Part 2

REGISTRAR OF COMPANIES AND COMPANIES REGISTER

Overview

Part 2 of this (new) Companies Ordinance (Cap.622) deals with the functions and powers of the Registrar of Companies, which is predominately administrative, as well as a protective agency in relation to the registration of documents.

The powers given to the Registrar of the Companies under this Part are more than those previously conferred under the predecessor Companies Ordinance (CO). Examples of the new powers given to him under the Companies Ordinances include the powers in: (i) dealing with inconsistencies of the Companies Register (Section 39); (ii) updating Companies Register (Section 40); (iii) rectifying clerical errors (Section 41); and (iv) making annotations to the Register (Section 44).

In summary, Part 2 of this (new) Ordinance contains those initiatives aimed at improving regulation, facilitating business, and modernising the law, including:

(i) the clarification of the Registrar's powers in relation to the registration of documents;

(ii) clarifying and enhancing the Registrar's powers in relation to the keeping of the Companies Register itself;
(iii) express instructions and directions for the removal of information on the Companies Register; and
(iv) withholding residential addresses of directors and company secretaries and full identification numbers of individuals from public inspection (which has not yet been implemented as stated and explored below).

Division 7 of Part 2 of the (new) Companies Ordinance (Cap.622) provides restrictions on the disclosure of residential addresses and full identification numbers of directors and full identification numbers of company secretaries to the public. This has been one of the most controversial parts of the new Cap.622. See commentary at the start of Division 7 of Part 2 for further information in this regards.

Under this (new) Companies Ordinance details of the residential addresses and full identification or passport numbers of directors or other officers ("protected information") are not made available at the Register to the public. Only correspondence addresses and partial identity numbers are available. Note that there is still no automatic protection for such information already registered on the Register when this Companies Ordinance came into operation.

A current or former director, reserve director or company secretary of a company may however, under section 49 of this (new) Companies Ordinance, apply to the Registrar and pay a fee to have a correspondence address substituted for their residential address and any person can apply to have part of their identity number masked ("withheld information").

This new regime of mechanism for protection of privacy has attracted a lot of debates and arguments over protection of privacy, freedom of press, investigative journalism and hindrance of civil process (such as service of documents). The Privacy Commissioner had also expressed concerns in this regard.

Back in late March 2013, the Administration announced that they were shelving those controversial provisions. In order for the new arrangement to be operated, the Companies (Residential Addresses and Identification Numbers) Regulation, which was originally scheduled to be tabled at Legislative Council in late May 2013 under the negative vetting procedures, were to be made to specify the types of persons who may apply for access to the full personal information and the relevant procedures. In light of these privacy concerns, the Financial Services and the Treasury Bureau stated that it was not making the Companies (Residential Addresses and Identification

Numbers) Regulation at this stage, and as such, were not including these relevant provisions in the commencement notice to be made in the fourth quarter of 2013 for commencing this (new) Companies Ordinance.[1]

However, the new filing requirement for company secretaries' addresses will continue to be implemented, even though company secretaries will not be required to file residential addresses with the Companies Registry upon the commencement of the Companies Ordinance. The disclosure of identification numbers of directors and company secretaries as well as other individuals (*e.g.* liquidators) are dealt with in the same provisions in this (new) Companies Ordinance. Pending further deliberations on the new arrangement with regard to directors' personal information, the full identification numbers of company secretaries and these other relevant individuals will continue to be made available on the Companies Register.

Part 2
Registrar of Companies and Companies Register

Division 1 Preliminary

20. Interpretation

(1) In this Part—

company (公司) includes—
(a) a non-Hong Kong company registered under section 777(1); or
(b) a company that was, at any time before the commencement date of Part 16, registered in the register kept under section 333AA of the predecessor Ordinance;

digital signature (數碼簽署) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

document (文件) includes a document in electronic form or any other form;

electronic signature (電子簽署) has the meaning given by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

in electronic form (電子形式) means in the form of an electronic record;

in hard copy form (印本形式) means in a paper form or similar form capable of being read.

[1] See New Arrangement for the Inspection of Personal Information on the Companies Register under this (new) Companies Ordinance (Cap.622) issued by Financial Services and the Treasury Bureau on 28 March 2013.

(2) In this Part, a reference to delivering a document includes sending, supplying, forwarding or producing it.

COMMENTARY

Overview

20.01 This section sets out the various definitions in Part 2 of the Companies Ordinance.

Definition of "company" under section 20(1) of this Ordinance

20.02 The definition of "company" essentially is the same as the previous definition of "company" of section 2(1) of the predecessor CO. Note that it also includes in the definition a registered non-Hong Kong company.

The definition of "digital signature" follows the previous definition of "digital signature" of section 2(1) of the predecessor CO.

The definition of "documents" under the new Ordinance is wider. It not only includes the previous definition of "document" of section 2(1) of the predecessor CO, but also covers in "documents" in electronic or any other form in the Part 2 of the Companies Ordinance.

The definitions of "electronic signature", "in electronic form" and "in hard copy form" follow the previous definition of "digital signature" of former section 168BAA(3) of the predecessor CO.

Proper delivery of a document under section 20(2) of the Ordinance

20.03 This clause re-enacts section 346(5) of the predecessor Company Ordinance in regards to the definition and what constitutes acceptable and proper delivery of a document. See also sections 346A(5) and 348(5) of the predecessor CO.

Division 2 Registrar of Companies

21. Office of Registrar

(1) The Chief Executive may appoint a person to be the Registrar of Companies.

(2) The Chief Executive may appoint other officers for the purposes of this Ordinance.

(3) For the purpose of the registration of companies under this Ordinance, an office is to be established at a place designated by the Chief Executive.

(4) The Chief Executive may direct a seal to be prepared for the authentication of documents required for or connected with the performance of the Registrar's functions.

COMMENTARY

Overview

21.01 This section provides for the Chief Executive's powers to, *inter alia*, appoint the Registrar of Companies and direct a seal to be prepared for the authentication of documents.

Equivalent provisions in the predecessor CO

21.02 This section re-enacts section 303 of the CO.

Transitional Arrangements

21.03 A person holding the office or acting in the office of the Registrar of Companies immediately before the commencement date of section 21 continues to hold or act in that office (as the case may be) as if the person were appointed under subsection 21(1) of this (new) Cap.622 (Section 2(1) of Schedule 11 of the Companies Ordinance).

The place directed or last directed by the Chief Executive to be an office for registration of companies under section 303(1) of the predecessor CO before the commencement date of section 21 is to be regarded as the place that has been designated under subsection 21(3) (Section 2(3) of Schedule 11 of the Companies Ordinance). The Registry is located at Queensway Government Offices, 66 Queensway, Admiralty, Hong Kong.

The seals to be prepared for the authentication of documents which were directed under former section 303(4) of the predecessor CO are now to be prepared in accordance with new subsection 21(4) of this (new) Cap.622 (Section 2(2) of Schedule 11 of the Companies Ordinance).

22. Registrar's functions

The Registrar's functions are those conferred on the Registrar by or under this Ordinance or any other Ordinance.

Part 5

TRANSACTIONS IN RELATION TO SHARE CAPITAL

Brief Overview of Part 5

Part 5 of the Companies Ordinance contains initiatives that aim at facilitating business operation. It principally deals with the following transactions affecting share capital:

(i) Reduction of share capital (Sections 209 to 232);
(ii) Share redemptions and buy-backs (Sections 233 to 273); and
(iii) Financial assistance for acquisition of own shares (Sections 274 to 289).

Upon the commencement of this Companies Ordinance on 3 March 2014, apart from passing a special resolution for reduction of share capital to be confirmed by a Court order under sections 226 to 232, a company may now reduce its capital by special resolution supported by a solvency statement signed by all directors without confirmation by Court order (*i.e.* the 'alternative court-free procedure'). Members and creditors in turn also have the right to apply to the Court for cancellation of the special resolution (Sections 215 to 225).

A new uniform solvency test based on cash-flow (Sections 204 to 208) is adopted for the different types of transaction under this Part 5.

The restriction of financial assistance has been relaxed for both listed and unlisted companies, for example, for the purposes of employee share schemes.

Share redemption and buy-backs is now open to listed companies (Sections 257 to 266), *except* that listed companies must not make a payment out of capital in respect of a buy-back of its own shares on the stock exchange (Section 257(3) of the Ordinance).

The former regime of financial assistance has been reinstated in this Ordinance (as contained in Sections 275 to 289 of the Ordinance) *except* that with a solvency statement made by the directors, who approved the grant of assistance, a company may give financial assistance in the following circumstances:

(i) the assistance does not exceed 5% of the paid up share capital and reserves of the company (Section 283);
(ii) all members have approved the assistance by written resolution (Section 284); or
(iii) the giving of assistance is approved by ordinary resolution of members and no application is made to the Court by members holding at least 5% of the total voting rights or, if made, the Court confirms the giving of assistance (Sections 285 to 289).

PART 5
TRANSACTIONS IN RELATION TO SHARE CAPITAL

Division 1 Preliminary

203. Interpretation

(1) In this Part—

Commission (監察機關) means—
(a) subject to paragraphs (b) and (c), the Securities and Futures Commission referred to in Section 3(1) of the Securities and Futures Ordinance (Cap.571);
(b) if any relevant transfer order made under Section 25 of that Ordinance is in force, the recognized exchange company concerned or both the Securities and Futures Commission and the recognized exchange company concerned, in accordance with the provisions of that order; or
(c) if any relevant transfer order made under Section 68 of that Ordinance is in force, the recognized exchange controller concerned or both the Securities and Futures Commission and the recognized exchange controller concerned, in accordance with the provisions of that order;

contingent buy-back contract (待確定回購合約) means a contract entered into by a company relating to any of its shares—
(a) that is not a contract to buy back those shares; but
(b) under which the company may (subject to any conditions) become entitled or obliged to buy back those shares;

distributable profits (可分派利潤), in relation to the making of a payment by a company, means those profits out of which the company could lawfully make a distribution equal in value to the payment;

recognized exchange controller (認可控制人) has the meaning given by Section 1 of Part 1 of Schedule 1 to the Securities and Futures Ordinance (Cap.571);

specified Chinese language newspaper (指明中文報章) means a Chinese language newspaper that is specified under subsection (2);

specified English language newspaper (指明英文報章) means an English language newspaper that is specified under subsection (2).

(2) The Chief Secretary for Administration may specify Chinese language newspapers and English language newspapers for the purposes of this Part and must publish a list of the specified newspapers in the Gazette.

COMMENTARY

Overview 203.01

This section sets out the meaning of certain terms used in Part 5 of the Companies Ordinance.

Note that:

(i) The definitions of "Commission" and "recognized exchange controller" set out in section 2(1) of the predecessor CO are reinstated here;
(ii) The definition of "contingent purchase contract" in section 49E(1) of the predecessor CO is adopted in the definition of "contingent buy-back contract";
(iii) The definition of "distributable profits" is extracted from section 49S(1) of the predecessor CO; and
(iv) The definitions of "specified Chinese language newspaper" and "specified English language newspaper" are extracted from section 71A(3)(a) of the predecessor CO.

Subsection 203(2) of this Ordinance empowers the Chief Secretary for Administration to specify a list of Chinese language newspapers and English language newspapers for the purposes of Part 5 in the Gazette.

Equivalent provisions in the predecessor CO

203.02 This provision reinstates sections 2(1), 49E(1), 49S(1), and 71A(3)(a) of the predecessor CO.

Transitional Arrangements

203.03 Chinese language newspapers and English language newspapers specified in the list of newspapers last published under section 71A(3)(a) of the predecessor CO will be treated as the "specified Chinese language newspaper" or as a "specified English language newspaper" (as the case may be) for the purposes of Part 5 of the Companies Ordinance until the Chief Secretary for Administration publishes a list in the Gazette under subsection 203(2) of this Ordinance. See also section 47 of Schedule 11 of this Ordinance.

Division 2 Solvency Test

204. Application of Division

This Division has effect for the following transactions—

(a) a reduction of share capital by special resolution supported by a solvency statement under Subdivision 3 of Division 3;

(b) a payment out of capital in respect of a share redemption or buy-back under Division 4;

(c) the giving of financial assistance by a company under Subdivision 4 of Division 5.

COMMENTARY

Overview

204.01 This new section provides that Division 2 of Part 5 of this Ordinance (on the solvency test) applies to a reduction of capital, share redemption or buy-back out of capital and the giving of financial assistance, these being, in essence, exceptions to the 'capital maintenance' doctrine, which provides that the share capital of a company cannot be returned to its shareholders, *except* upon a winding up of the company. See *Trevor v Whitworth* (1887) 12 App Cas 409.

Equivalent provisions in the predecessor CO

204.02 There is no equivalent provision in the predecessor CO.

205. Solvency test

A company satisfies the solvency test in relation to a transaction if—

(a) immediately after the transaction there will be no ground on which the company could be found to be unable to pay its debts; and

(b) either—

(i) if it is intended to commence the winding up of the company within 12 months after the date of the transaction, the company will be able to pay its debts in full within 12 months after the commencement of the winding up; or

(ii) in any other case, the company will be able to pay its debts as they become due during the period of 12 months immediately following the date of the transaction.

COMMENTARY

Overview

205.01 This new section provides a uniform solvency test to:

(i) reduction of capital;
(ii) share redemption or buy-back out of capital; and
(iii) the giving of financial assistance.

Under the predecessor CO there were three different solvency tests for the above-mentioned three types of transaction.

A company satisfies the required solvency test, if:

(i) immediately after the transaction there will be no ground for a company to be found to be unable to pay its debts; and
(ii) the company will be able to pay its debts in full within 12 months of the commencement of the winding up or the completion date of the transaction, as the case may be.

The solvency test under this section 205 is essentially a 'cash-flow' test. For discussion of the 'cash-flow' test, see the case of *Lau Siu Hung v Man Kwai Fong* [2013] 1 HKLRD 356.

Equivalent provisions in the predecessor CO

205.02 This section restates section 47F(1)(d) of the predecessor CO and also section 643 of the UK Companies Act 2006.

206. Solvency statement

(1) A solvency statement in relation to a transaction is a statement that each of the directors making it has formed the opinion that the company satisfies the solvency test in relation to the transaction.

(2) In forming an opinion for the purpose of making a solvency statement, a director must—

(a) inquire into the company's state of affairs and prospects; and

(b) take into account all the liabilities of the company (including contingent and prospective liabilities).

(3) A solvency statement—

(a) must be in the specified form;

(b) must state—

(i) the date on which it is made; and

(ii) the name of each director making it; and

(c) must be signed by each director making it.

(4) Subsection (3)(a) does not apply to a solvency statement made for the purposes of the giving of financial assistance by a company under Subdivision 4 of Division 5.

COMMENTARY

Overview

206.01 The directors are now required to prepare a solvency statement for:

(i) reduction of capital;

(ii) share redemption or buy-back out of capital; and

(iii) the giving of financial assistance.

Except for the giving of financial assistance, the solvency statement must be in the specified form (Form NSC17) (Sections 206(3)(a) and 206(4) of this Ordinance) and must be made and signed by all directors (Sections 206(3)(c) and 206(4) of this Ordinance). Although this section 206 does not expressly state how many directors should make and sign a solvency statement in the case of financial assistance, it is suggested that it must be a majority of the directors (which in reality should be those directors who are to vote/have voted in favour of the relevant board resolution approving of the giving of financial assistance).

A director must:

(i) inquire into the company's state of affairs and prospects; and

(ii) take into account all the liabilities of the company (including contingent and prospective liabilities) in forming an opinion for the making of the solvency statement.

A contingent liability is a liability which, pursuant to an existing obligation, would arise upon the occurrence of a certain event. See *Re William Hockley Ltd* [1962] 2 All ER 111. On the other hand a prospective liability is a liability that is certain to arise in the future, *e.g.* a debt that will be due at a future date. See *Stonegate Securities Ltd v Gregory* [1980] Ch 576.

For analysis of the obligation to "take into account all the liabilities of the company" see the matter of *Re a Company* [1986] BCLC 261 at 263.

Unlike under the predecessor CO, there is no requirement under the Companies Ordinance to attach an auditor's report to the solvency statement.

It is suggested that a transaction could be rendered unlawful if the solvency statement does not comply with this section 206, however see the matter *Re Hill and Tyler Ltd (in administration)* [2005] 1 BCLC 41 for the contrary to this notion.

This section 206 appears to require the directors to state that they have formed the opinion that the company satisfies the solvency test; whether it actually does so or not is irrelevant.

Equivalent provisions in the predecessor CO

206.02 This section adopts, in substance, the approach set out under sections 47F(1)(d) and 47F(2) of the predecessor CO (which provided the solvency test in respect of financial assistance by an unlisted company for the purpose of an acquisition of shares in the company or its holding company). Also note section 643 of the UK Companies Act 2006.

207. Offences regarding solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it commits an offence and is liable—

(a) on conviction on indictment to a fine of $150,000 and to imprisonment for 2 years; or

PART 10
DIRECTORS AND COMPANY SECRETARIES

Division 1 Appointment, Removal and Resignation of Directors

Subdivision 1 Requirement to have Directors

453. Public company and company limited by guarantee required to have at least 2 directors

(1) This section applies to—
(a) a public company; and
(b) a company limited by guarantee.

(2) The company must have at least 2 directors.

(3) With effect from the date of incorporation of the company, the first directors of the company are the persons named as the directors in the incorporation form delivered to the Registrar under Section 67(1).

(4) A person who is deemed to be a director of the company under Section 153(2) of the pre-amended predecessor Ordinance immediately before the commencement date of this section continues to be deemed to be a director of the company as if Section 19(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004) had not been enacted, until a notice of appointment of a director is delivered to the Registrar in accordance with Section 645(1).

(5) If a power specified in subsection (6) is exercisable by a director under the company's articles where the number of directors is reduced below the number fixed as the necessary quorum of directors, the power is exercisable also where the number of directors is reduced below the number required by subsection (2).

(6) The power specified for the purposes of subsection (5) is a power to act for the purpose of—
(a) increasing the number of directors; or
(b) calling a general meeting of the company,

but not for any other purpose.

(7) In subsection (4)—

pre-amended predecessor Ordinance (修訂前的《前身條例》) means the predecessor Ordinance that was in force immediately before it was amended by Section 19(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

COMMENTARY

453.01

Overview

This section provides that a public company[7] and a company limited by guarantee[8] must have at least 2 directors (Sections 453(1) and 453(2) of Cap.622). The persons named as directors in the incorporation form of a company will be treated as the first directors of the company (Section 453(3) of Cap.622). Subsections 453(4) and 453(7) simply restated the deemed appointment of first director from that of sections 153(6) and 153(7) of the predecessor CO.

Previously, under section 153(3) of the predecessor CO, a company and every officer of the company commits an offence when a company has less than 2 directors. However, note that this offence has not been included in this (new) Companies Ordinance.

If the number of directors fall below 2, any power of a director under the articles to increase the number of directors or to summon a general meeting may be exercised by the only director (Sections 453(5) and 453(6)). This power was confirmed by the Court in the case of *Ching Shing Trading Co Ltd v Lee Sip Hop* (unrep., Civ App No 140 of 1985, 27 November 1985).

453.02

Equivalent provisions in the predecessor CO

Subsections 453(1) and 453(2) of this (new) Cap.622 are comparable to section 153(1) of the predecessor CO. Subsection 453(3) of this Cap.622 is comparable to section 153(2) of the predecessor CO.

Subsections 453(4) and 453(7) of this Cap.622 are in essence substantially the same with that of sections 153(6) and 153(7) of the predecessor CO except these subsections were redrafted accordingly for this new law.

The power of a director to increase the number of directors or to summon a general meeting under section 153(5) of the predecessor CO can now found in subsections 453(5) and 453(6) of this (new) Ordinance.

453.03

Transitional Arrangements

Sections 153(2) or 153A(2) of the predecessor CO, as the case may be, regarding the deeming appointment of persons named in the incorporation

[7] For definition of public company, see section 12 of this (new) Companies Ordinance.
[8] For definition of company limited by guarantee, see section 9 of this (new) Companies Ordinance.

form as the first directors, continues to apply to a company formed and registered under the predecessor CO (Section 88 of Schedule 11 of this (new) Cap.622).

454. Private company required to have at least one director

(1) A private company must have at least one director.

(2) With effect from the date of incorporation of a private company, the first directors of the company are the persons named as the directors in the incorporation form delivered to the Registrar under Section 67(1).

(3) A person who is deemed to be a director of a private company under Section 153A(2) of the pre-amended predecessor Ordinance immediately before the commencement date of this section continues to be deemed to be a director of the company as if Section 20(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004) had not been enacted, until a notice of appointment of a director is delivered to the Registrar in accordance with Section 645(1).

(4) In subsection (3)—

pre-amended predecessor Ordinance (修訂前的《前身條例》) means the predecessor Ordinance that was in force immediately before it was amended by Section 20(1) of Schedule 2 to the Companies (Amendment) Ordinance 2004 (30 of 2004).

COMMENTARY

Overview

454.01 This section provides that a private company[9] must have at least one director (Section 454(1) of this Cap.622). The persons named as directors in the incorporation form of a company will be treated as the first director(s) of the company as prescribed in subsections 454(2) of this (new) Cap.622.

Subsections 453(4) and 453(7) of this Cap.622 restated the deemed appointment of a first director as allowed under sections 153(6) and 153(7) of the predecessor CO. Previously, under section 153A(3) of the predecessor CO, a company and every officer of the company commits an offence when a private company has no director. This offence *has not been included* in the new Companies Ordinance (Cap.622).

[9] For definition of private company see section 11 of this Companies Ordinance.

Equivalent provisions in the predecessor CO 454.02

Subsection 454(1) herein is comparable to section 153A(1) of the predecessor CO.

Subsection 454(2) herein is comparable to Section 153A(2) of the predecessor CO.

Subsections 454(3) and 454(4) are substantially the same as sections 153A(10) and 153(11) of the predecessor CO.

455. Nomination of reserve director of private company

(1) If a private company has only one member and that member is the sole director of the company, the company may by a resolution passed at a general meeting, despite anything in its articles, nominate a person (other than a body corporate) who has attained the age of 18 years as a reserve director of the company to act in the place of the sole director in the event of the sole director's death.

(2) The nomination of a person as a reserve director of a private company ceases to have effect if—

(a) before the death of the director in respect of whom the person was nominated—

(i) the person resigns as reserve director in accordance with Section 464; or

(ii) the company at a general meeting revokes the nomination; or

(b) the director in respect of whom the person was nominated ceases to be the sole member and sole director of the company for any reason other than the death of that director.

(3) If the nomination of a person as a reserve director of a private company ceases to have effect under subsection (2), the company must deliver a notice to the Registrar in accordance with Section 645(4).

(4) Subject to compliance with the conditions specified in subsection (5), in the event of the death of the director in respect of whom the reserve director is nominated, the reserve director is to be regarded as a director of the company for all purposes until—

(a) a person is appointed as a director of the company in accordance with its articles; or

(b) the reserve director resigns from the office of director in accordance with Section 464,

whichever is the earlier.

(5) The conditions specified for the purposes of subsection (4) are—
(a) that the nomination of the reserve director has not ceased to have effect under subsection (2); and
(b) that the reserve director is not prohibited by law nor disqualified from acting as a director of the company.

COMMENTARY

Overview

455.01 This provision provides that where a private company has only one member who is also the sole director, the company may nominate *a reserve director*, who has reached 18 years old, to act in place of the sole director in the event of death of the sole director.

When, in the case of a private company, where the private company either (i) nominates a reserve director; or (ii) when the nomination of the reserve director ceases to have effect, the private company shall make a report on the above to the Registrar of Companies ('The Registrar'), within 15 days from the nomination or the nomination ceasing to have effect (Sections 455(3) and 645 of this Cap.622).

Equivalent provisions in the predecessor CO

455.02 Section 455 herein is comparable to sections 153A(6) to 153A(9) of the predecessor CO.

456. Restriction on body corporate being director

(1) This section applies to—
(a) a public company;
(b) a private company that is a member of a group of companies of which a listed company is a member; and
(c) a company limited by guarantee.

(2) A body corporate must not be appointed a director of the company.

(3) An appointment made in contravention of subsection (2) is void.

(4) Nothing in this section affects any liability of a body corporate under any provision of this Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) if it—
(a) purports to act as a director; or
(b) acts as a shadow director, although it could not, by virtue of this section, be appointed as a director.

COMMENTARY

Overview 456.01

The following companies *shall not* appoint a body corporate to be its director:

(i) public company;[10]
(ii) private company[11] that is a member of a group of companies of which a listed company is a member; and
(iii) company limited by guarantee.[12]

Any appointment of corporate director(s) for the afore-said companies is void as prescribed under subsection 456(3) of this Cap.622. However, note that under the new subsection 456(4) of this Cap.622, the liability of a body corporate, which purports to act as a director or to act as a shadow director, under this (new) Companies Ordinance or the predecessor CO will not be affected.

Section 456 of this (new) Ordinance maintains the restriction that a corporate body cannot be named as a company director (as this restriction was also in place in the predecessor CO) in: (i) public companies; (ii) companies limited by guarantee; and (iii) private companies which are members of a group of companies of which a listed company is a member. As for other private companies, they are required by this provision to have at least one director who is a natural person to enhance transparency and accountability.

Equivalent provisions in the predecessor CO 456.02

Subsections 456(1) and 456(2) herein are comparable to sections 154A(1) to 154A(3) of the predecessor CO.

Under section 154A(4) of the predecessor CO, a corporate director appointed for the afore-said companies is deemed to have vacated its office on the expiry of a period of 6 months from the date of appointment and all acts done thereafter shall be null and void.

At first sight, the consequences for appointment of any corporate director for the respective companies under this (new) Companies Ordinance are more serious than those prescribed under the predecessor CO, because such appointment is void *ab initio* (Section 456(3) of this Cap.622). However, the

[10] For definition of public company, see section 12 of this (new) Companies Ordinance.
[11] For definition of private company, see section 11 of this (new) Companies Ordinance.
[12] For definition of company limited by guarantee, see section 9 of this (new) Companies Ordinance.

Part 15

DISSOLUTION BY STRIKING OFF OR DEREGISTRATION

Brief Overview of Part 15

Part 15 of the Companies Ordinance (Cap.622) contains provisions on: (i) striking off and deregistration of companies; (ii) restoration of companies which have been struck off the Companies Register or deregistered by the Registrar; and (iii) other miscellaneous matters, such as the disposal of properties of dissolved companies.

Under the provisions of this Part 15, the procedures for the striking off and the restoration of companies are now streamlined. New requirements are also imposed to prevent possible abuses of the deregistration procedure.

Streamlining the procedures:

(1) The procedure under the predecessor CO for striking off a company which are not in operation or carrying on business is now simplified under the new Companies Ordinance (Cap.622) (Sections 744 and 746);

(2) The procedure for the restoration of dissolved companies is also streamlined as administrative restoration by the Registrar without recourse to the Court is possible (Sections 760 to 764) as well as restoration by the Court itself (Sections 765 to 768); and

(3) Under the predecessor CO, there were two routes available for companies which have been struck off or deregistered to be restored or reinstated to the register by application to the court. They were respectively under former sections 291(7) and 291AB(2) of the predecessor CO and are very similar in nature. The two streams have now been merged into one provision under this new Ordinance.

Deregistration versus winding-up

Deregistration is a simpler and cheaper way to dissolve a company compared to the winding-up process. Under the predecessor CO, only a private company may apply to the Registrar for deregistration under former section 291AA of the predecessor CO, subject to certain conditions.

Under the former section 291AA of the predecessor CO, the following conditions had to be met before a private company was allowed to be deregistered:

(a) the company has not commenced operation or business or has not been in operation or carried on business for three months;
(b) it has no outstanding liabilities; and
(c) all the members agree to the deregistration.

Under this voluntary deregistration procedure, a company can be dissolved without going through the winding-up process. Now section 749 of this (new) Ordinance also extends the application of a voluntary deregistration procedure to *companies limited by guarantee*. Furthermore, the list of conditions that must be met before the company may be deregistered have since been expanded as prescribed in section 750 of this (new) Ordinance.

Possible Abuses

It is suggested that deregistration has been used by companies whose assets include land that is subject to onerous liabilities, *e.g.* slopes or exposed walls, so that on dissolution by deregistration of a company, the land will be vested on the Government by way of *bona vacantia*. As the Government cannot disclaim immovable property, the Government has to use public funds to deal with the property. To minimize such abused use of deregistration of a company, the new Companies Ordinance (Cap.622) expands the conditions for an application for deregistration to include statements to be made by the applicant company that it is not a party to any legal proceedings and its assets or the assets of its subsidiaries do not include immovable property in Hong Kong (Sections 750(2)(d), 750(2)(e), and 750(2)(f)).

This Part 15 contains the newly formed initiatives aimed at facilitating business and improving regulation:

(a) extending the voluntary deregistration procedure to guarantee companies;
(b) imposing additional conditions for deregistration of defunct companies;
(c) introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar; and

(d) streamlining the procedures for restoration of dissolved companies by court order

PART 15
DISSOLUTION BY STRIKING OFF OR DEREGISTRATION

Division 1 Striking off

Subdivision 1 Registrar's Power to Strike off Name of Company not in Operation or Carrying on Business

744. Registrar may send inquiry letter to company

(1) If the Registrar has reasonable cause to believe that a company is not in operation or carrying on business, the Registrar may send to the company by post a letter inquiring whether the company is in operation or carrying on business.

(2) A letter must be addressed—
(a) to the company at its registered office;
(b) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or
(c) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(3) If the Registrar is of the opinion that the address of the company's registered office cannot be ascertained or that a letter under subsection (1) is unlikely to be received by the company, the Registrar may, instead of sending a letter under that subsection, publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Companies Register, and the company dissolved, at the end of 3 months after the date of the notice.

COMMENTARY

Registrar's right to send an inquiry letter to determine if a company is still in operation or not 744.01

If the Registrar has reasonable cause to believe that a company is not in operation or carrying on business, the Registrar may send an inquiry letter ("First Inquiry Letter") to the company for its status by post.

The inquiry letter must be sent to:

(i) registered office of the company;
(ii) if no registered office has been reported, then to the care of the company's officer; or
(iii) each founder member whose name and address are known to the Registrar.

744.02 **Alternative means of inquiry by the Registrar**

The Registrar may, instead of sending an inquiry letter, publish a notice in the Gazette if the Registrar considers:

(i) the address of such company's registered office cannot be ascertained; or
(ii) the First Inquiry Letter is unlikely to be received by the company.

In such a case, the procedures for striking off of a company commences. Unless shown to the contrary, the company's name will be struck off the Companies Register,[1] and the company is then dissolved at the end of 3 months after the date of the notice in the Gazette.

744.03 **Equivalent provisions in the predecessor CO**

This section herein is comparable to sections 291(1), 291(5), and 291(8) of the predecessor CO.

745. Registrar must follow up under certain circumstances

(1) This section applies if, within one month after sending a letter under Section 744(1)—
  (a) the Registrar does not receive a reply to the letter; or
  (b) the Registrar receives a reply to the letter to the effect that the company is not in operation or carrying on business.

(2) The Registrar must, within 30 days after the end of that one month—
  (a) subject to subsection (4), send to the company by registered post another letter—
    (i) referring to the letter sent under Section 744(1); and
    (ii) stating that—
      (A) no reply to it has been received; or
      (B) the Registrar has received a reply to it to the effect that the company is not in operation or carrying on business; and

[1] For definition of Company Register see sections 2(1) and 27 of this (new) Cap.622.

  (b) publish in the Gazette a notice that, unless cause is shown to the contrary, the company's name will be struck off the Companies Register, and the company dissolved, at the end of 3 months after the date of the notice.

(3) A letter must be addressed—
  (a) to the company at its registered office;
  (b) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or
  (c) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(4) The Registrar is not required to send a letter to the company under subsection (2)(a) if the Registrar is of the opinion that the address of the company's registered office cannot be ascertained or that the letter is unlikely to be received by the company.

COMMENTARY

745.01 **Registrar's duty to follow up with a second inquiry if no initial reply**

Where the Registrar either: (i) does not receive reply to its First Inquiry Letter; or (ii) receives a reply to the First Inquiry Letter that the company is not in operation or carrying on business within one month after sending the First Inquiry Letter, the Registrar *must* within 30 days after the end of that one month send the second letter to the company by registered post.

745.02 **Contents of the Second Inquiry Letter**

The second letter must refer to the First Inquiry Letter and state that there was either: (i) no reply to the First Inquiry Letter has been received; or (ii) that the Registrar has received a reply that the company is not in operation or carrying on business.

745.03 **Addressee of the Second Inquiry Letter**

The second letter must be sent to:

(i) registered office of the company;
(ii) if no registered office has been reported, then to the care of the company's officer; or
(iii) each founder member whose name and address are known to the Registrar.

The Registrar at the same time must publish a notice in the Gazette, unless cause is shown to the contrary, the company's name will be struck off the Companies Register, and the company dissolved, at the end of 3 months after the date of the notice in the Gazette.

The Registrar may dispense with the sending of second letter if it considers the address of such company's registered office cannot be ascertained or the second letter is unlikely to be received by the company.

745.04 **Equivalent provisions in the predecessor CO**

This section is comparable to sections 291(2), 291(3), 291(5), and 291(8) of the predecessor CO.

Under this section 745, the Gazette notice is to be published simultaneously with the sending of the second letter instead of waiting for one month after sending the second letter. Accordingly, the time for the procedure is shortened.

746. Registrar may strike off company's name

(1) After publishing a notice under Section 744(3) or 745(2)(b), the Registrar may, unless cause is shown to the contrary, strike the company's name off the Companies Register at the end of 3 months after the date of the notice.

(2) The Registrar must publish in the Gazette a notice indicating that the company's name has been struck off the Companies Register.

(3) On publication of the notice under subsection (2), the company is dissolved.

COMMENTARY

Time frame in which the Registrar may strike off a company from the companies register

746.01 After the Registrar has published notice in the Gazette for the proposed striking off, under sections 744 or 744 of this (new) Cap.622, *unless* cause is shown to the contrary, the company's name will be struck off the Companies Register, at the end of 3 months after the respective date of the notice in the Gazette.

The Registrar must then publish a second Gazette notice indicating that the company's name has been struck off the Companies Register. Upon publication of the notice, the company is dissolved.

Equivalent provisions in the predecessor CO

746.02 This section herein is comparable to former section 291(6) of the predecessor CO.

Transitional Arrangements

746.03 Section 129(1) of Schedule 11 of this (new) Companies Ordinance provides that former sections 291(2), 291(3), and 291(6) of the predecessor CO continue to apply to the striking off the register of the name of a company and to the dissolution of the company if, before the commencement date of Subdivision 1 of Division 1 of Part 15, the Registrar has sent a letter to the company under former section 291(1) of the predecessor CO.

Section 129(2) of Schedule 11 of this (new) Companies Ordinance further provides that former section 291(6) of the predecessor CO continues to apply to the striking off the register of the name of a company and to the dissolution of the company if, before the commencement date of Subdivision 1 of Division 1 of Part 15, the Registrar has published in the Gazette a notice in relation to the company under that former section 291(5) of the predecessor CO.

Subdivision 2 Striking off under Other Circumstances

747. Registrar's duty to act in case of company being wound up

(1) Subsection (2) applies if—

(a) a company is being wound up;

(b) the Registrar has reasonable cause to believe that—

(i) no liquidator or provisional liquidator is acting; or

(ii) the company's affairs are fully wound up; and

(c) the returns required to be made by the liquidator or provisional liquidator have not been made for 6 consecutive months.

(2) Subject to subsection (5), the Registrar must publish in the Gazette, and send to the company or the liquidator or provisional liquidator (if any), a notice that, unless cause is shown to the contrary, the company's name will be struck off the Companies Register, and the company dissolved, at the end of 3 months after the date of the notice.

(3) A notice to be sent to a company must be addressed—

(a) to the company at its registered office;

(b) if notice of the company's registered office has not been given to the Registrar, to the care of an officer of the company; or

(c) if there is no officer of the company whose name and address are known to the Registrar, to each founder member whose name and address are known to the Registrar.

(4) A notice to be sent to a liquidator or provisional liquidator must be addressed to the liquidator or provisional liquidator at the addressee's last known address.

(5) The Registrar is not required to send a notice to the company or the liquidator or provisional liquidator under subsection (2) if the Registrar is of the opinion that—

(a) the address of the company's registered office, or the name and address of the liquidator or provisional liquidator (as the case may be) cannot be ascertained; or

(b) the notice is unlikely to be received by the company or the liquidator or provisional liquidator (as the case may be).

(6) After publishing a notice under subsection (2), the Registrar may, unless cause is shown to the contrary, strike the company's name off the Companies Register at the end of 3 months after the date of the notice.

(7) The Registrar must publish in the Gazette a notice indicating that the company's name has been struck off the Companies Register.

(8) On publication of the notice under subsection (7), the company is dissolved.

COMMENTARY

747.01 **Registrar's duty to act when a company becomes insolvent**

In the instances where a company is being wound-up or where the Registrar has reasonable cause to believe that: (i) no liquidator or provisional liquidator is acting; or (ii) that the company's affairs are fully wound up and the required returns, which have to be made by the liquidator or provisional liquidator, have not been made for 6 consecutive months, the Registrar is duty-bound to publish a notice in the Gazette and send the notice to the company or the liquidator or provisional liquidator (if any at all).

Unless shown to the contrary, the company's name will be struck off the Companies Register, and the company dissolved, at the end of 3 months after the date of the notice in the Gazette.

747.02 **Notice sent by the Registrar**

The Registrar may send the notice of the company being struck off the register to the registered office of the company.

But where no registered office has been reported, notice can then be sent to (i) the care of the company's officer; or (ii) each founder member whose name and address are known to the Registrar.

The Registrar may dispense with the sending of notice to the company, the liquidator or provisional liquidator if it considers their name and addresses cannot be ascertained or the notice is unlikely to be received by the company, the liquidator or provisional liquidator.

After the Registrar has published notice in the Gazette, unless cause is shown to the contrary, the Registrar may strike the company's name off the Companies Register at the end of 3 months after the date of the notice in the Gazette.

The Registrar must then publish a second Gazette notice indicating that the company's name has been struck off the Companies Register. Upon publication of the notice, the company is dissolved.

747.03 **Equivalent provisions in the predecessor CO**

This section herein is comparable to sections 291(4), 291(5), 291(6) and 291(8) of the predecessor CO.

748. Court may strike off name of company not appropriate to be wound up

(1) If, on application by the Registrar, it appears to the Court that a company should be dissolved but, having regard to the company's assets or for other reasons, it would not be appropriate to wind up the company, the Court may order that the company's name be struck off the Companies Register and the company dissolved.

(2) If an order is made, the company is dissolved on the date of the order.

COMMENTARY

748.01 **Registrar's application to the Court to dissolve a company**

The Registrar may apply to the Court for a company to be struck off the Companies Register and dissolved on the ground that having regard to the company's assets or other reasons, it would not be appropriate to wind-up the company.

The company will be dissolved on the date of the order.

Cap 622

SUBSIDIARY LEGISLATION

Introduction to the Subsidiary Legislation

0.001 As we are now all aware, there are 12 pieces of subsidiary legislation to this (new) Companies Ordinance (Cap.622) which includes two amendment regulations. These deal with the administrative, procedural and technical details of the Companies Ordinance. Fourteen of these were gazette on various dates but all of them came into force on 3 Mach 2014, the same date as the new Companies Ordinance (Cap.622) came into effect. The subsidiary legislation have been designated Cap.622A to Cap.622L.

Time frame in which each of the subsidiary legislation was placed in the gazette by the government

0.002 The first batch of the 12 subsidiary legislations for the implementation of the Companies Ordinance were placed in the gazette back on 1 February 2013:

(1) Companies (Words and Expressions in Company Names) Order,
(2) Companies (Disclosure of Company Name and Liability Status) Regulation,
(3) Companies (Accounting Standards (Prescribed Body)) Regulation,
(4) Companies (Directors' Report) Regulation, and
(5) Companies (Summary Financial Reports) Regulation.

0.003 The second batch of the subsidiary legislation were the:

(6) Companies (Revision of Financial Statements and Reports) Regulation
(7) Companies (Disclosure of Information about Benefits of Directors) Regulation.

0.004 The above two subsidiary provisions were subject to the negative vetting procedure of Legislative Council. As such, they were placed in the gazette on 22 March 2013 and were tabled before Legislative Council at the meeting of 27 March 2013.

0.005 The following third batch of subsidiary legislations for implementation of the Companies Ordinance were placed in the gazette on or about May 2013:

(8) Companies (Unfair Prejudice Petitions) Proceedings Rules
(9) Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013
(10) Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013
(11) Company Records (Inspection and Provision of Copies) Regulation
(12) Companies (Model Articles) Notice
(13) Companies (Non-Hong Kong Companies) Regulation
(14) Companies (Fees) Regulation.

0.006 Note that items (9) and (10) were simply amendment regulations as they amended the above items (2) and (6), respectively.

Companies (Residential Addresses and Identification Numbers) Regulation still not in force

0.007 It is certainly worthwhile to note that the one piece of subsidiary legislation which has *not yet been* put into force is the Companies (Residential Addresses and Identification Numbers) Regulation. This regulation deals with the disclosure of details of the residential addresses and full identification or passport numbers of directors or other officers ("protected information"). This regulation was carved out from other regulations and, at the time of this Second Edition, still has not been put into effect.

0.008 Division 7 of Part 2[1] of the new Companies Ordinance, as originally proposed, was to provide protection of personal data of the directors and company secretaries to a certain extent.

0.009 This restriction on the use of personal data for office holders under the new Companies Ordinance (as originally proposed) stated that:

(i) Protected information is not available at the Register to the public;
(ii) The only information available is the correspondence addresses and some parts of the identity numbers of the directors and the company secretaries;
(iii) As for the existing personal data information currently on the Registrar, a current or former director, reserve director or company secretary of a company may apply to the Registrar and paying a fee to have a correspondence address substituted for their residential address (section 49 of the Companies Ordinance); and
(iv) Any person can apply to have part of their identity number masked.

Contrary Views

0.010 The above proposed regime however attracted heated debates and arguments over issues concerning the protection of privacy, freedom of press, investigative journalism and hindrance of civil process (such as service of documents).

Shelving the regime

0.011 To stem the tide of criticism and to avoid any further delay with the enactment of the (new) Companies Ordinance (Cap. 622), the Administration announced in late March 2013 that they were shelving those controversial provisions and the *Companies (Residential Addresses and Identification Numbers) Regulation* will be put on hold for the time being.[2] This legislation continues to be shelved as of this date now.

List of Subsidiary Legislation enacted

0.012 The 12 pieces of subsidiary legislation, which provide for the relevant technical and procedural matters for the implementation of the new Companies Ordinance are as follows:

Cap. 622A: Companies (Words and Expressions in Company Names) Order

Cap. 622B: Companies (Disclosure of Company Name and Liability Status) Regulation

Cap. 622C: Companies (Accounting Standards (Prescribed Body)) Regulation

[1] For details of the Division 7 of Part 2, please refer to Vol.1 of this publication.
[2] See New Arrangement for the Inspection of Personal Information on the Companies Register under the new Companies Ordinance issued by Financial Services and the Treasury Bureau on 28 March 2013.

Cap. 622D: Companies (Directors' Report) Regulation (Cap. 622D)

Cap. 622E: Companies (Summary Financial Reports) Regulation (Cap. 622E)

Cap. 622F: Companies (Revision of Financial Statements and Reports) Regulation

Cap. 622G: Companies (Disclosure of Information about Benefits of Directors) Regulation

Cap. 622H: Companies (Model Articles) Notice

Cap. 622I: Company Records (Inspection and Provision of Copies) Regulation

Cap. 622J: Companies (Non-Hong Kong Companies) Regulation

Cap. 622K: Companies (Fees) Regulation

Cap. 622L: Companies (Unfair Prejudice Petitions) Proceedings Rules

Summary of the Subsidiary Legislation enacted under the new Companies Ordinance

On company names

Companies (Words and Expressions in Company Names) Order (Cap. 622A)

0.013 This order was made:

(i) by the Financial Secretary;
(ii) under section 101 of the Companies Ordinance;
(iii) for the use of section 100(2)(b); and
(iv) was placed in the gazette on 1 February 2013.

0.014 Prior approval of the Registrar is required if a company proposes to register a name containing words or expressions stated in this order. This order came into operation upon the commencement of section 101 of the Companies Ordinance (3 March 2014).

0.015 Section 100(2)(b) of the (new) Ordinance retained an existing arrangement under which approval has to be sought from the Registrar of Companies should a company wish to register a name containing certain words or expressions as specified in the subsidiary legislation. Cap. 622A sets out the updated list of words and expressions by which a company is allowed to choose from. This list basically follows the list from that of the former Companies (Specification of Names) Order (Cap. 32E) (which was repealed on commencement of the new Ordinance) *but* with the addition of the words

"levy" and "tourism board" to guard against the registration of a company name which gives people the impression that the company in question is responsible for the collection of levies or is connected in some way with the Hong Kong Tourism Board.

Note that with this updated list in Cap. 622A, several words and expressions in the former Cap. 32E were not retained as they were either duplicative or no longer required. **0.016**

Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B)

0.017 Section 659 of the new Ordinance empowers the Financial Secretary to make regulations requiring a company to display, state or provide prescribed information in relation to disclosure of a company's name and registered office.

0.018 Cap. 622B was made pursuant to sections 659 and 660 of the (new) Ordinance and was placed in the gazette on 1 February 2013. This regulation sets out the requirement for a company to display its name at its office, correspondence and documents. This regulation came into operation upon the same date as when sections 659 and 660 of the (new) Ordinance came into operation (3 March 2014).

0.019 Note that sections 93 and 94 of the predecessor CO stipulated and stated the requirements concerning the display and disclosure of a company's registered name at the company's offices. Cap. 622B, while re-enacting the majority of existing requirements, also introduced the following changes to these requirements:

(a) the requirement for the company to paint or affix its name outside of its office is replaced by the requirement for the name to be displayed at the office and so positioned that it can be easily seen by any visitor to the office;
(b) exceptions in certain circumstances under which the requirement to display the name of the company concerned may be dispensed with after taking into account the usual practices of company service providers and liquidators;
(c) provisions added to accommodate the use of electronic devices for the display of company names at a location shared by more than six companies which takes into consideration that a location may serve as the registered offices of multiple companies; and
(d) the obligation to state the company's registered name (and the liability status where applicable) in all communication documents and transaction instruments.

PART 2
CONTENTS OF REVISED DOCUMENTS

3. Requirements regarding contents of revised financial statements

(1) A provision of the Ordinance or relevant Regulation as to the requirements regarding the contents of the financial statements of a company (other than a company falling within the reporting exemption for the financial year concerned) applies to revised financial statements, as it applies to the original financial statements, as if the revised financial statements were prepared by the directors of the company on the date of the original financial statements.

(2) Without limiting subsection (1), section 380(1) and (2) of the Ordinance applies to the revised financial statements of a company (other than a company falling within the reporting exemption for the financial year concerned), as it applies to the original financial statements, so as to require the revised financial statements to give a true and fair view of the matters mentioned in that section.

(3) A provision of the Ordinance or relevant Regulation as to the requirements regarding the contents of the financial statements of a company falling within the reporting exemption for a financial year applies to revised financial statements, as it applies to the original financial statements, as if the revised financial statements were prepared by the directors of the company on the date of the original financial statements.

(4) If the directors of a company cause any financial statements to be revised by replacement, the directors must make in a prominent position in the revised financial statements—

(a) a statement that the revised financial statements replace the original financial statements for the financial year specified in the statement;

(b) a statement that the original financial statements—

(i) are taken as having been revised by the directors on the date of the original financial statements instead of on the date of revision; and

(ii) accordingly do not deal with events between those 2 dates; and

(c) a statement as to—

(i) the respects in which the original financial statements did not, as appears to the directors, comply with the Ordinance or relevant Regulation; and

(ii) the material revisions to the original financial statements.

(5) If the directors of a company cause any financial statements to be revised by supplementary note, the directors must make in a prominent position in the supplementary note—

(a) a statement that the supplementary note—

(i) revises in certain respects the original financial statements; and

(ii) is to be treated as forming part of those statements; and

(b) a statement that the original financial statements—

(i) are taken as having been revised by the directors on the date of the original financial statements instead of on the date of revision; and

(ii) accordingly do not deal with events between those 2 dates.

(6) In addition to the requirements under subsection (4) or (5) (as the case may be), the directors must also—

(a) for a revision to a statement of financial position, cause the date of revision to be stated—

(i) for a revision by replacement, in the revised financial statements; or

(ii) for a revision by supplementary note, in the supplementary note; or

(b) in any other case, cause the date specified by the directors as the date on which the financial statements are taken as having been revised to be stated—

(i) for a revision by replacement, in the revised financial statements; or

(ii) for a revision by supplementary note, in the supplementary note.

(7) In this section, a reference to a provision of the Ordinance or relevant Regulation is, if the provision has been amended after the date of the original financial statements but before the date of revision, a reference to the provision as in force at the date of the original financial statements.

COMMENTARY

Overview **F3.01**

The whole of sections 3 to 6 of the Regulation deal with requirements as to the contents and matters to be included in the revised reporting documents

Specifically, section 3 of the Regulation sets out the contents and matters required to be included in the revised financial statements.

The guiding principle is that these obligations and arrangements concerning the original reporting documents as provided in the new Ordinance should equally apply to the revised reporting documents, subject to necessary modification.

Subsection 3(2) of the Regulation looks at the application of the requirement to give a true and fair view under sections 380(1) and 380(2) of the new Ordinance to revised financial statements where the exception in section 380(7) of the Ordinance does not apply these requirements for those companies falling within the reporting exemption. As such, the revised financial statements of such companies are accordingly exempted from the requirement to give a true and fair view.

Also note that in relation to revised financial statements (other than a revised statement of financial position), the directors are required to cause the date specified by them as the date on which the financial statements are taken as having been revised to be stated in the revised financial statements or the supplementary note (Section 3(6)(b) of Cap.622F), rather than the date of approval as this was the case in the repealed Cap.32N. This requirement has been modified as the financial statements (except statement of financial position) *are not required* to be approved by directors or dated under the new Ordinance.

Equivalent provision in the predecessor CO

F3.02 This section 3 herein restates sections 3(1) to 3(5) and 3(11) of the repealed Companies (Revision of Accounts and Reports) Regulation (Cap.32N).

4. Offences relating to section 3

(1) This section applies in respect of any revised financial statements of a company a copy of which—

(a) is laid before the company in general meeting under section 429 of the Ordinance;

(b) is sent to a member under section 430 of the Ordinance; or

(c) is otherwise circulated, published or issued by the company.

(2) If a director of a company fails to take all reasonable steps to secure compliance with any of the following provisions as respects any revised financial statements of the company, the director commits an offence and is liable to a fine of $300000—

(a) for a company not falling within the reporting exemption for the financial year concerned—

(i) a provision mentioned in section 3(1) or (2);

(ii) section 3(4) or (5) (as the case may be) or section 3(6); or

(b) for a company falling within the reporting exemption for the financial year concerned—

(i) a provision mentioned in section 3(3);

(ii) section 3(4) or (5) (as the case may be) or section 3(6).

(3) If a director of a company wilfully fails to take all reasonable steps to secure compliance with any of the following provisions as respects any revised financial statements of the company, the director commits an offence and is liable to a fine of $300000 and to imprisonment for 12 months—

(a) for a company not falling within the reporting exemption for the financial year concerned—

(i) a provision mentioned in section 3(1) or (2);

(ii) section 3(4) or (5) (as the case may be) or section 3(6); or

(b) for a company falling within the reporting exemption for the financial year concerned—

(i) a provision mentioned in section 3(3);

(ii) section 3(4) or (5) (as the case may be) or section 3(6).

(4) If a person is charged with an offence under subsection (2) for failing to take all reasonable steps to secure compliance with a provision mentioned in subsection (2)(a)(i) or (ii) or (b)(i) or (ii), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person—

(a) was charged with the duty of ensuring that the provision was complied with; and

(b) was in a position to discharge that duty.

(5) In this section, a reference to a provision of the Ordinance or relevant Regulation is, if the provision has been amended after the date of the original financial statements but before the date of revision, a reference to the provision as in force at the date of the original financial statements.

COMMENTARY

Overview

F4.01 If a director fails to ensure the revised financial statements to comply with all the provisions, he commits an offence.

Equivalent provision in the predecessor CO

F4.02 This section 4 restates sections 3(6) to 3(11) of the repealed Companies (Revision of Accounts and Reports) Regulation (Cap.32N).

5. Matters to be included in revised directors' report

(1) A provision of the Ordinance or relevant Regulation as to the matters to be included in a directors' report of a company applies to a revised directors' report, as it applies to the original directors' report, as if the revised directors' report were approved by the directors of the company on the date of the original directors' report.

(2) If the directors of a company make revisions to a directors' report by replacement, the directors must make in a prominent position in the revised directors' report—

(a) a statement that the revised directors' report replaces the original directors' report for the financial year specified in the statement;

(b) a statement that the revised directors' report—

(i) is taken as having been approved by the directors on the date of the original directors' report instead of on the date of revision; and

(ii) accordingly does not deal with events between those 2 dates; and

(c) a statement as to the material revisions to the original directors' report.

(3) If the directors of a company make revisions to a directors' report by supplementary note, the directors must make in a prominent position in the supplementary note—

(a) a statement that the supplementary note—

(i) revises in certain respects the original directors' report; and

(ii) is to be treated as forming part of that report; and

(b) a statement that the revised directors' report—

(i) is taken as having been approved by the directors on the date of the original directors' report instead of on the date of revision; and

(ii) accordingly does not deal with events between those 2 dates.

(4) In addition to the requirements under subsection (2) or (3) (as the case may be), the directors must also cause the date of revision to be stated—

(a) for a revision by replacement, in the revised directors' report; or

(b) for a revision by supplementary note, in the supplementary note.

(5) If a director of a company fails to take all reasonable steps to secure compliance with any of the following provisions as respects a revised directors' report of the company, the director commits an offence and is liable to a fine of $150000—

(a) a provision mentioned in subsection (1);

(b) subsection (2) or (3) (as the case may be) or subsection (4).

(6) If a director of a company wilfully fails to take all reasonable steps to secure compliance with any of the following provisions as respects a revised directors' report of the company, the director commits an offence and is liable to a fine of $150000 and to imprisonment for 6 months—

(a) a provision mentioned in subsection (1);

(b) subsection (2) or (3) (as the case may be) or subsection (4).

(7) If a person is charged with an offence under subsection (5) for failing to take all reasonable steps to secure compliance with a provision mentioned in subsection (5)(a) or (b), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person—

(a) was charged with the duty of ensuring that the provision was complied with; and

(b) was in a position to discharge that duty.

(8) In this section, a reference to a provision of the Ordinance or relevant Regulation is, if the provision has been amended after the date of the original directors' report but before the date of revision, a reference to the provision as in force at the date of the original directors' report.

COMMENTARY

Overview F5.01

Section 5 is self-explanatory as this provision sets out the content and matters required to be included in a revised director's report.

Equivalent provision in the predecessor CO F5.02

Section 5 restates section 4 of the repealed Companies (Revision of Accounts and Reports) Regulation (Cap.32N).

6. Matters to be included in revised summary financial report

(1) A provision of the Ordinance or relevant Regulation as to the matters to be included in a summary financial report of a company applies to a revised summary financial report, as it applies to the original summary

member (成員) excludes—

(a) a member who is an employee of the company; and

(b) a person who was a member while being an employee of the company and who continues to be a member after ceasing to be such an employee.

(4) For the purposes of this article, 2 or more persons who hold shares in the company jointly are to be regarded as 1 member.

PART 3
DIRECTORS AND COMPANY SECRETARY

Division 1—Directors' Powers and Responsibilities

3. Directors' general authority

(1) Subject to the Ordinance and these articles, the business and affairs of the company are managed by the directors, who may exercise all the powers of the company.

(2) An alteration of these articles does not invalidate any prior act of the directors that would have been valid if the alteration had not been made.

(3) The powers given by this article are not limited by any other power given to the directors by these articles.

(4) A directors' meeting at which a quorum is present may exercise all powers exercisable by the directors.

4. Members' reserve power

(1) The members may, by special resolution, direct the directors to take, or refrain from taking, specified action.

(2) The special resolution does not invalidate anything that the directors have done before the passing of the resolution.

5. Directors may delegate

(1) Subject to these articles, the directors may, if they think fit, delegate any of the powers that are conferred on them under these articles—

(a) to any person or committee;

(b) by any means (including by power of attorney);

(c) to any extent and without territorial limit;

(d) in relation to any matter; and

(e) on any terms and conditions.

(2) If the directors so specify, the delegation may authorize further delegation of the directors' powers by any person to whom they are delegated.

(3) The directors may—

(a) revoke the delegation wholly or in part; or

(b) revoke or alter its terms and conditions.

6. Committees

(1) The directors may make rules providing for the conduct of business of the committees to which they have delegated any of their powers.

(2) The committees must comply with the rules.

Division 2—Decision-taking by Directors

7. Directors to take decision collectively

(1) A decision of the directors may only be taken—

(a) by a majority of the directors at a meeting; or

(b) in accordance with article 8.

(2) Paragraph (1) does not apply if—

(a) the company only has 1 director; and

(b) no provision of these articles requires it to have more than one director.

(3) If paragraph (1) does not apply, the director may take decisions without regard to any of the provisions of these articles relating to directors' decision-taking.

8. Unanimous decisions

(1) A decision of the directors is taken in accordance with this article when all eligible directors indicate to each other (either directly or indirectly) by any means that they share a common view on a matter.

(2) Such a decision may take the form of a resolution in writing, copies of which have been signed by each eligible director or to which each eligible director has otherwise indicated agreement in writing.

(3) A reference in this article to eligible directors is a reference to directors who would have been entitled to vote on the matter if it had been proposed as a resolution at a directors' meeting.

(4) A decision may not be taken in accordance with this article if the eligible directors would not have formed a quorum at a directors' meeting.

9. Calling directors' meetings

(1) Any director may call a directors' meeting by giving notice of the meeting to the directors or by authorizing the company secretary to give such notice.

(2) Notice of a directors' meeting must indicate—
- (a) its proposed date and time; and
- (b) where it is to take place.

(3) Notice of a directors' meeting must be given to each director, but need not be in writing.

10. Participation in directors' meetings

(1) Subject to these articles, directors participate in a directors' meeting, or part of a directors' meeting, when—
- (a) the meeting has been called and takes place in accordance with these articles; and
- (b) they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.

(2) In determining whether directors are participating in a directors' meeting, it is irrelevant where a director is and how they communicate with each other.

(3) If all the directors participating in a directors' meeting are not in the same place, they may regard the meeting as taking place wherever any one of them is.

11. Quorum for directors' meetings

(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.

(2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors and unless otherwise fixed it is 2.

12. Meetings if total number of directors less than quorum

If the total number of directors for the time being is less than the quorum required for directors' meetings, the directors must not take any decision other than a decision—

- (a) to appoint further directors; or
- (b) to call a general meeting so as to enable the members to appoint further directors.

13. Chairing of directors' meetings

(1) The directors may appoint a director to chair their meetings.

(2) The person appointed for the time being is known as the chairperson.

(3) The directors may terminate the appointment of the chairperson at any time.

(4) If the chairperson is not participating in a directors' meeting within 10 minutes of the time at which it was to start or is unwilling to chair the meeting, the participating directors may appoint one of themselves to chair it.

14. Chairperson's casting vote at directors' meetings

(1) If the numbers of votes for and against a proposal are equal, the chairperson or other director chairing the directors' meeting has a casting vote.

(2) Paragraph (1) does not apply if, in accordance with these articles, the chairperson or other director is not to be counted as participating in the decision-making process for quorum or voting purposes.

15. Alternates voting at directors' meetings

A director who is also an alternate director has an additional vote on behalf of each appointor who—
- (a) is not participating in a directors' meeting; and
- (b) would have been entitled to vote if he or she were participating in it.

16. Conflicts of interest

(1) This article applies if—
- (a) a director is in any way (directly or indirectly) interested in a transaction, arrangement or contract with the company that is significant in relation to the company's business; and
- (b) the director's interest is material.

(2) The director must declare the nature and extent of the director's interest to the other directors in accordance with section 536 of the Ordinance.

(a) there was a defect in the appointment of any of the directors or of the person acting as a director;
(b) any one or more of them were not qualified to be a director or were disqualified from being a director;
(c) any one or more of them had ceased to hold office as a director; or
(d) any one or more of them were not entitled to vote on the matter in question.

19. Record of decisions to be kept

The directors must ensure that the company keeps a written record of every decision taken by the directors under article 7(1) for at least 10 years from the date of the decision.

20. Written record of decision of sole director

(1) This article applies if the company has only 1 director and the director takes any decision that—
(a) may be taken in a directors' meeting; and
(b) has effect as if agreed in a directors' meeting.

(2) The director must provide the company with a written record of the decision within 7 days after the decision is made.

(3) The director is not required to comply with paragraph (2) if the decision is taken by way of a resolution in writing.

(4) If the decision is taken by way of a resolution in writing, the company must keep the resolution for at least 10 years from the date of the decision.

(5) The company must also keep a written record provided to it in accordance with paragraph (2) for at least 10 years from the date of the decision.

21. Directors' discretion to make further rules

Subject to these articles, the directors may make any rule that they think fit about—
(a) how they take decisions; and
(b) how the rules are to be recorded or communicated to directors.

Division 3—Appointment and Retirement of Directors

22. Appointment and retirement of directors

(1) A person who is willing to act as a director, and is permitted by law to do so, may be appointed to be a director—
(a) by ordinary resolution; or
(b) by a decision of the directors.

(2) Unless otherwise specified in the appointment, a director appointed under paragraph (1)(a) holds office for an unlimited period of time.

(3) An appointment under paragraph (1)(b) may only be made to—
(a) fill a casual vacancy; or
(b) appoint a director as an addition to the existing directors if the total number of directors does not exceed the number fixed in accordance with these articles.

(4) A director appointed under paragraph (1)(b) must—
(a) retire from office at the next annual general meeting following the appointment; or
(b) if the company has dispensed with the holding of annual general meetings or is not required to hold annual general meetings, retire from office before the end of 9 months after the end of the company's accounting reference period by reference to which the financial year in which the director was appointed is to be determined.

23. Retiring director eligible for reappointment

A retiring director is eligible for reappointment to the office.

24. Composite resolution

(1) This article applies if proposals are under consideration concerning the appointment of 2 or more directors to offices or employments with the company or any other body corporate.

(2) The proposals may be divided and considered in relation to each director separately.

(3) Each of the directors concerned is entitled to vote (if the director is not for another reason precluded from voting) and be counted in the quorum in respect of each resolution except that concerning the director's own appointment.

25. Termination of director's appointment

A person ceases to be a director if the person—

(a) ceases to be a director under the Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) or is prohibited from being a director by law;

(b) becomes bankrupt or makes any arrangement or composition with the person's creditors generally;

(c) becomes a mentally incapacitated person;

(d) resigns the office of director by notice in writing of the resignation in accordance with section 464(5) of the Ordinance;

(e) for more than 6 months has been absent without the directors' permission from directors' meetings held during that period; or

(f) is removed from the office of director by an ordinary resolution of the company.

26. Directors' remuneration

(1) Directors' remuneration must be determined by the company at a general meeting.

(2) A director's remuneration may—

(a) take any form; and

(b) include any arrangements in connection with the payment of a retirement benefit to or in respect of that director.

(3) Directors' remuneration accrues from day to day.

27. Directors' expenses

The company may pay any travelling, accommodation and other expenses properly incurred by directors in connection with—

(a) their attendance at—

(i) meetings of directors or committees of directors;

(ii) general meetings; or

(iii) separate meetings of the holders of any class of shares or of debentures of the company; or

(b) the exercise of their powers and the discharge of their responsibilities in relation to the company.

Division 4—Alternate Directors

28. Appointment and removal of alternates

(1) A director (***appointor***) may appoint as an alternate any other director, or any other person approved by resolution of the directors.

(2) An alternate may exercise the powers and carry out the responsibilities of the alternate's appointor, in relation to the taking of decisions by the directors in the absence of the alternate's appointor.

(3) An appointment or removal of an alternate by the alternate's appointor must be effected—

(a) by notice to the company; or

(b) in any other manner approved by the directors.

(4) The notice must be authenticated by the appointor.

(5) The notice must—

(a) identify the proposed alternate; and

(b) if it is a notice of appointment, contain a statement authenticated by the proposed alternate indicating the proposed alternate's willingness to act as the alternate of the appointor.

(6) If an alternate is removed by resolution of the directors, the company must as soon as practicable give notice of the removal to the alternate's appointor.

29. Rights and responsibilities of alternate directors

(1) An alternate director has the same rights as the alternate's appointor in relation to any decision taken by the directors under article 7(1).

(2) Unless these articles specify otherwise, alternate directors—

(a) are deemed for all purposes to be directors;

(b) are liable for their own acts and omissions;

(c) are subject to the same restrictions as their appointors; and

(d) are deemed to be agents of or for their appointors.

(3) Subject to article 16(3), a person who is an alternate director but not a director—

(a) may be counted as participating for determining whether a quorum is participating (but only if that person's appointor is not participating); and

(b) may sign a written resolution (but only if it is not signed or to be signed by that person's appointor).

(4) An alternate director must not be counted or regarded as more than one director for determining whether—

(a) a quorum is participating; or

(b) a directors' written resolution is adopted. (L.N. 127 of 2013)

(5) An alternate director is not entitled to receive any remuneration from the company for serving as an alternate director.

(6) But the alternate's appointor may, by notice in writing made to the company, direct that any part of the appointor's remuneration be paid to the alternate.

30. Termination of alternate directorship

(1) An alternate director's appointment as an alternate terminates—

(a) if the alternate's appointor revokes the appointment by notice to the company in writing specifying when it is to terminate;

(b) on the occurrence in relation to the alternate of any event which, if it occurred in relation to the alternate's appointor, would result in the termination of the appointor's appointment as a director;

(c) on the death of the alternate's appointor; or

(d) when the alternate's appointor's appointment as a director terminates.

(2) If the alternate was not a director when appointed as an alternate, the alternate's appointment as an alternate terminates if—

(a) the approval under article 28(1) is withdrawn or revoked; or

(b) the company by an ordinary resolution passed at a general meeting terminates the appointment.

Division 5—Directors' Indemnity and Insurance

31. Indemnity

(1) A director or former director of the company may be indemnified out of the company's assets against any liability incurred by the director to a person other than the company or an associated company of the company in connection with any negligence, default, breach of duty or breach of trust in relation to the company or associated company (as the case may be).

(2) Paragraph (1) only applies if the indemnity does not cover—

(a) any liability of the director to pay—

(i) a fine imposed in criminal proceedings; or

(ii) a sum payable by way of a penalty in respect of non-compliance with any requirement of a regulatory nature; or

(b) any liability incurred by the director—

(i) in defending criminal proceedings in which the director is convicted;

(ii) in defending civil proceedings brought by the company, or an associated company of the company, in which judgment is given against the director;

(iii) in defending civil proceedings brought on behalf of the company by a member of the company or of an associated company of the company, in which judgment is given against the director;

(iv) in defending civil proceedings brought on behalf of an associated company of the company by a member of the associated company or by a member of an associated company of the associated company, in which judgment is given against the director; or

(v) in connection with an application for relief under section 903 or 904 of the Ordinance in which the Court refuses to grant the director relief.

(3) A reference in paragraph (2)(b) to a conviction, judgment or refusal of relief is a reference to the final decision in the proceedings.

(4) For the purposes of paragraph (3), a conviction, judgment or refusal of relief—

(a) if not appealed against, becomes final at the end of the period for bringing an appeal; or

(b) if appealed against, becomes final when the appeal, or any further appeal, is disposed of.

(5) For the purposes of paragraph (4)(b), an appeal is disposed of if—

(a) it is determined, and the period for bringing any further appeal has ended; or

(b) it is abandoned or otherwise ceases to have effect.

32. Insurance

The directors may decide to purchase and maintain insurance, at the expense of the company, for a director of the company, or a director of an associated company of the company, against—