section of Cap.32N for the past three years.

Issuance of external circular on auditor’s liability

9. For the purpose of facilitating compliance with the new regulatory requirement, the Companies Registry will issue, before commencement of the operation of the new Companies Ordinance, an

External Circular on section 408 of the Ordinance and section 16 of the Regulation. 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.

Companies (Disclosure of Information about Benefits of Directors) Regulation

Textual amendments to the Regulation

10. While we consider the wording of sections 3, 16 and 18 to be sufficiently clear, we note the comments by the Legal Adviser of the sub-committee and agree to amend those provisions with a view to further elucidating the requirements concerned. We have also taken the opportunity to propose textual amendments to some other sections (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. Details of the proposed amendments are provided in the Annex for members' consideration.

Advice Sought

11. Subject to members' views, the Administration will introduce the amendments to the Companies (Revision of Financial Statements and Reports) Regulation and the Companies (Disclosure of Information about Benefits of Directors) Regulation.

Financial Services and the Treasury Bureau
Companies Registry
25 April 2013

**Proposed Amendments to
Sections 3 and 15 to 18 of the English text of
Companies (Disclosure of Information about Benefits of Directors) Regulation**

3. Interpretation of Part 2

(1) In this Part—

contributions (供款), in relation to a retirement benefits scheme—

- (a) means the payments (including insurance premiums) made under the scheme by or in respect of persons rendering services in respect of which retirement benefits are payable under the scheme; but
- (b) excludes any payments made in respect of 2 or more such persons if the amount of the payments made in respect of each of those persons cannot be ascertained;

qualifying services (合資格服務), in relation to a person, means—

- (a) the person's services as a director of the company concerned; or
- (b) while a director of the company—
 - (i) the person's services as a director of a subsidiary undertaking of the company; or
 - (ii) the person's other services in connection with the management of the affairs of the company or a subsidiary undertaking of the company;

retirement benefits (退休利益), in relation to a person—

- (a) includes—
 - (i) any lump sum, allowance, gratuity, periodical payment or other like benefit, any other property, or any other benefit whether in cash or otherwise—
 - (A) given or to be given on or after the retirement or death of the person (including any annuity or other benefit paid or payable under any insurance policy on or after the retirement or death of the person);
 - (B) given or to be given in anticipation of the retirement of the person; or
 - (C) given or to be given in connection with the person's service rendered before the retirement or death of the person; and
 - (ii) any benefit paid or to be paid under the Mandatory Provident Fund Schemes Ordinance (Cap. 485); but
- (b) excludes—
 - (i) any benefit which has been or is to be afforded solely because of the person's personal injury (including any incapacity or death caused by such injury) by accident arising out of and in the course of employment; and

- (ii) any retirement gift of a value (or, in the case of a retirement gift made otherwise than in cash, an estimated money value) not exceeding \$50,000;

retirement benefits scheme (退休利益計劃) means a scheme for the provision of retirement benefits, and includes—

- (a) a recognized occupational retirement scheme as defined by section 2 of the Inland Revenue Ordinance (Cap. 112);
- (b) a mandatory provident fund scheme as defined by that section; and
- (c) a retirement insurance scheme;

retirement insurance scheme (退休保險計劃)—

- (a) means a scheme for the provision of insurance coverage—
 - (i) on or after the retirement or death of a person; or
 - (ii) in connection with a person's service rendered before the retirement or death of the person; but
- (b) excludes a scheme for the provision of insurance coverage for a person's personal injury (including any incapacity or death caused by such injury) by accident arising out of and in the course of employment.

(2) In this Part, a reference to a director—

- (a) for the purposes of section 5, includes a former director; and
- (b) for the purposes of section 6, includes a former director and shadow director.

(3) For the purposes of subsection (2)(b), a reference to a shadow director is to be construed subject to section 516(5) of the Ordinance.

(4) In this Part, a reference to a subsidiary undertaking of a company—

- (a) in relation to a person who, while a director of the company, is or was also a director of any other undertaking by virtue of the company's nomination (whether direct or indirect), includes that other undertaking, whether or not that other undertaking is or was in fact a subsidiary undertaking of the company;
- (b) for the purposes of section 7, is a reference to a subsidiary undertaking of the company at the time the qualifying services of the person concerned are or were rendered; and
- (c) in paragraph (b) of the definition of **qualifying services** in subsection (1)—
 - (i) for the purposes of sections 4, 5 and 7, is a reference to a subsidiary undertaking of the company at the time the qualifying services of the person concerned are or were rendered; and
 - (ii) for the purposes of section 6, is a reference to a subsidiary undertaking of the company immediately before the loss of office as a director of the company.

15. **Information about loans, quasi-loans and other dealings in favour of directors, controlled bodies corporate and connected entities**

- (1) The information about loans, quasi-loans and other dealings in favour of directors, their controlled bodies corporate and their connected entities

prescribed by subsection (2) must be contained in the notes to the financial statements of a company for a financial year.

- (2) The information referred to in subsection (1) is—
 - (a) the particulars of any transaction entered into by the company for a person who at any time during the financial year was—
 - (i) a director of the company or of its holding company;
 - (ii) a controlled body corporate of such a director; or
 - (iii) in the case of a specified company, a connected entity of such a director; and
 - (b) the particulars of any transaction entered into by a subsidiary undertaking of the company for a person who at any time during the financial year was a director of the company.
- (3) The particulars referred to in subsection (2)(a) and (b) are—
 - (a) the name of the person for whom the transaction was entered into, and—
 - (i) if the person was a controlled body corporate of a director of the company or of its holding company, the name of that director; or
 - (ii) if the person was a connected entity of a director of the company or of its holding company, the name of that director and the nature of the connection;
 - (b) if the transaction consists of a loan, quasi-loan or credit transaction—
 - (i) the principal terms of the loan, quasi-loan or credit transaction, including the amount payable under it (whether in a lump sum or by instalments, or by way of periodical payments or otherwise), the rate of interest (if any) and the security for it (if any);
 - (ii) the amount outstanding, ~~in respect of the principal and interest or otherwise,~~ on the loan, quasi-loan or credit transaction, in respect of the principal and interest or otherwise, both at the beginning and at the end of the financial year;
 - (iii) the amount so outstanding at the end of the financial year;
 - (iv) (if, at different times during the financial year, the amounts so outstanding are different) the greatest of those amounts;
 - (v) the amount (if any) that, having fallen due, has not been paid; and
 - (vi) the amount of any provision made in respect of any failure or anticipated failure to repay the whole or part of the loan, quasi-loan or credit transaction, or to pay the whole or part of any interest or otherwise on the loan, quasi-loan or credit transaction; and
 - (c) if the transaction consists of a guarantee or security in connection with a loan, quasi-loan or credit transaction—
 - (i) the amount representing the maximum liability that may be incurred under the guarantee or security, ~~both at the beginning and at the end of the financial year;~~
 - (ii) the amount representing the maximum liability that may be so incurred at the end of the financial year;
 - (iii) (if, at different times during the financial year, the amounts representing the maximum liability that may be so incurred are different) the greatest of those amounts; and

- (iv~~iii~~) the amount paid and the amount of any liability incurred during the financial year for the purpose of fulfilling the guarantee or discharging the security, including any loss incurred by reason of the enforcement of the guarantee or security.

16. Provisions for statement in lieu of information prescribed by section 15

- (1) If the requirement prescribed by subsection (2) is complied with, the financial statements for a financial year are not required, by virtue of section 383(3) of the Ordinance, to contain—
 - (a) the particulars specified in section 15(3)(b) in respect of a quasi-loan or credit transaction; and
 - (b) the particulars specified in section 15(3)(c) in respect of a guarantee or security in connection with a quasi-loan or credit transaction.
- (2) The requirement referred to in subsection (1) is that the notes to the financial statements for the financial year must contain a statement showing, in respect of each person named in the notes under section 15(3)(a), the following information—
 - (a) in relation to all ~~the~~ quasi-loans made to, and all credit transactions entered into, for each such person—
 - (i) the aggregate of the amounts outstanding referred to in section 15(3)(b)(ii) on those quasi-loans and credit transactions;
 - (ii) the aggregate of the amounts outstanding referred to in section 15(3)(b)(iii) on those quasi-loans and credit transactions;
 - (iii~~ii~~) the aggregate of the amounts referred to in section 15(3)(b)(v~~iv~~) in respect of those quasi-loans and credit transactions; and
 - (iv~~iii~~) the aggregate of the amounts of provision referred to in section 15(3)(b)(v~~iv~~) in respect of those quasi-loans and credit transactions; and
 - (b) in relation to all ~~the~~ guarantees and security in connection with all ~~every~~ quasi-loans made to, and all ~~or every~~ credit transactions entered into, for each such person—
 - (i) the aggregate of the amounts representing the ~~the~~ maximum liability referred to in section 15(3)(c)(i) that may be incurred under those guarantees and security; ~~and~~
 - (ii) the aggregate of the amounts representing the maximum liability referred to in section 15(3)(c)(ii) that may be incurred under those guarantees and security; and
 - (iii~~ii~~) the aggregate of the amounts referred to in section 15(3)(c)(iv~~iii~~) in respect of those guarantees and security.

17. Provisions applicable to company that is or where its subsidiary undertaking is authorized financial institution

- (1) If a company is an authorized financial institution, the notes to the financial statements of the company for a financial year must contain a statement showing the following information—

- (a) the aggregate of the following amounts at the end of the financial year—
 - (i) the amount outstanding, in respect of the principal and interest or otherwise, on all loans and quasi-loans made by the company to, and all credit transactions entered into by the company as a creditor for, persons each of whom was, at any time during the financial year—
 - (A) a director of the company or of its holding company;
 - (B) a controlled body corporate of such a director; or
 - (C) in the case of a specified company, a connected entity of such a director; and
 - (ii) the amount ~~representing the~~ of maximum liability that may be incurred under all guarantees given, and all security provided, by the company in connection with ~~all~~ loans ~~and~~ quasi-loans made to, ~~and~~ ~~all~~ credit transactions entered into for, ~~any~~ of the persons referred to in subparagraph (i); and
 - (b) (if, at different times during the financial year, the aggregates of the amounts referred to in paragraph (a)(i) and (ii) are different) the greatest of those aggregates.
- (2) If any subsidiary undertaking of a company is an authorized financial institution, the notes to the financial statements of the company for a financial year must contain a statement showing the following information—
- (a) the aggregate of the following amounts at the end of the financial year—
 - (i) the amount outstanding, in respect of the principal and interest or otherwise, on all loans and quasi-loans made by the institution to, and all credit transactions entered into by the institution as a creditor for, persons each of whom was, at any time during the financial year, a director of the company; and
 - (ii) the amount ~~representing the~~ of maximum liability that may be incurred under all guarantees given, and all security provided, by the institution in connection with ~~all~~ loans ~~and~~ quasi-loans made to, ~~and~~ ~~all~~ credit transactions entered into for, ~~any~~ of the persons referred to in subparagraph (i); and
 - (b) (if, at different times during the financial year, the aggregates of the amounts referred to in paragraph (a)(i) and (ii) are different) the greatest of those aggregates.
- (3) In the case of a transaction entered into for any person by a company that is, or a company's subsidiary undertaking that is, an authorized financial institution, the information prescribed by section 15 is not required, by virtue of section 383(3) of the Ordinance, to be contained in the financial statements of the company for a financial year if—
- (a) the value of the transaction is not greater, and the terms of it are not more favourable, than what is reasonable to expect the institution to have offered to a person of the same financial standing but unconnected with the institution; or
 - (b) in any other case, the aggregate of the following amounts does not exceed \$10,000,000 or an amount equivalent to 10% of the paid up capital and reserves of the institution, whichever is the lower—
 - (i) the amount outstanding, in respect of the principal and interest or otherwise, during the financial year on all loans and quasi-loans (except those falling within paragraph (a)) made by the institution to,

and all credit transactions (except those falling within that paragraph) entered into by the institution as a creditor for, that person or (if, at different times during the financial year, the amounts so outstanding are different) the greatest of those amounts; and

- (ii) the amount representing the~~of~~ maximum liability that may be incurred during the financial year under all guarantees (except those falling within paragraph (a)) given, and all security (except those falling within that paragraph) provided, by the institution in connection with ~~all~~any loans ~~and or~~ quasi-loans made to, ~~and or~~ all~~any~~ credit transactions entered into for, that person or (if, at different times during the financial year, the amounts representing the~~of~~ maximum liability that may be so incurred are different) the greatest of those amounts.

18. Exemption for employee

This Part does not apply to a loan or quasi-loan made by a company to its employee or its subsidiary undertaking to an employee of the company or by the subsidiary undertaking of the company to an employee of the subsidiary undertaking, or a credit transaction entered into by a company ~~or its subsidiary undertaking~~ as a creditor for such an employee or by a subsidiary undertaking of the company as a creditor for an employee of the subsidiary undertaking, if—

- (a) the value of the loan, quasi-loan or credit transaction does not exceed \$100,000;
- (b) the loan or quasi-loan is certified by the directors of the company or the subsidiary undertaking to have been made, or the credit transaction is so certified to have been entered into, in accordance with the relevant practice adopted or about to be adopted by the company or the subsidiary undertaking;
- (c) the loan or quasi-loan is not made, or the credit transaction is not entered into, by the company under a guarantee given, or security provided, by a subsidiary undertaking of the company; and
- (d) the loan or quasi-loan is not made, or the credit transaction is not entered into, by the subsidiary undertaking under a guarantee given, or security provided, by the company or any other subsidiary undertaking of the company.