

LEGISLATIVE COUNCIL BRIEF

Bankruptcy Ordinance (Cap. 6)
Companies Ordinance (Cap. 32)

Bankruptcy (Amendment) Rules 2013
Bankruptcy (Fees and Percentages) (Amendment) Order 2013
Companies (Fees and Percentages) (Amendment) Order 2013
Companies (Winding-Up) (Amendment) Rules 2013

INTRODUCTION

The Chief Justice (“CJ”) has made the following rules and orders –

- (a) Bankruptcy (Amendment) Rules 2013 pursuant to section 113 of the Bankruptcy Ordinance (“BO”) (Cap. 6) (**Annex A**);
- (b) Bankruptcy (Fees and Percentages) (Amendment) Order 2013 pursuant to section 114(1) of BO (**Annex B**);
- (c) Companies (Fees and Percentages) (Amendment) Order 2013 pursuant to sections 296(3) and 296(5) of the Companies Ordinance (“CO”) (Cap. 32) (**Annex C**); and
- (d) Companies (Winding-Up) (Amendment) Rules 2013 pursuant to section 296(1) of CO (**Annex D**).

These Amendment Rules and Amendment Orders are subject to the approval of the Legislative Council (“LegCo”).

JUSTIFICATIONS

2. The Official Receiver’s Office (“ORO”) has recently conducted a review of its statutory fees, charges and deposits. After taking into account their existing levels and ORO’s actual operating revenue and costs, it is projected that ORO will achieve cost recovery rate at 111% in

the financial year 2013/14. Therefore, we propose to revise ORO's fees, charges and deposits, with details as follows —

(a) Reducing the fixed fees and statutory “minimum fees” charged by ORO for bankruptcy and winding-up cases

ORO's statutory fees, charges and deposits were last revised in 1997, with a general increase of statutory fees and charges mostly in line with inflation (“the last fee revision exercise”) to prevent further deterioration of the cost recovery rate¹. In the last fee revision exercise, 13 fees applicable to bankruptcy and 13 fees relating to winding-up were increased. These include the statutory “minimum fees” charged by ORO where the Official Receiver (“OR”) acts as trustee in bankruptcy or liquidator, which were increased from \$11,250 to \$12,150 in line with inflation at that time. In the light of ORO's latest cost recovery projection, we propose to revert the levels of these fees back to the levels prior to the last fee revision exercise. As a result, the statutory minimum fees will be reduced from \$12,150 to \$11,250, and other fixed fees will also be adjusted downwards accordingly to the levels prior to the last fee revision exercise.

(b) Reducing the statutory deposits charged by ORO for bankruptcy and court winding-up cases

At present, petitioners for bankruptcy and court winding-up cases will need to make a deposit with ORO upon presentation of the petition. The deposit is \$8,650 for debtor-petition bankruptcy cases, and \$12,150 for creditor-petition bankruptcy and all court winding-up cases. The deposits are used to set off the statutory “minimum fees” as described in paragraph 2(a).

The amounts of the deposits were increased in the last fee revision exercise along with the adjustments to the statutory

¹ Before the last fee revision exercise in 1997, ORO's cost recovery rate for 1996-97 was 56%.

minimum fees and the fixed fees. In line with the proposed reduction in the statutory “minimum fees” and the fixed fees, we propose to reduce the deposits back to their levels prior to the last fee revision exercise, i.e. from \$8,650 to \$8,000 for debtor-petition bankruptcy cases and from \$12,150 to \$11,250 for creditor-petition bankruptcy and all court winding-up cases.

(c) Replacing the “realisation fee” by a fixed fee

At present, a “realisation fee” is levied by ORO at a rate of 10% on –

- (i) payments made by OR into the Bankruptcy Account when acting as the interim trustee or trustee in bankruptcy cases; or
- (ii) the amount of assets realised by OR when acting as the liquidator in court winding-up cases.

When OR acts as the interim trustee or trustee in bankruptcy cases or as the liquidator in court winding-up cases, ORO’s efforts in realising the assets mainly involve transferring money into the bank accounts of the estates of the bankrupts or companies being wound up. As such, we propose to replace the present mechanism for charging the “realisation fee” by a fixed fee on each payment made into the Bankruptcy Account (for a bankruptcy case) and the Companies Liquidation Account² (for a court winding-up case). We propose that the fixed fee should be set at \$170 on a full-cost recovery basis.

² Under section 202 of CO, all assets realised by OR when acting as the liquidator in court winding-up cases are required to be paid into the Companies Liquidation Account.

THE AMENDMENT RULES AND AMENDMENT ORDERS

3. The Bankruptcy (Amendment) Rules 2013 give effect to the proposal to reduce the amount of deposit payable by a petitioner to OR on the presentation of a petition of a bankruptcy case as set out in paragraph 2(b).

4. The Bankruptcy (Fees and Percentages) (Amendment) Order 2013 gives effect to the proposal to reduce the fixed fees, statutory “minimum fees”, and replace the “realisation fee” of bankruptcy cases with a fixed fee as set out in paragraphs 2(a) and 2(c) respectively.

5. The Companies (Fees and Percentages) (Amendment) Order 2013 gives effect to the proposal to reduce the fixed fees, statutory “minimum fees”, and replace the “realisation fee” of winding-up cases with a fixed fee as set out in paragraphs 2(a) and 2(c) respectively.

6. The Companies (Winding-Up) (Amendment) Rules 2013 give effect to the proposal to reduce the amount of deposit payable by a petitioner to OR on the presentation of a petition of a winding-up case, and reduce a fixed fee in relation to the winding-up proceedings of companies as set out in paragraphs 2(b) and 2(a) respectively.

LEGISLATIVE TIMETABLE

7. The Amendment Rules and Amendment Orders are subject to approval under the positive vetting procedures of LegCo. Subject to the views of LegCo, the Secretary for Financial Services and the Treasury will move a resolution for its approval at the LegCo sitting of 10 July 2013. The Amendment Rules and Amendment Orders will come into operation upon the resolution of LegCo.

IMPLICATIONS OF THE PROPOSAL

8. The Amendment Rules and Amendment Orders will have financial implications. Based on our estimates, if the proposed fee adjustments are implemented, it is estimated that the annual revenue

would be reduced by about \$17.3 million, comprising \$11.1 million of realisation fees and \$6.2 million of the other fees. If the proposed fee revision comes into effect in July 2013, ORO's projected cost recovery rate for 2013-14 will be around 100%. We will monitor ORO's cost recovery rate after implementation of the fee proposals and review the need to revise the levels of its fees as appropriate in future.

9. The Amendment Rules and Amendment Orders do not have civil service, economic, productivity, environmental, sustainability or family implications. It is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the binding effect of the BO and CO.

PUBLIC CONSULTATION

10. ORO consulted the ORO Services Advisory Committee, which comprises representatives from the banking, accounting and legal sectors as well as the insolvency practitioners, on the above proposals in September 2012 and March 2013. According to submissions received from the Hong Kong Institute of Certified Public Accountants and Hong Kong Association of Banks ("HKAB"), they have expressed concerns that reducing the amount of deposit payable by debtors for applying for bankruptcy may have the effect of encouraging people to pursue the bankruptcy route. Some market participants have suggested that the current level of statutory deposit for a debtor to petition for bankruptcy does not appear to be too high and there is no indication that it is discouraging people from recourse to bankruptcy proceedings.

11. In this regard, Members may wish to note that the proposed adjustment to the deposit would only represent a small amount when compared with the overall debt incurred by a bankrupt, and hence should have little bearing on a debtor's decision on whether or not to pursue bankruptcy action. In addition, with the revision of the various statutory fees payable to ORO as proposed in paragraph 2(a), it would be reasonable to introduce corresponding changes to the levels of the deposits such that both the statutory fees and the deposits will be reduced to their original levels before the last fee revision exercise.

12. HKAB has further suggested that the Administration should consider the revision of other statutory fees. In this regard, we have explained that the present fee proposals seek to revert the relevant fees, charges and deposits back to their levels before the last fee revision exercise, and by implementing these proposals, ORO would only just be able to achieve the target of full cost recovery. Therefore, there is no plan to reduce other fees in this exercise.

13. We briefed the LegCo Panel on Financial Affairs (“FA Panel”) on 3 May 2013 on our proposal to amend the subsidiary legislation. The idea of whether the Administration could consider possible measures to assist debtors who could not afford the deposit of \$8,650 for applying for bankruptcy (paragraph 2(b) refers) was discussed. We advised the FA Panel that it is very difficult to design a fair reduction/waiver mechanism, noting that most if not all persons who petition for bankruptcy may claim affordability problem, and that the United Kingdom and Singapore adopted similar arrangements as Hong Kong and neither of these two jurisdictions provide for a separate statutory mechanism to charge certain categories of persons a lower deposit or to waive the deposit for such persons. Therefore, we do not intend to consider a separate statutory mechanism for reducing or waiving the deposit in self-petitioned bankruptcy cases.

PUBLICITY

14. A spokesman will be arranged to handle media enquiries.

BACKGROUND

15. At present, ORO levies various statutory fees, charges and deposits for administering bankruptcy and winding-up cases. It is Government policy that fees charged by the Government should in general be set at levels adequate to recover the full cost of providing the services. This ensures that the costs for providing the services do not fall on the general tax-payers.

16. It has been ORO's established practice to levy fees and charges for the provision of insolvency services without reference to the actual time spent in any particular case. In general, the vast majority of insolvency cases administered by ORO are non-remunerative cases³, which means there are no or inadequate assets to cover the costs incurred by ORO in administering these cases. On the other hand, the fees and charges collected in remunerative insolvency cases are higher than the actual costs incurred by ORO to administer these cases. This fee charging approach is intended to help defray ORO's costs of administering the vast majority of non-remunerative cases. In 1987, the LegCo passed legislative amendments to both BO and CO to expressly provide for ORO to levy fees for the recovery of costs generally without reference to the administrative or other costs incurred in any particular case⁴.

ENQUIRIES

17. Any enquiry on this LegCo Brief should be addressed to Mr Denny Ho, Assistant Secretary for Financial Services and the Treasury (Financial Services) at 2527-3102.

Financial Services and the Treasury Bureau 19 June 2013

³ In 2011-12, 98% of new insolvency cases administered were non-remunerative cases. The percentage of non-remunerative cases has remained more or less the same for the past 5 years.

⁴ Section 114(3) and (5) of the BO states that "The amount of any fees prescribed under this section shall not be limited by reference to the amount of administrative or other costs incurred or likely to be incurred by the OR in proceedings in bankruptcy or in any particular bankruptcy" and "No fee prescribed under this section shall be invalid by reason only of the amount of that fee".

Section 296(4) and (7) of the CO also provides that "The amount of any fees prescribed under this section shall not be limited by reference to the amount of administrative or other costs incurred or likely to be incurred by the OR in the winding up of companies or of any particular company" and "No fee prescribed under this section shall be invalid by reason only of the amount of that fee".

Bankruptcy (Amendment) Rules 2013

(Made by the Chief Justice under section 113 of the Bankruptcy Ordinance (Cap. 6) with the approval of the Legislative Council)

1. **Bankruptcy Rules amended**

The Bankruptcy Rules (Cap. 6 sub. leg. A) are amended as set out in rule 2.

2. **Rule 52 amended (deposit by petitioner)**

(1) Rule 52(1)(a)—

Repeal

“\$8,650”

Substitute

“\$8,000”.

(2) Rule 52(1)(b)—

Repeal

“\$12,150”

Substitute

“\$11,250”.

Chief Justice

18 June 2013

Explanatory Note

These Rules amend the Bankruptcy Rules (Cap. 6 sub. leg. A) to reduce the deposit payable by a petitioner to the Official Receiver on the presentation of a petition.

**Bankruptcy (Fees and Percentages) (Amendment)
Order 2013**

(Made by the Chief Justice under section 114 of the Bankruptcy Ordinance (Cap. 6) with the approval of the Legislative Council)

1. **Bankruptcy (Fees and Percentages) Order amended**
The Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. leg. C) is amended as set out in section 2.
2. **Schedule amended**
 - (1) The Schedule, Table A, item 4—
Repeal
“40.00”
Substitute
“35.00”.
 - (2) The Schedule, Table A, item 6(b)—
Repeal
“35.00”
Substitute
“28.00”.
 - (3) The Schedule, Table A, item 10—
Repeal
“85.00”
Substitute
“80.00”.
 - (4) The Schedule, Table A, item 11(b)—

- (5) The Schedule, Table A, item 16—
Repeal
“\$45,000”
Substitute
“\$37,500”.
- (6) The Schedule, Table A, item 17—
Repeal
“85.00”
Substitute
“80.00”.
- (7) The Schedule, Table A, item 18—
Repeal
“205.00”
Substitute
“190.00”.
- (8) The Schedule, Table B, paragraph 1—
 - (a) **Repeal**
“payments made by the Official Receiver into the Official Receiver in Bankruptcy Account, whether acting as interim trustee or trustee to administer a debtor’s or bankrupt’s property, and on”;
 - (b) **Repeal**
“or bankrupt”.

(9) The Schedule, Table B, after paragraph 1—

Add

“1A. For the Official Receiver acting as interim trustee, or trustee to administer a debtor’s or bankrupt’s property, on every payment made into the Official Receiver in Bankruptcy Account \$170

The payment referred to in this paragraph does not include any of the following—

- (a) sums that are payable to secured creditors in respect of their securities;
- (b) money received in carrying on the business of the debtor or bankrupt.”.

(10) The Schedule, Table B, paragraph 4—

Repeal

“\$1,100” (wherever appearing)

Substitute

“\$1,000”.

(11) The Schedule, Table B, paragraph 5(a)—

Repeal

“\$670”

Substitute

“\$620”.

(12) The Schedule, Table B, paragraph 5(b)—

Repeal

“\$670”

Substitute

“\$620”.

(13) The Schedule, Table B, paragraph 6—

Repeal

“\$1,560”

Substitute

“\$1,440”.

(14) The Schedule, Table B, paragraph 11—

Repeal

“\$12,150”

Substitute

“\$11,250”.



Chief Justice

18 June 2013

Explanatory Note

This Order amends the Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. leg. C) to revise certain fees to be charged for bankruptcy proceedings under the Bankruptcy Ordinance (Cap. 6).

Companies (Fees and Percentages) (Amendment) Order 2013

(Made by the Chief Justice under section 296 of the Companies Ordinance (Cap. 32) with the approval of the Legislative Council)

1. **Companies (Fees and Percentages) Order amended**
The Companies (Fees and Percentages) Order (Cap. 32 sub. leg. C) is amended as set out in section 2.
2. **Schedule 3 amended**
 - (1) Schedule 3, Table A, item 1A—
Repeal
“12.00”
Substitute
“11.00”.
 - (2) Schedule 3, Table A, item 3—
Repeal
“390.00”
Substitute
“360.00”.
 - (3) Schedule 3, Table A, item 4—
Repeal
“390.00”
Substitute
“360.00”.
 - (4) Schedule 3, Table A, item 4A—

Repeal

“390.00”

Substitute

“360.00”.

- (5) Schedule 3, Table A, item 5—

Repeal

“60.00”

Substitute

“55.00”.

- (6) Schedule 3, Table A, item 6(b)—

Repeal

“\$45,000”

Substitute

“\$37,500”.

- (7) Schedule 3, Table A, item 7—

Repeal

“355.00”

Substitute

“330.00”.

- (8) Schedule 3, Table A, item 8—

Repeal

“85.00”

Substitute

“80.00”.

- (9) Schedule 3, Table A, item 10—

Repeal

“40.00”

Substitute

“35.00”.

- (10) Schedule 3, Table B, number IV(1)—

Repeal

“\$670”

Substitute

“\$620”.

- (11) Schedule 3, Table B, number IV—

Repeal paragraph (2)

Substitute

“(2) On every payment made into the Companies Liquidation Account under section 202 \$170

The payment referred to in this paragraph does not include any of the following—

(a) where the Official Receiver collects, calls or realizes property for debenture holders—the total assets, including the produce of calls on contributories, realized or brought to credit by the Official Receiver;

(b) money received in carrying on the business of the company.”.

- (12) Schedule 3, Table B, number V—

Repeal

everything after “debenture holders”

Substitute

“, the following fees are to be paid out of the proceeds of the calls or property—

(1) On the total assets, including the produce of calls on contributories, realized or brought to credit by the Official Receiver, after deducting the amount spent out of the money received in carrying on the business of the company, 10%.

(2) The same fee as under number IV(3) of this Table.”.

- (13) Schedule 3, Table B, number VI—

Repeal

everything after “debenture holders”

Substitute

“, the following fee is to be paid out of the proceeds of the property—

On the total assets, including the produce of calls on contributories, realized or brought to credit by the Official Receiver, after deducting the amount spent out of the money received in carrying on the business of the company, 10%.”.

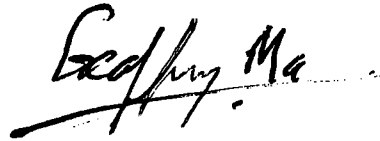
- (14) Schedule 3, Table B, number IX—

Repeal

“\$12,150”

Substitute

“\$11,250”.



Chief Justice

18 June 2013

Explanatory Note

This Order amends the Companies (Fees and Percentages) Order (Cap. 32 sub. leg. C) to revise certain fees and percentages prescribed for winding-up proceedings of companies.

Companies (Winding-up) (Amendment) Rules 2013

(Made by the Chief Justice under section 296 of the Companies Ordinance
(Cap. 32) with the approval of the Legislative Council)

1. **Companies (Winding-up) Rules amended**

The Companies (Winding-up) Rules (Cap. 32 sub. leg. H) are amended as set out in rules 2 and 3.

2. **Rule 22A amended (deposit by petitioner)**

Rule 22A(1)—

Repeal

“\$12,150”

Substitute

“\$11,250”.

3. **Rule 117 amended (costs of calling meeting)**

Rule 117—

Repeal

“\$1,560”

Substitute

“\$1,440”.



Chief Justice

18 June 2013

Explanatory Note

These Rules amend the Companies (Winding-up) Rules (Cap. 32 sub. leg. H) to reduce—

- (a) the deposit payable by a petitioner before presenting a petition for covering the fees and expenses to be incurred by the Official Receiver; and
- (b) the costs of summoning a meeting of creditors or contributories in winding-up proceedings of companies.