

## Part 2

# REGISTRAR OF COMPANIES AND COMPANIES REGISTER

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### Part 2 Summary

Part 2 of the Companies Ordinance (Cap.622) deals with the functions and powers of the Registrar of Companies, which is a 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 the Registrar under the Ordinance include the powers in: (i) dealing with inconsistencies of the Companies Register (s.39); (ii) updating the Companies Register (s.40); (iii) rectifying clerical errors (s.41); and (iv) making annotations to the Register (s.44).

This Part 2 contains those initiatives aimed at improving regulation, facilitating business, and modernising the law, which includes:

- (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*).

#### *Relevant information withheld?*

Division 7 of Part 2 of the Ordinance 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 this (new) Ordinance. Note the commentary at the start of Division 7 of Part 2 for further information in this regards.

Under the 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 the correspondence addresses and partial identity numbers are available. But do note that there is still no automatic protection for such information *already registered* on the Register when this Ordinance came into operation.

A current or former director, reserve director, or company secretary of a company may however, under s.49 of the 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.

Accordingly, 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 back in 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 enacting* the Companies (Residential Addresses and Identification Numbers) Regulation, and as such, these relevant provisions

were not included in the commencement notice which enacted this Ordinance.<sup>1</sup>

However, the new filing requirement for company secretaries' addresses were implemented as company secretaries *are not be required* to file residential addresses with the Companies Registry once this Ordinance was commenced. 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 the 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.

<sup>1</sup> 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

- 20.01** **Corresponding statutory provisions**  
Section 20 basically reenacts ss.346(5) 346A(5) and 348(5) of the predecessor CO in regards to the definitions and *what constitutes acceptable and proper delivery of a document* under this Ordinance.
- 20.02** **Definitions of terms under section 20(1) of this Ordinance**  
This provision sets out the various definitions referred to in this Part 2 of the Companies Ordinance.
- 20.03** The definition of “company” essentially is the same as the previous definition of “company” of s.2(1) of the predecessor CO. Note that it also includes in the definition a registered non-Hong Kong company.
- 20.04** The definition of “digital signature” follows the previous definition of “digital signature” of s.2(1) of the predecessor CO.
- 20.05** The definition of “documents” under the Ordinance is *wider* than as defined under the predecessor CO. It not only includes the previous definition of “document” of s.2(1) of the predecessor CO, *but also covers* in “documents” in electronic or any other form in Part 2 of the Companies Ordinance.
- 20.06** The definitions of “electronic signature”, “in electronic form” and “in hard copy form” follow the previous definition of “digital signature” of (former) s.168BAA(3) of the predecessor CO.
- 20.07** **Defined Terms**  
*Company* means: (i) a company formed and registered under this Ordinance; or (ii) an existing company; and (iii) also includes a non-Hong Kong company registered under this Ordinance. - An *existing company* means a company formed under a former Companies Ordinance.
- Body corporate*: (a) includes (i) a company; and (ii) a company incorporated outside Hong Kong; *but* (b) excludes a corporation sole.

## 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

- Corresponding statutory provisions**  
This section re-enacts section 303 of the predecessor CO. 21.01
- Overview**  
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. 21.02
- Transitional Arrangements (where still applicable)**  
A person holding the office or acting in the office of the Registrar of Companies immediately before the commencement date of this Ordinance 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 Ordinance (CO, Schedule 11, s.2(1)). 21.03
- The seals to be prepared for the authentication of documents which were directed under the predecessor CO continue to be in effect and are now to be prepared in accordance with this Ordinance (CO, Schedule 11, s.2(2)). 21.04
- The place/location directed or last directed by the Chief Executive to be the office for registration of companies under the predecessor CO before the commencement date of this Ordinance continues *to be regarded as the place that has been designated* as such under this Ordinance (CO, Schedule 11, s.2(3)). The Registrar is located at Queensway Government Offices, 66 Queensway, Admiralty, Hong Kong. 21.05

**Terms defined**

21.06

The *Companies Registrar* is tasked with keeping the records of: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part; (ii) the information contained in every certificate that is issued by the Registrar under this Ordinance; and (iii) the information contained in every prospectus registered by the Registrar under section 38D or 342C of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32). The Registrar must also continue to keep the records that were, immediately before the commencement date of this section, kept for the purpose of a register of companies under the predecessor CO. - *Companies Registrar* is the office set up and officers appointed by the Chief Executive of Hong Kong which deals with administration of companies and enforcement of the Companies Ordinance (Cap.622). The Registrar is located at Queensway Government Offices, 66 Queensway, Admiralty, Hong Kong.

*Companies Register* are those records of a company that must be kept by the *Companies Registrar*, which includes: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under the Ordinance; (ii) the information contained in every certificate that is issued by the Registrar under this Ordinance; and (iii) the information contained in every prospectus registered by the Registrar under ss.38D or 342C of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32). The Registrar must also continue to keep the records that were, immediately before the commencement date of this Ordinance, kept for the purpose of a register of companies under the predecessor CO.

**22. Registrar's functions**

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

**COMMENTARY****Corresponding statutory provisions**

22.01

Section 22 is a new provision and accordingly there is no equivalent provision in the predecessor CO. However, this provision may be compared to s.1061(1) of the UK Companies Act 2006.

**Overview**

This provision is self explanatory as it identifies and defines the statutory source of the functions of the Registrar.

22.02

**23. Registrar may specify form**

**(1) The Registrar may specify the form of any document required for the purposes of this Ordinance.**

**(2) Subsection (1) does not apply to a document—**

- (a) the form of which is prescribed by this Ordinance; or**
- (b) the form of which is or may be prescribed by regulations made under this Ordinance.**

**(3) In specifying the form of a document under subsection (1), the Registrar may specify more than one form of the document, whether as alternatives or to provide for different circumstances.**

**COMMENTARY****Corresponding statutory provisions**

Section 22 reenacts (former) s.2A of the predecessor CO.

23.01

**Overview**

The Registrar is empowered to specify those particular forms of any document required by the Ordinance, *except* those which have already been prescribed by this Ordinance itself.

23.02

The Registrar of Companies has specified 83 forms, which have been published in the Gazette (G.N. 6495) on 1 November 2013, for use under the Companies Ordinance. These forms can be found at the following website: [http://www.cr.gov.hk/en/companies\\_ordinance/specified\\_forms\\_index.htm](http://www.cr.gov.hk/en/companies_ordinance/specified_forms_index.htm).

23.03

All the new company forms as specified by the Registrar should now be used. Note that that these forms as so specified by the Registrar are set forms and the Ordinance does not empower users to modify the forms in any way.

23.04

**24. Registrar may issue guidelines**

**(1) The Registrar may issue guidelines—**

- (a) indicating the manner in which the Registrar proposes to perform any function or exercise any power; or**



- (b) providing guidance on the operation of any provision of this Ordinance.
- (2) The Registrar—
- (a) must publish the guidelines in a manner appropriate to bring them to the notice of persons affected by them; and
- (b) must make copies of the guidelines available to the public (in hard copy form or electronic form).
- (3) Guidelines issued under this section are not subsidiary legislation.
- (4) The Registrar may amend or revoke any of the guidelines. Subsections (2) and (3) apply to an amendment or revocation of guidelines in the same way as they apply to the guidelines.
- (5) A person does not incur any civil or criminal liability only because the person has contravened any of the guidelines. If, in any legal proceedings, the court is satisfied that a guideline is relevant to determining a matter that is in issue—
- (a) the guideline is admissible in evidence in the proceedings; and
- (b) proof that the person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter.

#### COMMENTARY

- Corresponding statutory provisions**
- 24.01 Section 24 is a new provision and accordingly there is no equivalent provision in the predecessor CO. But this provision could instead be compared to s.1117(3) of the UK Companies Act 2006.
- 24.02 Also note that similar provisions can be found under s.13 of the Financial Reporting Council Ordinance (Cap.589).
- Overview**
- 24.03 This is a new power given to the Registrar through the enactment of the Ordinance. Under the predecessor CO, it was implied that the Registrar had power to issue guidelines but this was purely as an administrative measure. This section *now empowers* the Registrar to issue guidelines and to specify the status of such guidelines which are not subsidiary legislation.

#### 25. Registrar may authenticate document etc.

- (1) If a document is required by this Ordinance to be signed by the Registrar or to bear the Registrar's printed signature, the Registrar may authenticate it in any manner that the Registrar thinks fit.
- (2) If anything is authorized to be certified by the Registrar under this Ordinance or any other Ordinance, the Registrar may certify it in any manner that the Registrar thinks fit.

#### COMMENTARY

- Corresponding statutory provisions**
- Section 25 reenact (former) ss.305A and 305(3B) of the predecessor CO, respectively. 25.01
- Overview**
- This provision provides for the manner of authentication of documents by the Registrar. As noted above, this provision basically picks up (former) ss.305A and 305(3B) which were in turn originally enacted in 2003 to cater for the authentication and certification of documents issued and filed in electronic form. 25.02

#### 26. Fees payable to Registrar

- (1) The Financial Secretary may make regulations to require payment to the Registrar of fees in respect of—
- (a) the performance of any of the Registrar's functions; or
- (b) the provision by the Registrar of services or facilities for purposes incidental to, or otherwise connected with, the performance of any of the Registrar's functions.
- (2) The regulations may—
- (a) provide for the amount of the fees to be fixed by or determined under the regulations;
- (b) provide for different fees to be payable in respect of the same matter in different circumstances; and
- (c) specify when and how fees are to be paid.
- (3) The Registrar—
- (a) may, subject to the approval of the Financial Secretary, determine what fees are chargeable in respect of the

performance of functions or the provision of services or facilities—

(i) for which fees are not provided for by the regulations; or

(ii) in circumstances other than those for which fees are provided by the regulations; and

(b) may charge such fees.

(4) Fees received by the Registrar must be paid into the general revenue, unless the fees are required by section 5 of the Trading Funds Ordinance (Cap 430) to be paid into the Companies Registry Trading Fund.

### COMMENTARY

#### Corresponding statutory provisions

26.01 Subsections 26(1) and 26(2) are new provisions and accordingly there is no equivalent provision in the predecessor CO. But subsections 26(3) and 26(4) herein reenact (former) ss.304(2) and 304(4) of the predecessor CO, respectively.

#### Overview

26.02 This provision provides the authority by which the Registrar can charge fees for the functions exercised by it and also identifies the destination of the funds.

#### Distinctions from the predecessor CO

26.03 The Eighth Schedule to the predecessor CO consisting of a table of fees payable to the Registrar *has been replaced herewith* by regulations made by the Financial Secretary as empowered to do so under subsections 26(1) and 26(2) which are now known as the Companies (Fees) Regulation (Cap. 622K).

### Division 3 Companies Register

#### 27. Registrar must keep records of companies

(1) The Registrar must keep records of—

(a) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part;

(b) the information contained in every certificate that is issued by the Registrar under this Ordinance; and

(c) the information contained in every prospectus registered by the Registrar under section 38D or 342C of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

(2) The Registrar must continue to keep the records that were, immediately before the commencement date of this section, kept for the purpose of a register of companies under the predecessor Ordinance.

(3) For the purposes of subsections (1) and (2), the Registrar must record the specified address as the correspondence address of a director, reserve director or company secretary of the following company—

(a) an existing company;

(b) a company falling within paragraph (a) of the definition of *company* in section 20(1) that is registered under section 777(1) by virtue of section 132 of Schedule 11; or

(c) a company falling within paragraph (b) of the definition of *company* in section 20(1).

(4) After the specified address is recorded under subsection (3) as the correspondence address of a director, reserve director or company secretary of a company, the Registrar must update the entry of such correspondence address with—

(a) the latest address of the company's registered office contained in a notice of change of address of the company's registered office—

(i) that is sent under section 92(3) of the predecessor Ordinance or section 658(3); and

(ii) that is registered by the Registrar under this Part; or

(b) the latest address of the company's principal place of business in Hong Kong contained in a return in respect of the change of address of the company's principal place of business in Hong Kong—

(i) that is delivered under section 335(1)(d) of the predecessor Ordinance or section 791(1); and

(ii) that is registered by the Registrar under this Part.

(5) Subsection (4) does not apply if, in relation to the director, reserve director or company secretary of a company—



- (a) a notice or return is delivered under section 645(4), 652(2) or 791(1) in respect of a change of the person's correspondence address; and
- (b) the notice or return is registered by the Registrar under this Part.

(6) For the purposes of subsection (3), an address is the specified address in relation to a director, reserve director or company secretary of a company if—

- (a) immediately before the commencement date of this section, the address was shown on the register of companies under the predecessor Ordinance as the address of the company's registered office or principal place of business in Hong Kong;
- (b) the address is contained, as the address of the company's registered office, in an incorporation form—
  - (i) delivered before the commencement date of Division 1 of Part 3 to the Registrar for registration under section 15(1) of the predecessor Ordinance; and
  - (ii) registered on or after that commencement date under section 16(1) of the predecessor Ordinance; or
- (c) the address is contained, as the address of the company's principal place of business in Hong Kong, in an application for registration delivered before the commencement date of Division 2 of Part 16 to the Registrar under section 333 of the predecessor Ordinance and the registration takes place under section 777(1).

#### COMMENTARY

##### Corresponding statutory provisions\*

27.01 Section 27 provides a new power given to the Registrar and accordingly there is no equivalent provision in the predecessor CO. However, do note that under s.333AA of the predecessor CO, the Registrar was statutorily obliged to keep a register of non-Hong Kong companies.

27.02 But note that subsections 27(3), 27(4), 27(5), and 27(6) in so far as they relate to a director or reserve director *have not yet come into operation*. In addition, note that the whole of subsection 27(6) continues to *remain in-active* and *is still not yet in operation*.

#### Overview

The Registrar is now expressly required to keep and maintain certain records (e.g. the "specified address") as the correspondence address of a director, reserve director or company secretary. Among other things, the existing registered office address of such company will become the "specified address" of directors.

As previously explored, the newly proposed regime substantially changes the existing practice and has caused a huge debate in relation to the protection of data privacy and the interest of public. Note that subsections 27(3), 27(4), 27(5), and 27(6) in so far as they relate to a director or reserve director *have not yet come into operation*.

#### 28. Provisions supplementary to section 27

(1) The records kept under section 27 must be such that information relating to a company is associated with the company in a manner determined by the Registrar, so as to enable all the information relating to the company to be retrieved.

(2) A record of information for the purposes of section 27(1) must be kept in such form as to enable any person to inspect the information contained in the record and to make a copy of the information.

(3) Subject to subsections (1) and (2), a record of information for the purposes of section 27(1) may be kept in any form that the Registrar thinks fit.

(4) If the Registrar keeps a record of information in a form that differs from the form in which the document containing the information was delivered to, or generated by, the Registrar, the record is presumed, unless the contrary is proved, to represent the information contained in the document as delivered or generated.

(5) If the Registrar records the information contained in a document for the purposes of section 27(1), the Registrar is to be regarded as having discharged any duty imposed by law on the Registrar to keep, file or register the document.

## COMMENTARY

**Corresponding statutory provisions**

- 28.01 Section 28 should be referred to (former) ss.348D(1), 348D(2), and 348D(3) of the predecessor CO for a comparison of the maintenance of these records under the predecessor regime.

**Overview**

- 28.02 This provision is self-explanatory as the Registrar is empowered to keep records in any form that the Registrar thinks fit.

**29. Registrar not required to keep certain documents etc.**

(1) The Registrar may destroy or dispose of any document delivered to the Registrar for registration under an Ordinance if the information contained in the document has been recorded by the Registrar in any other form for the purposes of section 27(1) or for the purpose of a register of companies under the predecessor Ordinance.

(2) If a document or certificate has been kept by the Registrar for at least 7 years for the purposes of section 27(1) or for the purpose of a register of companies under the predecessor Ordinance, the Registrar may destroy or dispose of the document or certificate.

(3) If the Registrar is required by section 48 not to make any information available for public inspection, the Registrar is not required to keep a record of the information for any longer than appears to the Registrar to be reasonably necessary for the purpose for which the information was delivered to the Registrar.

## COMMENTARY

**Corresponding statutory provisions**

- 29.01 Subsections 29(1) and 29(2) herein reenact (former) s.348B of the predecessor CO while subsection 29(3) is a newly created provision under this Ordinance.

**Overview**

- 29.02 The Registrar is now empowered to destroy or dispose of any document delivered to the Registrar for registration which has been:

- (i) recorded by the Registrar in any other form for the purposes of previous s.27(1) of the Ordinance; or

- (ii) kept by more than seven years for the purpose of previous s.27(1) of the Ordinance; or  
(iii) excluded from public inspection by law or Court order as prescribed under later s.48 of the Ordinance.

**30. Registrar must keep Index of Company Names**

**The Registrar must keep an index of the names of every company.**

## COMMENTARY

**Corresponding statutory provisions**

Section 30 reenacts (former) s.22C of the predecessor CO.

30.01

**Overview**

The Registrar is required to keep an index of the names of every company as now mandated by this provision.

30.02

**Division 4 Registration of Document****Subdivision 1 Preliminary****31. Unsatisfactory document**

(1) For the purposes of this Division, a document delivered to the Registrar for registration is unsatisfactory if—

- (a) the information contained in the document is not capable of being reproduced in legible form;
- (b) in the case of a document that is neither in English nor in Chinese, it is not accompanied by a certified translation of it in English or Chinese;
- (c) the requirements specified in relation to the document under section 32 are not complied with;
- (d) the document is not delivered in accordance with an agreement made under section 33, and any regulations made under section 34, in relation to it;
- (e) the applicable requirements of the Ordinance under which the document is delivered are not complied with;
- (f) the document is not accompanied by the fee payable for the registration;



- (g) the document, or any signature on, or any digital or electronic signature accompanying, the document—
  - (i) is incomplete or incorrect; or
  - (ii) is altered without proper authority;
- (h) the information contained in the document—
  - (i) is internally inconsistent; or
  - (ii) is inconsistent with other information on the Companies Register or other information contained in another document delivered to the Registrar;
- (i) the information contained in the document derives from anything that—
  - (i) is invalid or ineffective; or
  - (ii) has been done without the company's authority; or
- (j) the document contains matters contrary to law.

(2) In this section—

*applicable requirements* (適用規定), in relation to a document, means the requirements as regards—

- (a) the contents of the document;
- (b) the form of the document;
- (c) the authentication of the document; and
- (d) the manner of delivery of the document.

## COMMENTARY

### Corresponding statutory provisions

- 31.01 Section 31 consolidates (former) ss.346(1)(a), 346(1)(b), and 348(1) of the predecessor CO and also introduces *new grounds* for a refusal to register a document.

### Overview

- 31.02 This provision states and lists the circumstances when documents delivered to the Registrar for registration *could be considered unsatisfactory*.
- 31.03 Set forth in subsection 31(1) are those situations where a document is considered to be unsatisfactory. It consolidates and clarifies the existing grounds on which the Registrar may refuse the registration of a document. *For example*, it is expressly provided that a document is unsatisfactory if it is internally inconsistent or inconsistent with the information already on the Companies Register.
- 31.04 It has been acknowledged that an unsatisfactory document is *now defined in wide terms*. See *China Capital Strategy Ltd v The Registrar of Companies* (unrep., HCMP

3275/2013, 9 March 2016). Accordingly, note that under the predecessor CO, it was not entirely clear whether the Registrar could refuse to register a document if the information contained therein was internally inconsistent or inconsistent with information already filed on the Register.

The Registrar is also empowered *refuse to accept or register* a document if it is unsatisfactory in accordance with later s.35 of this Ordinance.

31.05

### Terms defined

The *Companies Registrar* is tasked with keeping the records of: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part; (ii) the information contained in every certificate that is issued by the Registrar under this Ordinance; and (iii) the information contained in every prospectus registered by the Registrar under section 38D or 342C of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32). The Registrar must also continue to keep the records that were, immediately before the commencement date of this section, kept for the purpose of a register of companies under the predecessor CO. - *Companies Registrar* is the office set up and officers appointed by the Chief Executive of Hong Kong which deals with administration of companies and enforcement of the Companies Ordinance (Cap.622). The Registrar is located at Queensway Government Offices, 66 Queensway, Admiralty, Hong Kong.

31.06

*Companies Register* are those records of a company that must be kept by the *Companies Registrar*, which includes: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under the Ordinance; (ii) the information contained in every certificate that is issued by the Registrar under this Ordinance; and (iii) the information contained in every prospectus registered by the Registrar under ss.38D or 342C of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap.32). The Registrar must also continue to keep the records that were, immediately before the commencement date of this Ordinance, kept for the purpose of a register of companies under the predecessor CO.

*Applicable requirements*, in relation to a document meeting the requirements to be registered with the Registrar, means those requirements as regards to the: (i) contents of the document; (ii) form of the document; (iii) authentication of the document; and (iv) manner of delivery of the document.



**32. Registrar may specify requirements (for section 31(1))**

(1) The Registrar may, in relation to any document required or authorized to be delivered to the Registrar under an Ordinance—

- (a) specify requirements for the purpose of enabling the Registrar to make copies or image records of the document and to keep records of the information contained in it;
- (b) specify requirements as to the authentication of the document; and
- (c) specify requirements as to the manner of delivery of the document.

(2) The Registrar may, in relation to any document authorized to be delivered to the Registrar for registration under section 41(3) for the purpose of rectification of an error, specify requirements as to—

- (a) the delivery of the document in a form and manner enabling it to be associated with the document containing the error; and
- (b) the identification of the document containing the error.

(3) For the purposes of subsections (1) and (2), the Registrar may specify different requirements for different documents or classes of documents, or for different circumstances.

(4) For the purposes of subsection (1)(b), the Registrar may—

- (a) require the document to be authenticated by a particular person or a person of a particular description;
- (b) specify the means of authentication; and
- (c) require the document to contain, or to be accompanied by, the name or registration number, or both, of the company to which it relates.

(5) For the purposes of subsection (1)(c), the Registrar may—

- (a) require the document to be in hard copy form, electronic form or any other form;
- (b) require the document to be delivered by post or any other means;
- (c) specify requirements as to the address to which the document is to be delivered; and
- (d) in the case of a document to be delivered by electronic means, specify requirements as to the hardware and software to be used and the technical specifications.

(6) This section does not empower the Registrar—

- (a) to require a document to be delivered to the Registrar by electronic means; or
- (b) to specify any requirement that is inconsistent with any requirement prescribed by an Ordinance as to—
  - (i) the authentication of the document; and
  - (ii) the manner of delivery of the document to the Registrar.

(7) Requirements specified under this section are not subsidiary legislation.

**COMMENTARY****Corresponding statutory provisions**

While s.32 was newly introduced herewith, it may still be compared to (former) ss.346(1)(c), 346(1A), 346A(1), and 346A(2) of the predecessor CO.

32.01

**Overview**

For the purpose of previous s.31(1) regarding the registration of documents, the Registrar may specify the requirements of those documents as to form, authentication and manner of delivery of documents and may include rectification of an error in the Companies Register in accordance with subsections 32(1), 32(2), 32(4), and 32(5) herein.

32.02

The Registrar has exercised his power under this s.32 to specify that: (i) documents should be in hard copy form; (ii) shareholders' lists in the form of CD-ROM or DVD-ROM (accompanying the relevant Annual Returns or Returns of Allotment in hard copy form); and (iii) documents in electronic form to be delivered to the Registrar for registration under the Ordinance *shall instead* comply with the requirements as respectively set out in Annex 1, 2, and 3 of the Companies Registry External Circular No. 8/2014, *The New Companies Ordinance (Cap. 622) – Requirements for Documents Delivered for Registration*. See, <http://www.cr.gov.hk/en/publications/docs/ec8-2014-e.pdf>.

32.03

But note that it is *not mandatory* to deliver the documents to the Registrar by electronic means (electronic form) as prescribed under subsection 32(6) herein as personal hard copy delivery still seems to be the preferable method.

32.04

**Terms defined**

The *Companies Registrar* is tasked with keeping the records of: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under this Part; (ii) the

32.05



## COMMENTARY

### Corresponding statutory provisions

- 202.01 Section 202 basically reinstates (former) s.350A of the predecessor CO *except* for the removal of the reference to “authorized capital” which is abolished under this Ordinance.

### Overview

- 202.02 Section 202 herein provides that if a company composes its issued capital in an official document which is defined to mean a “notice, circular, advertisement or other official publication of the company,” it must also include a statement of its paid-up capital in the documents.

### Offence

- 202.03 The company and every responsible person commits an offence if it issues, circulates, or distributes an official document in Hong Kong that states its issued capital *without* its paid-up capital as so defined in subsection 202(2) herein.

## Part 5

# TRANSACTIONS IN RELATION TO SHARE CAPITAL

- 
- Division 1 Preliminary  
Division 2 Solvency Test  
Division 3 Reduction of Share Capital  
Division 4 Share Redemptions and Buy-backs  
Division 5 Financial Assistance for Acquisition of Own Shares
- 

### Part 5 Summary

Part 5 of the Companies Ordinance contains initiatives that aim at facilitating business operation. This part principally deals with the following transactions and matters affecting share capital, namely by:

- (i) Adopting a uniform solvency test based on cash-flow for different types of transactions under this Part;
- (ii) Introducing an alternative court-free procedure for reduction of capital based on a solvency test;
- (iii) Allowing all companies to purchase their own shares out of capital, subject to a solvency test (share redemptions and buy-backs);
- (iv) Allowing all types of companies (listed or unlisted) to provide financial assistance for acquisitions of the companies' shares, subject to satisfaction of the solvency test and certain specified procedures; and
- (v) Relaxing the rules on giving of financial assistance for the purposes of employee share schemes.

A new uniform solvency test based on cash-flow (ss.204 to 208) was adopted for the different types of transaction under this Part 5. In that regards:

- (i) Section 204 provides that a uniform solvency test will be applicable to all three categories of transactions, namely reduction of capital, buy-backs and financial assistance;

- (ii) Section 205 sets out the content of the uniform solvency test, which in substance, re-enacts (former) s.47F(1)(d) of the predecessor CO; and
- (iii) Section 206 provides for the making of a solvency statement by the directors who have formed the opinion that the company satisfies the solvency test in relation to the transaction concerned.

In forming his/her opinion, a director must inquire into the company's state of affairs and prospects and take into account contingent and prospective liabilities of the company. The solvency statement must be made and signed by all directors for buy-backs and reductions of capital, and made and signed by a majority of directors for financial assistance.

Apart from passing a special resolution for reduction of share capital to be confirmed by a Court order under ss.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 under those ss.215 to 225 of the Ordinance.

This *court-free procedure*, subject to compliance with the solvency test, is summarized below:

- (i) All the directors need to sign the solvency statement in support of the proposed reduction (s.216);
- (ii) Company needs to obtain members' approval by a special resolution (ss.215 and 217);
- (iii) Company must publish notices with relevant information in the Gazette and newspapers and must register the solvency statement with the Registrar of Companies (s.218);
- (iv) Any creditor or non-approving member of the company may, within five weeks after the special resolution is passed, apply to the court for cancellation of the resolution (ss.220 to 222). During this five-week period, the company must make available the special resolution and solvency statement for members' and creditors' inspection (s.219); and
- (v) Company must deliver after the five-week period (but no later than seven weeks) to the Registrar a return in specified form if there is no court application (s.224), or within 15 days after the court makes the order confirming the special resolution or the proceedings are ended without determination by the court (s.225). The reduction of share capital takes effect when the return is registered by the Registrar.

Share redemption and buy-backs is now open to listed companies (ss.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 (s.257(3)).

The regime of financial assistance as it was in the predecessor CO has been reinstated in this Ordinance (as contained in those ss.275 to 289) *except* that with a solvency statement made by the directors, who approved the granting 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 (s.283);
- (ii) all members have approved the assistance by written resolution (s.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. This assistance may only be *given not less than 28 days* after the resolution has passed and not more than 12 months after the day on which the solvency statement was made (ss.285 to 289).

Also note that the restriction of financial assistance has been relaxed for both listed and unlisted companies, for example, for the purposes of employee share schemes. Section 280 allows financial assistance for all types of employee share schemes *if* the assistance is: (i) given in good faith in the interest of the company for the purposes of an employee share scheme; or (ii) the giving of the assistance is for the purposes of enabling or facilitating transactions to acquire the beneficial ownership of shares for the employees.

## 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

##### Corresponding statutory provisions

203.01

This provision re-instates ss.2(1), 49E(1), 49S(1), and 71A(3)(a) of the predecessor CO.

#### Overview

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

203.02

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

#### Appointment of a list of Chinese/English Newspapers

Note that subsection 203(2) 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.

203.03

Those Chinese language newspapers and English language newspapers which were specified in the list of newspapers last published under (former) s.71A(3)(a) of the predecessor CO will still be treated as the “specified Chinese language newspaper” or as a “specified English language newspaper” (as the case may be) for the purposes of this Part 5 of the Companies Ordinance until the Chief Secretary for Administration publishes a revised list in the Gazette under subsection 203(2) of this Ordinance (CO, Schedule 11, s.47).

203.04

#### 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 2 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

- 204.01** **Corresponding statutory provisions**  
Section 204 is a new provision and accordingly there is no equivalent provision in the predecessor CO.

- 204.02** **Overview**  
Section 204 is a new provision which provides that Division 2 of Part 5 of this Ordinance (on the solvency test) applies to all three categories: (i) a reduction of capital and share redemption; (ii) buy-back out of capital; and (iii) the giving of financial assistance. These are in essence, the 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.

**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

- 205.01** **Corresponding statutory provisions**  
Section 205 reenacts (former) s.47F(1)(d) of the predecessor CO. This provision may also be comparable to s.643 of the UK Companies Act 2006.

**Overview**

Section 205 sets out the content of the uniform solvency test. This provision applies the uniform solvency test to: (i) the 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 it now:

- (i) immediately after the transaction, 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 provision 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.

**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

**Corresponding statutory provisions**

- 206.01 Section 206 adopts, in substance, the approach set out under (former) ss.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. This provision is also comparable to s.643 of the UK Companies Act 2006.

**Overview**

- 206.02 This provision provides for the making of a solvency statement by the directors who have formed the opinion that the company satisfies the solvency test in relation to the transaction concerned. In forming this opinion, a director must inquire into the company's state of affairs and prospects and take into account contingent and prospective liabilities of the company. The solvency statement must be made and signed by all directors for buy-backs and reductions of capital, and made and signed by a majority of directors for financial assistance.

- 206.03 Accordingly, the company directors are now required to prepare a solvency statement for: (i) the reduction of capital; (ii) share redemption or buy-back out of capital; and (iii) the giving of financial assistance.

- 206.04 *Except* for the giving of financial assistance, the solvency statement must be in the specified form (Form NSC17) (as dictated under subsections 206(3)(a) and 206(4)) and must be made and signed by all directors (as required under subsections 206(3)(c) and 206(4)). Although this provision 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).

**Director's duty to inquire and take into account all liabilities**

- 206.05 As previously stated, a director is now duty bound to: (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.
- 206.06 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.
- 206.07 *Contingent liability* is defined as 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 defined as 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.

**Directors approving the solvency statement**

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

Furthermore, this s.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. Also note that unlike under the predecessor CO, there is no requirement under this Ordinance to attach an auditor's report to the solvency statement.

**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
- (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months.

## COMMENTARY

**Corresponding statutory provisions**

Section 207 modifies (former) s.47F(5) of the predecessor CO to the extent that the director can now be charged on indictment or summarily. Note that this provision is also comparable to those ss.643(4) and 643(5) of the UK Companies Act 2006.

**Overview**

A director of a company who makes a solvency statement without having reasonable grounds for the opinion expressed in it commits an offence.

**Distinctions from the predecessor CO**

This section modified (former) s.47F(5) of the predecessor CO to the extent that the director can now be charged on indictment or summarily, and in

respect of the latter the level of fine has been increased from level 5 to level 6 of HK\$100,000.

## 208. Power to modify solvency test by regulation

- (1) The Chief Executive in Council may make regulations—
- (a) modifying the solvency test or its application to any transaction or class of transactions; or
  - (b) modifying the matters that a director is required to take into account in forming an opinion for the purpose of making a solvency statement.
- (2) Regulations made under this section are subject to the approval of the Legislative Council.

### COMMENTARY

**208.01** **Corresponding statutory provisions**  
Section 208 restates (former) ss.49Q(1)(d) and 49Q(4) of the predecessor CO

**208.02** **Overview**  
The Chief Executive in Council is empowered by this s.208, subject to the approval of the Legislative Council (pursuant to the 'positive vetting' procedure under the Interpretation and General Clauses Ordinance (Cap.1), s.35), to make regulations modifying the solvency test or matters that a director is required to take into account in making a solvency statement.

## Division 3 Reduction of Share Capital

### Subdivision 1 General Provisions

## 209. Application of Division

This Division applies to—

- (a) a company limited by shares; and
- (b) a company limited by guarantee having a share capital that was formed as, or became, such a company under a former Companies Ordinance before 13 February 2004.

### COMMENTARY

## Corresponding statutory provisions

Section 209 substantially restates (former) s.58(1A) of the predecessor CO. Note that this provision is also comparable to s.641(1) of the UK Companies Act 2006.

## Overview

This provision provides that Division 3 of Part 5 of this Ordinance, which deals with reduction of capital, is applicable to: (i) a company limited by shares; and (ii) a company limited by guarantee having a share capital that was formed before 13 February 2004.

## Terms defined

A company is considered a *limited company* if it is a company limited by shares or by guarantee - A company is a *company limited by shares* if the liability of its members is limited by the company's articles to any amount unpaid on the shares held by the members. - A company is a *company limited by guarantee* if: (i) it does not have a share capital; and (ii) the liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its being wound-up.

## 210. Permitted reductions of share capital

(1) A company may, in accordance with the procedure specified in Section 211, reduce its share capital under this Division in any way.

Examples—

1. A company may extinguish or reduce the liability on any of its shares in respect of share capital not paid up.
2. A company may, either with or without extinguishing or reducing liability on any of its shares—
  - (a) cancel any paid-up share capital that is lost or unrepresented by available assets; or
  - (b) repay any paid-up capital in excess of the company's wants.

(2) However, a company must not reduce its share capital if, as a result of the reduction, there would no longer be any member of the company holding shares other than redeemable shares.



**(3) This Division is subject to any provision of a company's articles that prohibits or restricts the reduction of the company's share capital.**

### COMMENTARY

#### Corresponding statutory provisions

**210.01** Subsection 210(1) substantially restates (former) ss.58(1) and 58(1D) of the predecessor CO. The remaining subsections 210(2) and 210(3) are new and accordingly there is no equivalent provision in the predecessor CO. This provision as a whole can also be compared to ss.641 and 642 of the UK Companies Act 2006.

#### Overview

**210.02** This provision provides that a company may, in accordance with the procedures as specified in subsequent s.211, reduce its share capital under Division 3 of Part 5, *except* that if after the reduction, the redeemable shareholder(s) will be the only shareholder(s) of such company. Subsection 210(2) herein was *purposefully inserted* to ensure that the company would not be left with no members following a reduction of share capital.

**210.03** The examples provided in subsection 210(1) were copied from (former) s.58(1) of the predecessor CO, which in turn are based on the methods approved in the case of *Poole v National Bank of China Ltd* [1907] AC 229, and by which form part of this Ordinance. Although not made expressly under this provision, the three methods stated in the examples can be used individually or in combination. Alternatively, any two or all three of the methods can be used in a single complex reduction. Further, the company may allot debenture stock to shareholders instead of repaying cash as envisaged by example 2 (b), as stated above in the text of the provision.

#### Distinctions from the predecessor CO

**210.04** The position here does not (as it did under the predecessor CO) require the company's articles to authorize a share capital reduction before one could be affected. Instead, a company may prohibit or restrict its power for reduction of its share capital by its articles as allowed under subsection 210(3).

**210.05** Also note that later s.277(c) of this Ordinance, which provides a reduction of share capital, is *permitted as an exception* to the general prohibition stated under that s.275 of the Ordinance which relates to financial assistance for acquisition of shares or for reducing or discharging liability for acquisition.

#### Terms defined

*Share capital* is defined as either: (i) the money paid into the company; or (ii) the money legally promised as being available on call, by members in return for shares of that particular company.

210.06

*Share* means: (i) a share in a company's share capital; and (ii) if any of the company's shares is converted into stock, includes stock.

#### 211. Procedure for a company to reduce its share capital

The procedure for a company to reduce its share capital under this Division is—

(a) by special resolution supported by a solvency statement under Subdivision 2; or

(b) by special resolution confirmed by the Court under Subdivision 3.

### COMMENTARY

#### Corresponding statutory provisions

Subsection 211(b) reinstates (former) s.58(1) of the predecessor CO whereas subsection 211(a) is a new provision which introduced a *new means* to reduce share capital without the assistance of the court.

211.01

#### Overview

A company may reduce its share capital by special resolution either: (a) supported by a solvency statement (ss.215 to 225 of the Ordinance); or (b) confirmed by the Court (ss.226 to 232 of the Ordinance).

211.02

The new procedure under subsection 211(a) herein should be faster and cheaper than having to obtain Court approval. It can also be utilized by both public and private companies.

211.03

#### Distinctions from the predecessor CO

Subsection 211(a) herein introduced a new means to reduce share capital without the assistance of the court. But note however under that (former) s.58(3) of the predecessor CO (which was not reproduced in this Ordinance), Court approval *was not required* if the sole purpose of the reduction was to re-designate the nominal value of shares to a lower amount and the conditions set out therein were satisfied.

211.04



211.05

**Terms defined**

*Court* as referred to under this Ordinance means the Court of First Instance.

A *special resolution* means a resolution that is passed by a majority of at least 75% of the members and whereby the notice of the meeting for which that resolution is passed has included both: (i) the text of the resolution; and (ii) specified the intention/reason to propose it as a special resolution in the first instance.

*Share capital* is defined as either: (i) the money paid into the company; or (ii) the money legally promised as being available on call, by members in return for shares of that particular company.

*Solvency test* is applied to (i) the reduction of capital; (ii) share redemption or buy-back out of capital; and (iii) the giving of financial assistance. - A company satisfies the required *solvency test*, if it: (i) immediately after the transaction, 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. - *Solvency statement* means, in relation to a transaction, is a statement by the director(s) who have formed the opinion that the company satisfies the *solvency test* in relation to the transaction concerned.

**212. Offence if share capital is reduced in contravention of Division**

**(1) If a company reduces its share capital in contravention of this Division, the company, and every responsible person of the company, commit an offence and each is liable—**

- (a) on conviction on indictment to a fine of \$1,250,000 and to imprisonment for 5 years; or
- (b) on summary conviction to a fine of \$150,000 and to imprisonment for 12 months.

**(2) An offence is not committed under this section in relation to a reduction of share capital by a company only because one or more directors of the company commit an offence under Section 207 in making a solvency statement for the purposes of the reduction of share capital.**

**(3) An offence is not committed under this section if the reduction of share capital occurs as a result of a share redemption or buy-back in accordance with Division 4 or as otherwise provided in this Ordinance.**

**COMMENTARY****Corresponding statutory provisions**

Subsection 212(1) restates (former) ss.58(1A) and 58(1B) of the predecessor CO. Subsections 212(2) and 212(3) are new provisions and accordingly there are no equivalent provisions in the predecessor CO.

212.01

**Overview**

If a company reduces its share capital *in contravention* of this Division 3 of Part 5, the company and every *responsible person* of the company commits an offence and will be liable to pay a fine and to imprisonment.

212.02

If only because one or more *directors* of the company commits an offence under previous s.207 of this Ordinance in making a solvency statement for the reduction of share capital, the reduction of share capital by a company will not be regarded as contravening the prohibition on unlawful reductions as prescribed under subsection 212(2) herein.

212.03

Subsection 212(3) further clarifies that a reduction of share capital which occurs as a result of a share redemption or buy-back under this Ordinance will not be treated as an infringement of this s.212 as a whole.

212.04

**Distinctions from the predecessor CO**

The maximum fine on a summary conviction has been increased from HK\$125,000 to HK\$150,000, otherwise the other penalties stipulated under subsection 212(1) are the same as those stipulated in the predecessor CO.

212.05

**Terms defined**

*Share capital* is defined as either: (i) the money paid into the company; or (ii) the money legally promised as being available on call, by members in return for shares of that particular company.

212.06

A person is within the meaning of a *responsible person* if that person: (i) is an officer or shadow director of the company or non-Hong Kong company; and (ii) authorizes or permits, or participates in, the contravention or failure. A person is also considered a "responsible person" of a company or non-Hong Kong company if: (i) the person is an officer or shadow director of a body corporate that is an officer or shadow director of the company or non-Hong Kong company; (ii) the body corporate authorizes or permits, or participates in, the contravention or failure; and (c) the person authorizes or permits, or participates in, the contravention or failure.

*Director* includes any person occupying the position of director (by whatever name called) and by which now includes a shadow director and a reserve



director. A *director* is a person from a group of managers who leads or supervises a particular area of a company, program, or project. The *director*, as appointed or elected (as the case may be) has the responsibility for determining and implementing the company's policy. A *director* does not have to be a stockholder (shareholder) or an employee of the firm, and may only hold the office of director (see qualifications for directors). *Directors* act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association.

### 213. Liability of members following reduction of share capital

(1) If a company's share capital is reduced under this Division, a past or present member of the company is not liable in respect of a share to a call or contribution exceeding in amount the difference (if any) between—

- (a) the issue price of the share; and
- (b) the aggregate of the amount paid up on the share (if any) and the amount reduced on the share.

(2) Subsection (1) is subject to Section 232.

(3) Nothing in this section affects the rights of the contributories among themselves.

#### COMMENTARY

213.01

#### Corresponding statutory provisions

Section 213 restates (former) s.62 of the predecessor CO *except* for the proviso to that subsection 62(1), which is now set out in later s.232 of this Ordinance. This provision is also comparable to s.652 of the UK Companies Act 2006.

213.02

#### Reduction of share capital

Pursuant to this provision, after a reduction of share capital, the past or present members are not liable for calls or contributions as regards to the amount by which the issue price of their shares have been reduced. Thus, a shareholder who has been issued with shares that have been fully paid is not liable to contribute any further amount in the company's winding-up.

213.03

#### Where shares were partly paid

The situation is different where the shares have been partly paid. An example regards the issue price of a share being \$1. Out of this issue price \$0.6 has been paid up. The balance of \$0.4 is subject to be called. If the share has been

reduced from \$1 to \$0.7, then the shareholder is only liable to be called for \$0.1 instead of \$0.4 (\$0.7 – \$0.6) under this provision. Thus, a shareholder's maximum liability can be calculated by using the following formula: Issue price – (Paid-up amount + Reduced amount).

#### Distinctions from the predecessor CO

Note however, this provision does not affect the rights of the contributories among themselves.

213.04

#### Terms defined

*Members of company* includes: (i) the founding/founder members; as well as (ii) any other person who agrees to become a member of a company and whose name is entered, as a member, in the company's register of members is a member of the company.

213.05

### 214. Reserves arising from reductions of share capital

(1) If a company reduces its share capital in accordance with this Division, a reserve arising from the reduction is to be regarded for the purposes of Part 6 as realized profit.

(2) Subsection (1) is subject to anything to the contrary in—

- (a) an order of, or undertaking given to, the Court;
- (b) the resolution for, or any other resolution relevant to, the reduction of share capital; or
- (c) the company's articles.

#### COMMENTARY

#### Corresponding statutory provisions

Section 214 is a new provision and accordingly there is no equivalent provision in the predecessor CO. However, this provision may be comparable to s.654 of the UK Companies Act 2006 and Article 3(2) to 3(4) of the Companies (Reduction of Share Capital) Order 2008, SI 2008/1915.

214.01

#### Overview

This provision provides that a reserve arising from a reduction of share capital in accordance with Division 3 of Part 5 is realized profit available for distribution unless "anything to the contrary" is provided for in: (i) an order of the Court; (ii) any resolution; or (iii) the company's articles.

214.02

- 214.03 In relation to the Court, it may by exercising its (wide) power to make an order "on any terms and conditions it thinks fit" as so required that a reserve be created consequent upon a share capital reduction and that there is to be no distribution to members. See also CO, s.229(1).

### Subdivision 2 Reduction of Share Capital by Special Resolution Supported by Solvency Statement

#### 215. Special resolution for reduction of share capital

(1) A company may reduce its share capital by special resolution in accordance with this Subdivision.

(2) The special resolution and the reduction of share capital take effect when the return under section 224 or 225 in relation to the reduction is registered by the Registrar.

#### COMMENTARY

##### Corresponding statutory provisions

- 215.01 Section 215 may be compared with (former) ss.49K to 49O of the predecessor CO. This provision may also be compared to s.641 of the UK Companies Act 2006 (but as applied to private companies only).

##### Overview

- 215.02 This provision introduces a *new way for a company* to reduce its share capital without first resorting to the Court. Accordingly:

1. A company is now permitted to reduce its share capital by special resolution of its members (CO, s.217) supported by a solvency statement (s.216);
2. The proposed reduction of share capital must be publicized (CO, ss.218 and 219); and
3. Members and creditors have the right to apply to the Court to disallow the reduction (CO, s.220).

- 215.03 If there is application made to the Court in opposition to this share capital reduction, the company is to deliver a return to the Registrar for registration (CO, ss.224 and 225).

##### Procedures for share capital reduction

- 215.04 In summary, the procedures for reduction of share capital under subsection 215(2) are as follows:

1. the Directors having been satisfied that, there are no grounds on which the subject company will be unable to pay its debts upon the effective of the reduction of share capital and make a solvency statement to that effect (CO, ss.205 and 216);
2. the passing of a special resolution by shareholders to approve the reduction of share capital (CO, s.215);
3. publish a notice in the Gazette in accordance with later s.218 of the Ordinance;
4. shareholder or creditor *may apply to the Court* within 5 weeks after the date of special resolution for *cancellation* of the respective resolution as allowed under s.220 of the Ordinance; and
5. *if no application has been made* under that s.220, then there should be a filing of the relevant special resolution and the relevant return with the Companies Registrar pursuant to ss.215, 224, and 225 of this Ordinance.

Note that the special resolution and the reduction of share capital will take effect *only* when the return has been registered by the Registrar as so prescribed under subsection 215(2).

##### Terms defined

*Court* as referred to under this Ordinance means the Court of First Instance.

215.05

A *special resolution* means a resolution that is passed by a majority of at least 75% of the members and whereby the notice of the meeting for which that resolution is passed has included both: (i) the text of the resolution; and (ii) specified the intention/reason to propose it as a special resolution in the first instance.

*Share capital* is defined as either: (i) the money paid into the company; or (ii) the money legally promised as being available on call, by members in return for shares of that particular company.

#### 216. Solvency statement for reduction of share capital

(1) All directors of the company must make a solvency statement that complies with Division 2 in relation to the reduction of share capital.

(2) The special resolution for reduction of share capital must be passed within 15 days after the date of the solvency statement.

(3) If the special resolution is proposed as a written resolution, a copy of the solvency statement must be sent to every member of the company at or before the time when the proposed resolution is sent to them.



(4) If the special resolution is proposed at a meeting, a copy of the solvency statement must be made available for inspection by members at the meeting.

(5) The special resolution is not effective if subsection (3) or (4) (as applicable) is not complied with.

#### COMMENTARY

##### Corresponding statutory provisions

216.01 Section 216 may be compared with (former) ss.49K(3), 49K(7)(b), 49L(1), 49L(4) of the predecessor CO. This provision may also be compared to ss.642 and 644(5) of the UK Companies Act 2006.

##### Overview

216.02 To commence the procedure of reduction of share capital, all directors of a company must make and sign a solvency statement, in the form prescribed by previous ss.206. If the resolution is proposed to be passed by way of *written resolution*, the company has to send a copy of the solvency statement together with the proposed resolution to every member of the company.

216.03 If a meeting will be convened for the purpose of passing the special resolution, a copy of the solvency statement must be made available for inspection by members at the meeting.

216.04 Accordingly, the special resolution *will not be in effect unless*: (i) the members have been sent a copy of the statement (subsection 216(3)) or (ii) where the proposed at the meeting, the written resolution is made available for inspection by all the members (subsection 216(4)).

216.05 Once the above notice provisions have been complied with, the special resolution in support of the reduction *will then need to be passed with 15 days* for it to become effective.

##### Terms defined

216.06 *Written resolution*, as defined in s.548 of the Ordinance, refers to a resolution passed during a general meeting or any other meeting by members of a company. Such a resolution can be passed as an ordinary resolution or as a special resolution. A written resolution is legally valid, as it carries the signatures of all members who are entitled to vote.

A *special resolution* means a resolution that is passed by a majority of at least 75% of the members and whereby the notice of the meeting for which that resolution is passed has included both: (i) the text of the resolution; and

(ii) specified the intention/reason to propose it as a special resolution in the first instance.

*Members of company* includes: (i) the founding/founder members; as well as (ii) any other person who agrees to become a member of a company and whose name is entered, as a member, in the company's register of members is a member of the company.

*Solvency test* is applied to (i) the reduction of capital; (ii) share redemption or buy-back out of capital; and (iii) the giving of financial assistance. - A company satisfies the required *solvency test*, if it: (i) immediately after the transaction, 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. - *Solvency statement* means, in relation to a transaction, is a statement by the director(s) who have formed the opinion that the company satisfies the *solvency test* in relation to the transaction concerned.

#### 217. Special resolution: exercise of voting rights

(1) If the special resolution for reduction of share capital is proposed as a written resolution, a member of the company holding shares to which the resolution relates is not an eligible member for the purposes of Subdivision 2 of Division 1 of Part 12 (written resolution) in respect of those shares.

(2) If the special resolution is proposed at a meeting, the resolution is not effective if—

- (a) any member of the company holding shares to which the resolution relates exercises the voting rights carried by any of those shares; and
- (b) the resolution would not have been passed if the member had not done so.

(3) For the purposes of subsection (2)—

- (a) a member holding shares to which the resolution relates is to be regarded as exercising the voting rights carried by those shares not only if the member votes in respect of them on a poll on the question whether the resolution should be passed but also if the member votes on the resolution otherwise than on a poll;
- (b) any member of the company may demand a poll on that question; and
- (c) a vote or a demand for a poll by a person as proxy for a member is the same as a vote or a demand by the member.



(4) The special resolution is not effective if a demand for a poll referred to in subsection (3)(b) is refused.

(5) This section does not apply in the case of a reduction of share capital that applies equally to all issued shares in the company.

#### COMMENTARY

##### Corresponding statutory provisions

217.01 Section 217 may be compared with (former) ss.49K(7)(a) and 49L(2) to 49L(5) of the predecessor CO.

##### Overview

217.02 A special resolution for the reduction of share capital must be approved by all members. This special resolution can be proposed either at a meeting of the company's members or by way of written resolution. Where a meeting is to take place, any member can demand a poll vote, notwithstanding anything stated in the articles which might restrict the same.

217.03 The restrictions on the right to demand a poll that are otherwise permitted under later s. 591 of this Ordinance *would not be permissible* for the purpose of the resolution under this provision.

217.04 Any votes from members interested in the proposed reduction of shares shall not be counted *except* when a reduction of capital applies equally to all issued shares in the company. This is so as to ensure that there are no conflicts of interest.

#### 218. Public notice of reduction of share capital

(1) If a special resolution for reduction of share capital is passed, the company must, on or before the date specified in subsection (2), publish a notice in the Gazette—

- (a) stating that the company has approved a reduction of share capital;
- (b) specifying the amount of share capital to be reduced and the date of the special resolution;
- (c) stating where the special resolution and solvency statement are available for inspection; and
- (d) stating that a member of the company who did not consent to or vote in favour of the special resolution or a creditor of the company may, within 5 weeks after the

date of the special resolution, apply to the Court under Section 220 for cancellation of the special resolution.

(2) The date is—

- (a) a date that falls on the last working day of the week after the week in which the special resolution is passed; or
- (b) if the period between the date in paragraph (a) and the date on which the special resolution is passed is less than 4 business days (both dates exclusive), a date that falls on the last working day of the week next following.

Examples—

1. The special resolution is passed on 2 February of a year (Thursday). Apart from Saturdays and Sundays, all other dates in February of that year are business days. The date that falls on the last working day of the week after the week in which the special resolution is passed is 10 February (Friday) of that year. There are 5 business days between 2 February and 10 February. Therefore, the relevant notice must be published in the Gazette on or before 10 February (Friday) of that year.
2. The special resolution is passed on 30 March of a year (Friday). Both 4 April (Wednesday) and 6 April (Friday) of that year are general holidays. 2 April (Monday), 3 April (Tuesday), 5 April (Thursday) and 13 April (Friday) of that year are business days. The date that falls on the last working day of the week after the week in which the special resolution is passed is 5 April (Thursday). There are only 2 business days between 30 March and 5 April. Therefore, the relevant notice must be published in the Gazette on or before the last working day of the week next following, which is 13 April (Friday) of that year.

(3) Before the end of the week after the week in which the special resolution for reduction of share capital is passed, the company must also—

- (a) publish a notice to the same effect as the notice under subsection (1) in at least one specified Chinese language newspaper and at least one specified English language newspaper; or
- (b) give written notice to that effect to each of its creditors.

(4) If the company contravenes subsection (1) or (3), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.



(5) The company must deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company—

- (a) publishes the notice under subsection (1); or
- (b) if earlier, first publishes the notice or gives notice to creditors under subsection (3).

(6) If the company contravenes subsection (5), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

(7) For the purposes of subsection (2)—  
*business day* (辦公日) means a day that is not—

- (a) a general holiday;
- (b) a Saturday; or
- (c) a black rainstorm warning day or gale warning day as defined by Section 71(2) of the Interpretation and General Clauses Ordinance (Cap.1);

*working day* (工作日) means a day that is not—

- (a) a general holiday; or
- (b) a Saturday.

#### COMMENTARY

##### Corresponding statutory provisions

218.01 Section 218 may be compared with (former) ss.49M(1) to 49M(4) of the predecessor CO.

##### Overview

218.02 If the company passes a special resolution for reduction of capital, the company must:

- (i) Publish a notice with the required information in the Gazette:
  - (a) on or before the last working day of the week (the "Target Published Date") after the week in which the special resolution is passed; or
  - (b) if there is less than 4 business days between the Target Published Date and the date on which the special resolution is passed (both dates being excluded) then on or before the last working day of the week next following.

In order to illustrate the determination of the date for publication of notice in the Gazette, two examples are provided at the end of subsection 218(2) above.
- (ii) Before the end of the week of the Target Published Date, either:

- (a) publish a notice containing the same information as the notice published in the Gazette, in at least one specified Chinese language newspaper and one specified English language newspaper; or
- (b) give written notice to that effect to each of its creditors.
- (iii) Deliver to the Registrar for registration a copy of the solvency statement on or before the earlier of:
  - (a) the day on which the notice has been published in the Gazette; or
  - (b) the date of publication of the notice in the newspaper or the issue of notice to creditors, as the case may be.

##### Offence

The company and every responsible person commits an offence for contravening subsections 218(1), 218(3), or 218(5). A contravention of subsections 218(1) and 218(3) attracts a fine at level 3 (\$10,000) and a subsection 218(5) contravention attracts a fine at level 5 (\$50,000) plus a daily default fine (\$1,000).

218.03

##### Terms defined

*Business day* means a day that is not: (i) a general holiday; (ii) a Saturday; or (iii) a black rainstorm warning day or gale warning day. A *business day* is a term used to compute time for deadlines in filing papers, making payments, deliveries, etc. This typically refers to any day in which normal business is conducted. This is generally considered to be Monday through Friday from 9am to 5:30pm (local time) and excludes weekends and public holidays.

218.04

*Working day* means a day that is not: (i) a general holiday; or (ii) a Saturday. Any day (other than Saturday, Sunday or general holiday) on which legal business can be conducted.

*Specified Chinese language newspaper* means a Chinese language newspaper that is specified by the Chief Secretary for Administration and listed in the Gazette.

*Specified English language newspaper* means an English language newspaper that is specified by the Chief Secretary for Administration and listed in the Gazette.

#### 219. Inspection of special resolution and solvency statement

(1) The company must ensure that the special resolution for reduction of share capital and the solvency statement made in relation to it are kept at its registered office or at a place prescribed by regulations made under Section 657 for the period—

- (a) beginning on the day on which the company—
  - (i) publishes the notice under Section 218(1); or



(ii) if earlier, first publishes the notice or gives notice to creditors under Section 218(3); and

(b) ending 5 weeks after the date of the special resolution.

(2) The company must permit a member or creditor of the company to inspect the special resolution and solvency statement without charge during business hours in that period.

(3) If the company contravenes subsection (1) or (2), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5 and, in the case of a continuing offence, to a further fine of \$1,000 for each day during which the offence continues.

(4) If the company contravenes subsection (2), the Court may by order require the company to permit an immediate inspection.

#### COMMENTARY

##### Corresponding statutory provisions

219.01 Section 219 may be compared with (former) ss.49M(5) to 49M(7) of the predecessor CO.

##### Overview

219.02 During this five-week period the special resolution and solvency statement is kept at either the *registered office* or a place prescribed by the Financial Secretary (which must be a place in Hong Kong), the company must make available both these documents for inspection by both a member or creditor of the company.

219.03 Both the *special resolution* and *solvency statement* should be open for inspection by any member or creditor of the company without charge during business hours.

##### Offence

219.04 The company and every responsible person commits an offence for: (i) not keeping both the special resolution and solvency statement at the required place; (ii) not allowing the inspection of the aforesaid documents by a member or creditor of the company (ss.219(1) and 219(2)). A contravention of either the above attracts a fine at level 5 (\$50,000) plus a daily default fine (\$1,000) under subsection 219(3).

#### Court intervention

Note that the Court is empowered under subsection 219(4) to order immediate inspection of the documents upon a contravention of that subsection 219(2) denial of review to either a member or creditor.

219.05

#### Terms defined

*Companies Register* are those records of a company that must be kept by the *Companies Registrar*, which includes: (i) the information contained in every document that is delivered to the Registrar for registration and that the Registrar decides to register under the Ordinance; (ii) the information contained in every certificate that is issued by the Registrar under this Ordinance; and (iii) the information contained in every prospectus registered by the Registrar under ss.38D or 342C of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32). The Registrar must also continue to keep the records that were, immediately before the commencement date of this Ordinance, kept for the purpose of a register of companies under the predecessor CO.

219.06

*Court* as referred to under this Ordinance means the Court of First Instance.

A *special resolution* means a resolution that is passed by a majority of at least 75% of the members and whereby the notice of the meeting for which that resolution is passed has included both: (i) the text of the resolution; and (ii) specified the intention/reason to propose it as a special resolution in the first instance.

*Solvency test* is applied to (i) the reduction of capital; (ii) share redemption or buy-back out of capital; and (iii) the giving of financial assistance. - A company satisfies the required *solvency test*, if it: (i) immediately after the transaction, 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. - *Solvency statement* means, in relation to a transaction, is a statement by the director(s) who have formed the opinion that the company satisfies the *solvency test* in relation to the transaction concerned.

#### 220. Application to Court by members or creditors

(1) Subject to subsection (2), a member or creditor of the company may apply to the Court, within 5 weeks after the date of the special resolution for reduction of share capital, for cancellation of the resolution.

(2) A member who consented to or voted in favour of the special resolution is not entitled to apply.



# *Part 12*

## COMPANY ADMINISTRATION AND PROCEDURE

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<b>Division 1</b>	Resolutions and Meetings
<b>Division 2</b>	Registers
<b>Division 3</b>	Company Records
<b>Division 4</b>	Registered Office and Publication of Company Names
<b>Division 5</b>	Annual Return

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### **Part 12 Summary**

Part 12 governs the general administration of company affairs, *e.g.* resolutions, meetings, keeping of registers, company records, registered offices, publication of information relating to companies and also annual returns. Introduced here were a number of changes to enhance shareholders' engagement in and the transparency of the decision-making process of a company. These provisions also revised those sections relating to registers, registered offices and annual returns to suit the needs of the modern community.

One of the major changes introduced in this Part 12 was the expansion of the previous single provision on written resolutions in (former) s.116B of the predecessor CO which was now expanded to more than ten sections (consisting of ss.548 to 561) under this Ordinance.

Under the predecessor CO, there was no statutory requirement for proposing and passing a written resolution, as there was no guidance in regards to:

- i. who may propose a written resolution, and
- ii. how a written resolution is to be circulated among the members.

Now under this Ordinance, a comprehensive set of rules for proposing and passing a written resolution have been implemented in this Part 12. These new provisions deal with:

- i. who may propose a written resolution;
- ii. the company's duty to circulate written resolutions (note that the company does not have the obligation, if the Court is satisfied that the rights to circulation are being abused or used to secure needless publicity for defamatory matter);
- iii. the procedure for signifying agreement;
- iv. the period for agreeing to a proposed written resolution;
- v. requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, Annual General Meetings (AGMs); and
- vi. reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights.

The following provisions have also been enhanced under the Ordinance:

- i. powers for members to require the circulation of members' resolutions and statements (ss.580 to 583 and 615); and
- ii. provisions for publication of notice of a general meeting on a website (s.573).

Except in the case of an annual general meeting (AGM) (where 21 days' notice is still required to be given) *only 14 days'* notice is required for a general meeting of a limited company (s.571(1)) and for a resolution requiring special notice, *e.g.* for change of the company name, the notice which the company must give its members is reduced from 21 days (s.116C of the predecessor CO) to 14 days (s.578(3) herein).

Other noteworthy revisions to this Part 12 include:

- (i) A company may be required to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for AGMs (s.582);
- (ii) The threshold requirement for members to demand a poll is reduced from 10% to 5% of the total voting rights (s.591) and there are new provisions clarifying the rights and obligations of proxies (ss.596 to 605);
- (iii) A general meeting may be held at more than one location with audio-visual technology as a company may set out rules and procedures for holding such meeting in its articles (s.584);
- (iv) A company may opt to dispense with the convention of the AGM by unanimous shareholders' consent (s.613) and furthermore, company is not required to hold an AGM if it has only one member (s.612(2)(a));
- (v) The Financial Secretary is empowered to make the Companies (Disclosure of Company Name and Liability Status) Regulation

(Cap.622B) to: (a) require a company to display its name and related information in certain locations; and (b) state prescribed information in documents or communications; and

- (vi) The register of directors and company secretaries becomes *two separate registers* (ss.641 and 648). The Financial Secretary is empowered to make the Company Records (Inspection and Provision of Copies) Regulation (Cap.622I) for inspection and provision of copies of registers.

One of the main initiatives of the Companies Ordinance was to modernise the law so that it is comparable to the legislation of other jurisdictions. Such new enhancements under this Part 12 include:

- (i) clarifying the rights and obligations of proxies and enhancing the right to appoint proxies;
- (ii) requiring public companies or companies limited by guarantee to file annual returns in respect of every financial year and requiring the annual return of a listed company to include particulars relating to members who held 5% or more of the issued shares; and
- (iii) empowering the Financial Secretary ("FS") to make regulations to require a company to display its name and related information in certain locations and to state prescribed information in documents or communications.

## PART 12

### COMPANY ADMINISTRATION AND PROCEDURE

#### Division 1 Resolutions and Meetings

##### Subdivision 1 Preliminary

#### 547. Interpretation

(1) In this Division—  
*circulation date* (傳閱日期), in relation to a written resolution or a proposed written resolution, means—

- (a) the date on which copies of the resolution are sent to eligible members in accordance with Section 553; or
- (b) if copies are sent to eligible members on different days, the first of those days;

*electronic address* (電子地址) means any sequence or combination of letters, characters, numbers or symbols of any language or, any



number, used for the purposes of sending or receiving a document or information by electronic means.

(2) For the purposes of this Division—

- (a) in relation to a proposed written resolution, the eligible members are the members who would have been entitled to vote on the resolution on the circulation date of the resolution; and
- (b) if the persons entitled to vote on the resolution change during the course of the day that is the circulation date of the resolution, the eligible members are the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement.

(3) Nothing in this Division affects the operation of any other Ordinance or rule of law as to—

- (a) things done otherwise than by passing a resolution;
- (b) circumstances in which a resolution is or is not to be regarded as having been passed; or
- (c) cases in which a person is precluded from alleging that a resolution has not been duly passed.

## COMMENTARY

### Corresponding statutory provisions

- 547.01 Subsection 547(3) is comparable to s.116BB(2) of the predecessor CO. Subsections 547(1) and 547(2) are instead comparable to ss.289, 290, 298(2) and 333(4) of the UK Companies Act 2006.

### Overview

- 547.02 This provision sets out the definitions used in the Division 1 of Part 12 of this Ordinance, which include the following:

- (a) New definition of “*circulation date*”, which is the date on which copies of the written resolution are sent to eligible members in accordance with later s.553. If copies of the written resolution are sent to eligible members on various days, then the first of those days will be treated as the circulation date (subsection 547(1));
- (b) “*Eligible members*” now includes the members who would have been entitled to vote on the resolution on the circulation date of the resolution. If there is a change of member on the circulation date of the written resolution, the eligible members will be the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement; and

- (c) New definition of “*electronic address*” is introduced herein to reflect the modern times of messages and mail sent electronically.

Note that these new procedures under this Part 12 *will not replace the common law doctrine of unanimous consent* or the so-called *Duomatic* principle that, if all the members of a company actually agree on a particular decision which can be made at a general meeting, the decision is binding and effective without a meeting (Note that subsection 547(3) restates the law under (former) s.116BB(2) of the predecessor CO).

As such, subsection 547(3) makes it clear that Division 1 of Part 12 of the Ordinance does not affect the operation of any other ordinance or rule of law regarding the passing of resolution. Accordingly, the common law doctrine of unanimous consent will still be applicable.

### Terms defined

The common law doctrine of unanimous consent or so-called *Duomatic* principle (*Re Duomatic Ltd* [1969] 2 Ch 365) provides that, if all the members of a company actually agree on a particular decision which can be made at a general meeting, the decision is binding and effective without a meeting.

## Subdivision 2 Written Resolution

### 548. Written resolution

(1) Anything that may be done by a resolution passed at a general meeting of a company may be done, without a meeting and without any previous notice being required, by a written resolution of the members of the company.

(2) Anything that may be done by a resolution passed at a meeting of a class of members of a company may be done, without a meeting and without any previous notice being required, by a written resolution of that class of members of the company.

(3) If a resolution is required by any Ordinance to be passed as an ordinary resolution or a special resolution, the resolution may be passed as a written resolution; and a reference in any Ordinance to an ordinary resolution or a special resolution includes a written resolution.

(4) A reference in any Ordinance to the date of passing of a resolution or the date of a meeting is, in relation to a written resolution, the date on which the written resolution is passed under Section 556.

- (5) A written resolution of a company has effect as if passed by—
- the company at a general meeting; or
  - a meeting of the relevant class of members of the company,

as the case may be, and a reference in any Ordinance to a meeting at which a resolution is passed or to members voting in favour of a resolution is to be construed accordingly.

- (6) This section does not apply to—
- a resolution removing an auditor before the end of the auditor's term of office; or
  - a resolution removing a director before the end of the director's term of office.

#### COMMENTARY

##### Corresponding statutory provisions

548.01 Section 548 restates (former) ss.116B(1), 116B(3) to 116B(6), and 116B(11) of the predecessor CO.

##### Power and effect of a 'written resolution'

548.02 Subdivision 2 of Division 1 of this Part 12 provides the procedures for proposing, passing and recording written resolutions. These new procedures facilitate the use of written resolutions for decision-making, which is more expeditious and less costly than passing a resolution in a general meeting.

548.03 Subsection 548(1) provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting or any previous notice, by a written resolution of the members of the company, *except* the removal of an auditor or a director before their term of office as so prescribed under later subsection 548(6).

548.04 A written resolution will be used for a resolution of a class of members of a company as prescribed under subsection 548(2). That subsequent subsection 548(3) simply makes it clear that a resolution may be passed by way of written resolution.

548.05 The date of passing of a written resolution will be the date on which all eligible members have signified their agreement to the written resolution in accordance with the provisions as prescribed in subsequent s.556 of the Ordinance as so stated in subsection 548(4).

A written resolution of a company has effect as if it is passed by the company at a general meeting or a meeting of the relevant class of members of the company. Also note that this subsection 548(5) further provides any reference in any ordinance to a meeting at which a resolution is passed or to members voting in favour of a resolution *is to be construed according to this subsection*. Therefore, this provision will have an overriding effect *vis-à-vis* the provisions of any ordinance as to the written resolution.

548.06

##### Transitional Arrangement (where still applicable)

Schedule 11, s.99 of the Companies Ordinance provides that (former) ss.116B (except those subsections (7), (8), (9) and (10) of 116B), 116BA, and 116BB of the predecessor CO continue to apply to resolutions sent or circulated to any member *before* the commencement date of Subdivision 2 of Division 1 of this Part 12.

548.07

##### Terms defined

*Eligible members* now includes: the members who would have been entitled to vote on the resolution on the circulation date of the resolution. If there is a change of member on the circulation date of the written resolution, the eligible members will be the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement.

548.08

*Written resolution*, as defined in s.548 of the Ordinance, refers to a resolution passed during a general meeting or any other meeting by members of a company. Such a resolution can be passed as an ordinary resolution or as a special resolution. A written resolution is legally valid, as it carries the signatures of all members who are entitled to vote.

#### 549. Power to propose written resolution

A resolution may be proposed as a written resolution by—

- the directors of a company; or
- a member of a company.

#### COMMENTARY

##### Corresponding statutory provisions

Section 549 now expressly states who is entitled to propose a written resolution. This new provision is comparable to ss.288(3) and 292(5) of the UK Companies Act 2006.

549.01



**Overview**

549.02

This provision expressly provides that the directors or a member of a company may propose written resolution. Also note that later s.552 provides that member(s) who hold the minimum 5% of the total voting rights of all the members shall be entitled to vote on the resolution in order to be entitled to propose a written resolution in the first place.

**Terms defined**

549.03

*Director* includes any person occupying the position of director (by whatever name called) and by which now includes a shadow director and a reserve director. - A *director* is a person from a group of managers who leads or supervises a particular area of a company, program, or project. The *director*, as appointed or elected (as the case may be) has the responsibility for determining and implementing the company's policy. A *director* does not have to be a stockholder (shareholder) or an employee of the firm, and may only hold the office of director (see qualifications for directors). *Directors* act on the basis of resolutions made at directors' meetings, and derive their powers from the corporate legislation and from the company's articles of association. - *Director* includes any person occupying the position of director (by whatever name called) and by which now includes a *shadow director*.

*Members of company* includes: (i) the founding/founder members; as well as (ii) any other person who agrees to become a member of a company and whose name is entered, as a member, in the company's register of members is a member of the company.

**550. Company's duty to circulate written resolution proposed by directors**

If the directors of a company have proposed a resolution as a written resolution under Section 549(a), the company must circulate the resolution.

**COMMENTARY****Corresponding statutory provisions**

550.01

Section 550 is a new provision which is comparable to s.291(2) of the UK Companies Act 2006.

**Overview**

550.02

A company is now required to circulate a written resolution when proposed by the directors.

**551. Members' power to request circulation of written resolution**

(1) A member of a company may request the company to circulate a resolution that—

(a) may properly be moved; and

(b) is proposed as a written resolution under Section 549(b).

(2) If a member requests a company to circulate a resolution, the member may request the company to circulate with the resolution a statement of not more than 1000 words on the subject matter of the resolution.

(3) However, each member may only request the company to circulate one such statement with respect to the resolution.

**COMMENTARY****Corresponding statutory provisions**

Section 551 is a new provision and is instead comparable to ss.292(1) and 292(3) of the UK Companies Act 2006.

551.01

**Overview**

This new provision empowers the members of the company to request: (i) the circulation of a written resolution together with a statement, of not more than 1,000 words; (ii) on the subject matter of the resolution, where the resolution has been properly moved and proposed.

551.02

**552. Company's duty to circulate written resolution proposed by members**

(1) A company must circulate a resolution proposed as a written resolution under Section 549(b) and any statement mentioned in Section 551(2) if it has received requests that it do so from the members of the company representing not less than the requisite percentage of the total voting rights of all the members entitled to vote on the resolution.

(2) The requisite percentage mentioned in subsection (1) is 5% or a lower percentage specified for this purpose in the company's articles.

(3) A request—

(a) may be sent to the company in hard copy form or in electronic form;

- (b) must identify the resolution and any statement mentioned in Section 551(2); and
- (c) must be authenticated by the person or persons making it.

## COMMENTARY

## Corresponding statutory provisions

552.01 Section 552 is a new provision and is instead comparable to ss.292(4) and 292(6) of the UK Companies Act 2006.

## Members of the company empowered to propose a written resolution

552.02 This section provides that the directors or a member of a company may propose a written resolution. Upon the receipt of a request from member(s), holding not less than 5% of the total voting rights of all the members entitled to vote on the resolution for circulation of a *written resolution*, a company *must* circulate the written resolution together with a statement, of not more than 1,000 words to all members.

## Terms defined

552.03 *Written resolution*, as defined in s.548 of the Ordinance, refers to a resolution passed during a general meeting or any other meeting by members of a company. Such a resolution can be passed as an ordinary resolution or as a special resolution. A written resolution is legally valid, as it carries the signatures of all members who are entitled to vote.

## 553. Circulation of written resolution

(1) If a company is required under Section 550 or 552 to circulate a resolution proposed as a written resolution, the company must send at its own expense to every eligible member and every other member (if any) who is not an eligible member—

- (a) a copy of the resolution; and
- (b) if so required under Section 551(2), a copy of a statement mentioned in that section.

(2) The company may comply with subsection (1)—

- (a) by sending copies at the same time (so far as reasonably practicable) to all members in hard copy form or in electronic form or by making the copies available on a website;

- (b) if it is possible to do so without undue delay, by sending the same copy to each member in turn (or different copies to each of a number of members in turn); or
- (c) by sending copies to some members in accordance with paragraph (a) and sending a copy or copies to other members in accordance with paragraph (b).

(3) The company must send the copies (or if copies are sent to members on different days, the first of those copies) not more than 21 days after it becomes subject to the requirement under subsection (1) to send the copies.

(4) If the company sends a copy of a proposed written resolution or statement by making it available on a website, the copy is not validly sent for the purposes of this Subdivision unless the copy is available on the website throughout the period—

- (a) beginning on the circulation date; and
- (b) ending on the date on which the resolution lapses under Section 558.

(5) For the purposes of subsection (4), a failure to make a copy of a proposed written resolution or statement available on a website throughout the period mentioned in that subsection is to be disregarded if—

- (a) the copy is made available on the website for part of that period; and
- (b) the failure is wholly attributable to circumstances that it would not be reasonable to have expected the company to prevent or avoid.

(6) The company must ensure that the copy of the proposed written resolution sent to an eligible member is accompanied by guidance as to—

- (a) how to signify agreement to the resolution under Section 556; and
- (b) the date by which the resolution must be passed if it is not to lapse under Section 558.

(7) If a company contravenes subsection (1), (3) or (6), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 5.

(8) The validity of the resolution, if passed, is not affected by a contravention of subsection (1), (3) or (6).



## COMMENTARY

- 553.01** **Corresponding statutory provisions**  
Section 553 is a new provision and is instead comparable to ss.291(2) to 291(7), 293(1), 294, and 299 of the UK Companies Act 2006.
- 553.02** **Written Resolutions**  
This new provision provides the *way and manner* by which the company may send a proposed written resolution and statement to all members. In regards to a written resolution, a company must send: (i) the written resolution as proposed by the directors or member; (ii) at the company's cost; (iii) to every eligible member and non-eligible member (if any), together with, if required by a member; (iv) a statement in hard copy form or in electronic form.
- 553.03** As an alternative, the company is *now allowed* to make the copies of the written resolution available on its website within 21 days after the company is required to send the copies.
- 553.04** But do note that:
- (i) If copy of documents is sent to members on different days, then the first of those copies must be sent within the said time period; and
  - (ii) If the company elects to send a copy of the document by making it available on a website, the copy of proposed resolution and/or statement have to be on the website throughout the period commencing from the date the copies are sent until the date the proposed written resolution is lapsed in accordance with the articles. If the articles has not provided for circumstances on lapse of proposed written resolution, then the period for the documents to be kept on the website will end on the 28th day from the date of sending the document.
- 553.05** **Guidance**  
The company must also send guidance regarding the way to signify agreement to the resolution and specify the date by which the resolution must be passed otherwise the resolution will be lapsed in accordance with statutory period for proposed resolution to be lapsed as prescribed in later s.558 of the Ordinance.
- 553.06** **Instances of failure to properly send or post the resolution**  
Failure to send the written resolution, the statement, guidance or to specify the last date for passing the resolution to the members will render the company and every responsible person to be liable for an offence. However, such failure will not affect the validity of the resolution itself (subsections 553(7) and 553(8)).

- Where all the documents cannot be sent at the same time to all members, then the company shall either: (i) without undue delay send the same copy to each member in turn (or different copies to each batch of members in turn); *or* (ii) send all the documents to certain batch of members first and then copy of certain part of the whole set of document to another batch of members (subsection 553(2)). **553.07**
- If the copy is made available on the website for part of that period and the failure to make the copy available on the website for the entire period is caused by circumstances which the company *could not reasonably* prevent or avoid, then such failure will be disregarded (subsections 553(4) and 553(5)). **553.08**
- Terms defined**  
*Eligible members* now includes: the members who would have been entitled to vote on the resolution on the circulation date of the resolution. If there is a change of member on the circulation date of the written resolution, the eligible members will be the persons entitled to vote on the resolution at the time that the first copy of the resolution is sent to a member for agreement. **553.09**
- 554. Application not to circulate accompanying statement**
- (1) A company is not required to circulate a statement mentioned in Section 551(2) if, on an application by the company or another person who claims to be aggrieved, the Court is satisfied that the rights given by that section are—
    - (a) being abused; or
    - (b) being used to secure needless publicity for defamatory matter.
  - (2) The Court may order the members who requested the circulation of the statement to pay the whole or part of the company's costs on an application under subsection (1), even if they are not parties to the application.

## COMMENTARY

- Corresponding statutory provisions**  
Section 554 is a new provision and is instead comparable to ss.295(1) and 295(2) of the UK Companies Act 2006. **554.01**
- Application to the Court to stop the circulation of a resolution**  
Upon application by either the company itself or the aggrieved person, the Court is empowered to relieve the company of the obligation to circulate the **554.02**



members' statement if this right to require circulation is: (i) abused; or (ii) being used to secure needless publicity for defamatory matter. This application may be made by originating summons in accordance with Order 102 rule 2(1) of the Rules of the High Court (Cap.4A).

554.03

Upon the granting of this application to prevent the circulation of a resolution, the Court is also empowered under subsection 554(2) to order the members who requested the circulation of the statement to pay the whole or part of the company's costs on an application, even if they are not parties to the application.

### 555. Company's duty to notify auditor of proposed written resolution

(1) If a company is required to send a resolution to a member of the company under Section 553, it must, on or before the circulation date, send to the auditor of the company (if more than one auditor, to everyone of them)—

- (a) a copy of the resolution; and
- (b) a copy of any other document relating to the resolution that is required to be sent to a member of the company under that section.

(2) The copies may be sent to the auditor or auditors of the company in hard copy form or in electronic form.

(3) If a company contravenes subsection (1), the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 3.

(4) The validity of the resolution, if passed, is not affected by a contravention of subsection (1).

### COMMENTARY

#### Corresponding statutory provisions

555.01

Section 555 is comparable to (former) ss.116BA(1), 116B(2), and 116B(4) of the predecessor CO and also s.502(1) of the UK Companies Act 2006.

#### Requirement to send a copy of the resolution to the company's auditors

555.02

The company is required to send to the company's auditors a copy of proposed *written resolution* together with other documents, in hard copy form or in electronic form, on or before the circulation date.

Failure to send the documents to the auditor will render the company and every responsible person liable to an offence. However, this will not affect the validity of the resolution itself as prescribed under subsections 555(3) and 555(4).

555.03

### Transitional Arrangement (where still applicable)

Schedule 11, s.99 of the Ordinance provides that ss.116B (except those subsections (7), (8), (9) and (10) of 116B), 116BA and 116BB of the predecessor CO continue to apply in relation to resolutions sent or circulated to any member before the commencement date of Subdivision 2 of Division 1 of this Part 12.

555.04

### Terms defined

An *auditor* means: a person appointed and authorized to examine a company's: (i) accounts and accounting records; (ii) compare the charges with the vouchers; (iii) verify balance sheet and income items; (iv) publish and state the results of; etc. This is usually an *accountant* who conducts an audit to verify the accuracy of the financial records and accounting practices of the company. A proper audit will point out deficiencies in accounting and other financial operations.

555.05

*Written resolution*, as defined in s.548 of the Ordinance, refers to a resolution passed during a general meeting or any other meeting by members of a company. Such a resolution can be passed as an ordinary resolution or as a special resolution. A written resolution is legally valid, as it carries the signatures of all members who are entitled to vote.

*Circulation date*, in relation to a written resolution or a proposed written resolution, means: (i) the date on which copies of the resolution are sent to eligible members in accordance with s.553 of the Ordinance; or (ii) if copies are sent to eligible members on different days, the first of those days.

### 556. Procedure for signifying agreement to proposed written resolution

(1) A written resolution is passed when all eligible members have signified their agreement to it.

(2) A member signifies agreement to a proposed written resolution when the company receives from the member (or from someone acting on the member's behalf) a document—

- (a) identifying the resolution to which it relates; and
- (b) indicating the member's agreement to the resolution.



But note that s.383 of the Ordinance requires that the information concerning benefits of directors, *e.g.* emoluments and retirement benefits, must be stated in the notes to financial statements. Therefore, apart from this section in the Directors' Report Regulation, a company also has to comply with the subsequent Companies (Disclosure of Information about Benefits of Directors) Regulation (Cap. 622G) in regards to the disclosure of information of its director(s).

A company which falls within the reporting exemption<sup>11</sup> is not required to disclose such information in its directors' report (s.10(7)(a) of the Directors' Report Regulation).

<sup>11</sup> That is companies which is eligible to prepare simplified financial statements. For details of reporting exemption, see Vol. 1 of this publication.

## Cap 622E

# COMPANIES (SUMMARY FINANCIAL REPORTS) REGULATION

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<b>PART 1</b>	PRELIMINARY
<b>PART 2</b>	SUMMARY FINANCIAL REPORT
<b>PART 3</b>	NOTIFICATION AND NOTICE OF INTENT, ETC.

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### Overview of Cap. 622E

Former ss.141CA to 141CG of predecessor CO provided that a listed company may prepare and send to its member a summary financial report, in place of the full set of financial documents. If a listed company intended to send a summary financial report under the predecessor CO, the company has to send a notification to members to ascertain their intent. The detailed requirements as regards the form and contents of a summary financial report and the notification for ascertaining the intent of members in respect of the receipt of summary financial reports were prescribed in the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>1</sup>

The Ordinance has now expanded the choice for summary financial reports<sup>2</sup> over the full set of financial statements documents to all types company.

Section 439 of the Ordinance provides that a summary financial report must contain the information as prescribed by the regulations made by the Financial Secretary.

<sup>1</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

<sup>2</sup> For summary financial report, see Division 7 of Part 9 of the Ordinance.

The Companies (Summary Financial Reports) Regulation<sup>3</sup> (Cap. 622E) (the "Summary Financial Reports Regulation") which took effect upon the commencement of ss.452(4) and 452(5) of the Ordinance (3 March 2014), provides the detailed requirements as regards the forms and contents of:

- (i) Summary financial report (ss.3 to 6 of the Summary Financial Reports Regulation); and
- (ii) Notification for seeking member's intent on receiving summary financial report (ss.7 to 11 of the Summary Financial Reports Regulation).

The Summary Financial Reports Regulation basically follows the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) with modifications made to align the Summary Financial Reports Regulation with the changes to the arrangements regarding summary financial report under the Companies Ordinance.

The Summary Financial Reports Regulation has the following three parts:

Parts	Matters
1	Definitions
2	Summary financial reports-forms and contents
3	The notification for seeking member's intent on mode of receipt of summary financial report-forms and requirements

The Ordinance expands and modifies the existing arrangement for eligible companies to prepare financial reports in summary form. The Summary Financial Reports Regulation sets out the requirements on the forms and contents of a summary financial report as well as the relevant notifications.

As stated above, this Cap. 622E basically follows the wording of the former Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M), which has been repealed upon the commencement of the Ordinance. But necessary modifications were made to this Regulation to reflect the new arrangements in relation to summary financial reports contained in ss.437 to 446 of the Ordinance.

<sup>3</sup> Made by the Financial Secretary pursuant to sections 452(4) and 452(5) of the Companies Ordinance.

## COMPANIES (SUMMARY FINANCIAL REPORTS) REGULATION (CAP. 622E)

### PART 1 PRELIMINARY

#### 1. Commencement

**This Regulation comes into operation on the same day on which Sections 452(4) and 452(5) of the Companies Ordinance (Cap. 622) comes into operation.**

(Omitted as spent—E.R. 1 of 2014)

### COMMENTARY

#### Overview

Section 1 of the Summary Financial Reports Regulation provides the authority for the commencement of the Summary Financial Reports Regulation upon the commencement of the Ordinance (Cap. 622).

E1.01

#### 2. Interpretation

##### (1) In this Regulation—

**annual consolidated financial statements** (周年綜合財務報表) means the consolidated statements required to be prepared under section 379(2) of the Ordinance;

**annual financial statements** (周年財務報表) means the statements required to be prepared under section 379(1) of the Ordinance;

**auditor's report** (核數師報告) means the report required to be prepared under section 405 of the Ordinance;

**directors' report** (董事報告) means—

(a) the report required to be prepared under section 388(1) of the Ordinance; or

(b) the consolidated report required to be prepared under section 388(2) of the Ordinance;

**Disclosure Regulation** (《披露規例》) means regulations made under sections 451 and 452(2) of the Ordinance;

**financial statements** (財務報表) means annual financial statements or annual consolidated financial statements;



**potential member** (潛在成員), in relation to a company, means a person who is entitled, whether conditionally or unconditionally, to become a member of the company;

**summary financial report** (財務摘要報告) means a financial report prepared under section 439 of the Ordinance.

(2) In this Regulation, a reference to the reporting documents for a financial year is a reference to all of the following—

- (a) the financial statements for the financial year;
- (b) the directors' report for the financial year;
- (c) the auditor's report on those financial statements.

#### COMMENTARY

##### Overview

E2.01 Section 2 of the Summary Financial Reports Regulation sets out the definition of various terms in the Summary Financial Reports Regulation.

The definitions of "annual consolidated financial statements", "annual financial statements", "auditor's report", "directors' report", "financial statements" and "summary financial report" are the same as those definitions in s.357(1) of the Ordinance and are styled on the definitions in (former) ss.2(1) and 141CF(1) of the predecessor CO.

The definition of "Disclosure Regulation" is the same as the definition of "Regulation" in s. 357(1) of the Ordinance.

This section also sets out the definition of "potential member," for the Summary Financial Reports Regulation which is the same definition in ss.437, 442, and 444 of the Ordinance. Accordingly, the definition of "potential member" (潛在成員), in relation to a company, means a person who is entitled, whether conditionally or unconditionally, to become a member of the company.

##### Equivalent provision in the predecessor CO

E2.02 Note that the interpretation in this s.2 of the Summary Financial Reports Regulation is different from the interpretation in the former Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>4</sup> Accordingly, there is no equivalent provision in predecessor CO.

<sup>4</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

## PART 2 SUMMARY FINANCIAL REPORT

### 3. Form and contents of summary financial report: general

(1) A summary financial report for a financial year of a company must contain the information derived from the reporting documents for the financial year of the company.

(2) A summary financial report for a financial year of a company must contain the information and particulars set out in subsection (3).

(3) The information and particulars referred to in subsection (2) are—

- (a) all the information and particulars included in the following statements of the company relating to the financial year—
  - (i) statement of financial position; and
  - (ii) statement of comprehensive income;
- (b) if the company is a holding company, all the information and particulars included in the following statements of the company relating to the financial year—
  - (i) consolidated statement of financial position; and
  - (ii) consolidated statement of comprehensive income;
- (c) if the company's reporting documents for the financial year include a separate income statement in addition to the company's statement of comprehensive income, all the information and particulars included in the income statement;
- (d) if the company is a holding company and its reporting documents for the financial year include a separate consolidated income statement in addition to the company's consolidated statement of comprehensive income, all the information and particulars included in the consolidated income statement; and
- (e) all the information and particulars—
  - (i) included in the directors' report of the company for the financial year as required under—
    - (A) sections 388 and 390 of the Ordinance; and
    - (B) the Companies (Directors' Report) Regulation; and
  - (ii) contained in the notes to the financial statements for the financial year as prescribed by the Disclosure Regulation.



## COMMENTARY

## Overview

**E3.01** Under the Ordinance, a company not falling under the reporting exemption for the financial year may instead prepare a summary financial report to be presented to its shareholders. This report will take the place of a full set of financial statements documents which is the normal course of business and procedure in this regards.

This s.3 (together with ss.4 and 5) of the Summary Financial Reports Regulation provides the general and basic forms as well as the contents that must initially be part of the summary financial report.

## Equivalent provision in the predecessor CO

**E3.02** Sections 3 to 5 of this Regulation are comparable to section 5 of the former Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>5</sup>

But note that new terminologies have been introduced in the Summary Financial Reports Regulation to replace some of the old terms of former Cap. 32M:

## NEW TERMS

## OLD TERMS BEING REPLACED

"consolidated financial statement"	"group accounts"
"statement of financial position"	"balance sheet"
"statement of comprehensive income"	"profit and loss account"

#### 4. Form and contents of summary financial report: auditor's report and opinion

(1) A summary financial report for a financial year of a company must—

- (a) contain a statement from the company's auditor as to whether the auditor's report for that financial year is qualified or otherwise modified, or includes a reference to any matter to which the auditor drew attention by way of emphasis without qualifying the report; and

<sup>5</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

- (b) if the auditor's report is qualified or otherwise modified, set out the full auditor's report and any further material necessary for the understanding of the qualification or other modification.

(2) If the auditor's report of a company contains a statement that, in the auditor's opinion, the financial statements for a financial year of the company have not been properly prepared in compliance with the Ordinance, and in particular—

- (a) a true and fair view of the financial position and financial performance of the company has not been given; or
- (b) for a company that is required to prepare annual consolidated financial statements, a true and fair view of the financial position and financial performance of the company, and all the subsidiary undertakings, as a whole has not been given, a summary financial report for that financial year must contain that statement.

(3) If the auditor's report of a company contains a statement that, in the auditor's opinion, the information in a directors' report for a financial year is not consistent with the financial statements for the financial year, a summary financial report for that financial year must contain that statement.

(4) If the auditor's report for a financial year of a company contains—

- (a) a statement that, in the auditor's opinion—
  - (i) adequate accounting records have not been kept by the company; or
  - (ii) the company's financial statements are not in agreement with its accounting records in any material respect;
- (b) a statement that the auditor has failed to obtain all the information or explanations that, to the best of the auditor's knowledge and belief, are necessary and material for the purpose of the audit; and
- (c) a statement giving the particulars that are required to be, but have not been, contained in the financial statements, as required by section 407(4) of the Ordinance, a summary financial report for that financial year must contain those statements.

(5) A summary financial report of a company must contain an opinion from the company's auditor as to whether—



- (a) the report is consistent with the reporting documents from which the report is derived; and
- (b) the report complies with the requirements of this Part.

### COMMENTARY

#### Overview

E4.01

This section 4 of the Regulation expands the forms and contents as required to be part of the auditor's report and opinion in the summary financial report. These statements are required by ss.406(1), 406(2), and 407(4) of the Companies Ordinance subject to this Regulation, a company may specify any other.

These additional statements to be contained in a summary financial report under this s.4 of Cap.622E are those required by ss.406(1) and 406(2), as well as s.407(4) of the Ordinance to be included in the auditor's report. Also note that there are further changes in terminology following the Ordinance approach, e.g. "statement of financial position" replaces "balance sheet", while "statement of comprehensive income" replaces "profit and loss account".

E4.02

#### Equivalent provision in the predecessor CO

Sections 3 to 5 of this Regulation are comparable to s.5 of the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>6</sup>

#### 5. Form and contents of summary financial report: other matters

##### (1)-(2) (Repealed L.N. 48 of 2013)

(3) If a company is not required to prepare annual consolidated financial statements, a summary financial report of the company must contain, in a prominent position (but not necessarily on the front cover) of the report, a statement to the effect that—

- (a) the report only gives a summary of the information and particulars contained in the reporting documents of the company from which the report is derived; and
- (b) a member of the company may obtain from the company free of charge a copy of the reporting documents if a request is made on or before the specified date.

<sup>6</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

(4) If a company is required to prepare annual consolidated financial statements, a summary financial report of the company must contain, in a prominent position (but not necessarily on the front cover) of the report, a statement to the effect that—

- (a) the report only gives a summary of the information and particulars contained in the reporting documents of the company, and its subsidiary undertakings, from which the report is derived; and
- (b) a member of the company may obtain from the company free of charge a copy of the reporting documents if a request is made on or before the specified date.

(5) A summary financial report for a financial year of a company must contain, in a prominent position (but not necessarily on the front cover) of the report, a statement about how a member of the company may obtain from the company free of charge a copy of the reporting documents from which the report is derived.

(6) This section does not prohibit a company from including in its summary financial report for a financial year any other information or particulars which—

- (a) the company considers appropriate; and
- (b) is not inconsistent with the reporting documents of the company for the financial year from which the report is derived.

(7) In this section—  
specified date (指明日期)—

- (a) if a company is required to hold an annual general meeting in accordance with section 610 of the Ordinance in respect of a financial year, means the day immediately before the expiry of a period of 6 months after the date of the annual general meeting on which a copy of the reporting documents is to be laid;
- (b) if a copy of the reporting documents is laid at a general meeting subsequent to an annual general meeting, means the day immediately before the expiry of a period of 6 months after the date of the subsequent meeting; or
- (c) if, by virtue of section 612(2) of the Ordinance, a company is not required to hold an annual general meeting in accordance with section 610 of the Ordinance in respect of a financial year, means the day immediately before the expiry of a period of 6 months after the date on which a copy of the reporting documents for the financial year is sent under section 430(3) of the Ordinance.



## COMMENTARY

### Overview

- E5.01** Section 5 of the Regulation (as with the previous ss.3 and 4) is self-explanatory as it states and provides a detailed list of all the other matters that must be included in the summary financial report.

### Equivalent provision in the predecessor CO

- E5.02** Sections 3 to 5 of this Regulation are comparable to section 5 of the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>7</sup>

### 6. Other requirements in relation to form of summary financial report

Subject to this Regulation, a company may specify any other requirements in relation to the form of its summary financial report that the company considers appropriate.

## COMMENTARY

### Overview

- E6.01** This section 6 basically puts a company on notice that it may include other information in the summary financial reports as it thinks fit and which would be helpful and informative to its shareholders.

### Equivalent provision in the predecessor CO

- E6.02** Section 6 is comparable to that s. 5(4) of the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>8</sup>

## PART 3

### NOTIFICATION AND NOTICE OF INTENT, ETC.

### 7. Form and contents of notification for seeking member's intent on receiving summary financial report

<sup>7</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

<sup>8</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

(1) For the purposes of section 442(2) of the Ordinance, the notification to be sent by a company to a member or potential member must—

- (a) state the financial year to which the notification relates; and
- (b) include a general statement about the contents and function of a summary financial report.

(2) The notification must contain the statements set out in subsection (3).

(3) The statements referred to in subsection (2) are—

- (a) a statement to the effect that a summary financial report only gives a summary of the information and particulars contained in the reporting documents from which the report is derived;
- (b) a statement to the effect that the person to whom the notification is addressed may send a notice of intent to the company informing the company as to whether—
  - (i) the person wishes to receive from the company a copy of the reporting documents—
    - (A) in hard copy form; or
    - (B) (if the company has given an option to request the copy to be sent in electronic form or by making it available on a website) in electronic form or by making it available on the company's website;
  - (ii) the person wishes to receive from the company, instead of a copy of the reporting documents, a copy of the summary financial report—
    - (A) in hard copy form; or
    - (B) (if the company has given an option to request the copy to be sent in electronic form or by making it available on a website) in electronic form or by making it available on the company's website; or
  - (iii) the person does not wish to receive a copy of the reporting documents or a copy of the summary financial report at all;
- (c) a statement to the effect that a notice of intent may be in the form and sent in the manner that is specified in the notification; and
- (d) a statement to the effect that if a notice of intent is to have effect in relation to the financial year to which the



notification relates, the card or document mentioned in section 10 must be received by the company at least 28 days before the specified date.

- (4) The notification must contain a statement about the effect of a notice of intent for a financial year, that is—
- (a) if the notice of intent is received by the company at least 28 days before the specified date, the notice of intent has effect in relation to that financial year, and every subsequent financial year, until it ceases to have effect under section 442(7) of the Ordinance;
  - (b) if the notice of intent is received by the company less than 28 days before the specified date—
    - (i) the notice of intent has effect in relation to every financial year subsequent to that financial year until it ceases to have effect under section 442(7) of the Ordinance; and
    - (ii) the member or potential member who gives the notice of intent is to be regarded as—
      - (A) having requested a copy of the summary financial report for the financial year; and
      - (B) having requested the copy of the report to be sent by the company in hard copy form; and
  - (c) if a member or potential member does not give the company a notice of intent in response to the notification before the specified date, the member or potential member is to be regarded as—
    - (i) having requested a copy of the summary financial report for the financial year and every subsequent financial year; and
    - (ii) having requested the copy of the report to be sent by the company in hard copy form, until the statutory election ceases to have effect under section 442(9) of the Ordinance.
- (5) In this section—  
*specified date* (指明日期) means the first date on which a copy of the reporting documents for a financial year is sent to a member under section 430 of the Ordinance.

## COMMENTARY

## Overview

Under s.442 of the Ordinance, a company may at any time ascertain the wishes of its members or potential members by written notification to them for them to elect the following form of the reporting documents or the summary financial report he is to receive. The company can make available the reporting documents or the summary financial report in any of the below-stated forms:

E7.01

- (i) in hard copy;
- (ii) in electronic form;
- (iii) by making it available on a website; or
- (iv) even the option of *not receiving* any copy of the documents at all.

This provision of the Summary Financial Reports Regulation provides the form and contents of notification for seeking member's intent on receipt of the forms of summary financial report. A member may give the company notice of how he would like to receive these aforementioned documents and reports, either in hard copy or electronic form. The member also has the option of declining the offer to receive these documents and reports in the first instance.

## Corresponding statutory provisions

Under the Ordinance, a member can choose to receive from the company a copy of the summary financial report in hard copy form, in electronic form, through the company's website, or not to receive any copies of the company's reporting documents at all (ss.437 to 446 of the Ordinance).

E7.02

This provision of the Summary Financial Reports Regulation includes the means of receipt of summary financial report through website and electronic form. This section 7 is comparable to section 6 of the (former) Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M).<sup>9</sup>

## 8. Additional provisions as to contents of notification under section 7

(1) The notification under section 7 must contain a statement specifying the matters referred to in subsection (2).

(2) The matters referred to in subsection (1) are—

<sup>9</sup> Companies (Summary Financial Reports of Listed Companies) Regulation (Cap. 32M) is repealed.

If a newly formed company has not included this in its own model articles then Article 56 of Schedule 3 will become part of its articles. When the articles are registered, the articles are deemed to be a contract under seal between the members and the company and can be enforced as such (s.86 of the Ordinance).

Note that above-mentioned are the only four circumstances set out which permit a member to inspect the documents. What if a member obtains a court order in the course of his set of court proceedings, and in accordance with that order, the member requests an inspection of the documents? This request would be outside the four circumstances set out in the above. A related question would then be: could the opposing party rely on this section to limit the exercise of that court order? This dilemma would then need further clarification through the legal process.

#### **Auditor's insurance**

Article 57 of Schedule 3 re-states the allowance that a company may take out insurance for an auditor or auditor of associated company against such liability as so dictated in s. 415 of the Ordinance.

#### **End Note**

The model articles do not contain the *mandatory articles* that companies are required to have under the Ordinance. Sections 81 to 85 of the Ordinance set out these mandatory articles which include:

- (a) The name of the company (s.81 of the Ordinance);
- (b) The objects of the company, if the company has been granted a licence to dispense with the use of the word "limited" in its name under s.103 of the Ordinance (s.82 of the Ordinance);
- (c) Details of members liabilities (s.83 of the Ordinance);
- (d) Details of liabilities or contribution of members (s.84 of the Ordinance); and
- (e) Details of initial capital and initial shareholding (s.85 of the Ordinance).

The full set of articles of a company should therefore consist of *both* the model articles and the mandatory articles.

# **Cap 622I**

## **COMPANY RECORDS (INSPECTION AND PROVISION OF COPIES) REGULATION**

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### **PART 1 PRELIMINARY**

### **PART 2 PLACE FOR KEEPING COMPANY RECORDS, ETC.**

### **PART 3 INSPECTION OF COMPANY RECORDS**

### **PART 4 PROVISION OF COPY OF COMPANY RECORDS BY COMPANY**

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#### **Overview of Cap.622I**

The Company Records (Inspection and Provision of Copies) Regulation (Cap.622I) ("Record Regulation"), was made by the Financial Secretary as empowered to do so under ss.356 and 657 of the Ordinance.

This Record Regulation provides for the detailed arrangements and procedures concerning company records kept by a company in respect of:

- (1) the place for keeping of records for both Hong Kong companies and non-Hong Kong companies and to make such company records available for review under the Ordinance;
- (2) the inspection of records:
  - (a) Which includes the:
    - (i) manner of making a request for inspection of records,
    - (ii) fee payable for an inspection, and
    - (iii) obligation of companies to make available company records for inspection during business hours and to permit a copy of company records to be made in the course of inspection.
  - (b) It also provides for the powers of the Court to make certain orders relating to the inspection of company records; and
- (3) the provision of copies of records, which includes:
  - (a) the obligation of companies to provide copies of company records within 10 business days upon receipt of the request or



payment of the prescribed fees for the copies (whichever is the later); and

- (b) also prescribes the fee payable for a copy of company records and empowers the Court to make certain orders relating to the provision of a copy of company records.

The keeping of registers and records, their location and inspection and copies is now consolidated in Part 12 of the Ordinance as Division 2 deals with Registers and Division 3 deals with Company Records. Section 654 in Division 3 of the Ordinance defines "company records" to mean any register, index, agreement, memorandum, minutes or other document required by the Ordinance to be kept by a company, but does not include accounting records.

For illustration purpose, company records include:

Relevant sections in the Companies Ordinance	Name of records
308	Register of debenture holders
351	Copies of instrument creating charges
352	Register of charges
618	Records of resolutions and meetings
627	Register of members
641	Register of directors
648	Register of company secretaries

The Record Regulation applies only to the above-stated company records and it does not apply to accounting records, which are governed by ss.373 to 378 of the Ordinance.

In summary, s.627 of the Ordinance is the new provision which provides for the keeping the information of register of members. Subsequent s.628 of the Ordinance provides that the register of members must be kept at either the company's registered office or a prescribed place. Section 631 of the Ordinance then deals with the persons who have the right to inspect the register of members and to request a copy of the register or any part of it. This request must be made in the prescribed manner and where a fee is required, on payment of the required fee, and requests for copies of the register or any part and any fee therefore must be in accordance with regulations made under s.657 of the Ordinance.

There are similar provisions for the register of directors and there is now a new separate register of company secretaries and for company records. Note that s.657 of the Ordinance is in Division 3 of Part 12 (Company Records) and empowers the Financial Secretary to make regulations about keeping and inspection of company records and this empowering provision is applied to the register of directors (s.642 of the Ordinance) and the register of company secretaries (s.649 of the Ordinance).

The only register to be treated separately is the charges register which is dealt with in Part 8 of the Ordinance (Registration of Charges). This is because of the additional obligation to keep copies of registered charges and because those provisions apply both to Hong Kong companies and registered non-Hong Kong companies. The provisions as to keeping the charges, register, its location and rights of inspection and to copies and the power for the Financial Secretary to make regulation for the purposes of Division 7 of Part 8 is contained in s.356 of the Ordinance.

Accordingly, because of the new mandate to keep these registers separate, the Financial Secretary was entitled to create Cap.622I under ss.356 and 657 of the Ordinance.

This Cap.622I has the following four parts:

Parts	Matters
1	Preliminary
2	Prescription of the place for records keeping
3	Inspection of company records
4	Obligation of companies to provide copy of company records

Part 1 of Cap.622I provides for commencement of the Regulation and contains the definitions necessary for the interpretation of the Regulation.

Part 2 of Cap.622I prescribes the place where a company or registered non-Hong Kong company may keep their company records or make their company records available for inspection under the Ordinance.

Part 3 of Cap.622I provides for the inspection of company records.

Part 4 of Cap.622I provides for the obligation of companies to provide copies of company records or trust deeds or any other documents securing the issue of debentures.

# COMPANY RECORDS (INSPECTION AND PROVISION OF COPIES) REGULATION (CAP.622I)

## PART 1 PRELIMINARY

### 1. Commencement

This Regulation comes into operation on the same day on which Section 356 of the Companies Ordinance (Cap.622) comes into operation.

(Omitted as spent—E.R. 1 of 2014)

## COMMENTARY

### Overview

Section 1 of this Cap.622I provides for the applicable statutory power and authority for the commencement of this Record Regulation.

### 2. Interpretation

In this Regulation—  
*company records* (公司紀錄)—

- (a) in Parts 2 and 3—
  - (i) in relation to a company, means company records as defined by section 654 of the Ordinance; or
  - (ii) in relation to a registered non-Hong Kong company, means a copy of an instrument kept by the company under section 351(2) of the Ordinance or a register of charges kept by the company under section 353(1) of the Ordinance; and
- (b) in Part 4, means—
  - (i) company records as defined by section 654 of the Ordinance; or
  - (ii) a trust deed as defined by section 657(6) of the Ordinance.

## COMMENTARY

### Overview

Section 2 of the Record Regulation sets out the definition of “*company records*” as utilized and applied to in each of the specified parts of this Record Regulation.

For Parts 2 and 3 of Cap.622I

“Company records” in Parts 2 and 3 of the Record Regulation is defined as:

- any register, index, agreement, memorandum, minutes or other document required by the Companies Ordinance to be kept by a company, but does not include accounting records;<sup>1</sup> and
- copies of instrument creating a charge.

For Part 4 of Cap.622I

“Company records” in Part 4 of the Record Regulation is defined as:

- any register, index, agreement, memorandum, minutes or other document required by the Companies Ordinance to be kept by a company, but does not include accounting records;<sup>2</sup> and
- debenture trust deed.

## PART 2

### PLACE FOR KEEPING COMPANY RECORDS ETC.

### 3. Prescribed place for keeping company records etc.

(1) For the purposes of a relevant provision, the place prescribed for keeping company records or making company records available for inspection is a place in Hong Kong.

(2) In this section—  
*relevant provision* (相關條文) means a provision of the Ordinance which provides that the company records mentioned in that provision may be kept or made available for inspection at a place prescribed by regulations made under section 356 or 657 of the Ordinance.

<sup>1</sup> See section 654 of the Ordinance.

<sup>2</sup> See section 654 of the Ordinance.



## COMMENTARY

I3.01

### Overview

Section 3 of this Regulation deals with the prescribed place for keeping company records (which, in addition to its definition in s.654 of the Ordinance-for the purposes of Division 2 and 3 of Cap.622I includes copies of instruments creating a charge-for the purposes of Division 4 of 622I includes debenture trust deeds) and for making company records available for inspection. The prescribed place must be a place in Hong Kong. But note that it seems that the place of inspection need not be the place where the records are kept.

If a company is permitted to keep the records or make the records available for inspection at a prescribed place other than its registered office, section 3 of the Record Regulation provides that the place prescribed for:

- keeping company records, or
- making company records available for inspection still must be a place in Hong Kong.

## PART 3 INSPECTION OF COMPANY RECORDS

### 4. Interpretation of Part 3

#### In this Part—

**company (公司)** includes a registered non-Hong Kong company;  
**relevant provision (相關條文)** means a provision of the Ordinance which provides that a person is entitled, on request made in the prescribed manner and on payment of a prescribed fee or without charge, to inspect the company records mentioned in that provision in accordance with regulations made under section 356 or 657 of the Ordinance.

## COMMENTARY

### Overview

I4.01

The whole of ss.4 to 9 deal with inspection of company records. Note that the Record Regulation apply to registered non-Hong Kong companies<sup>3</sup> and companies incorporated in Hong Kong.

<sup>3</sup> Registered non-Hong Kong company means a non-Hong Kong company that is registered in the Companies Register as a registered non-Hong Kong company (Section 2 of the Ordinance).

## 5. Prescribed manner for making request for inspection

For the purposes of a relevant provision, a request for inspection of any company records of a company is to be made, either orally or in writing, to the company by identifying the records by reference to—

- (a) the type of the records; and
- (b) the date on which the records were made or the period covered by the records.

## COMMENTARY

### Overview

Section 5 in particular prescribes the manner in which a request for inspection of company records under the Ordinance is to be made.

I5.01

A request for inspection for company records must be made to the company:

- (1) Orally; *or*
- (2) In writing; *and*
- (3) Stating the:
  - (a) type of the records; and
  - (b) the date on which the records were made, or
  - (c) the period covered by the records.

## 6. Prescribed inspection fee

For the purposes of a relevant provision, the fee prescribed for an inspection of company records is \$50.

#### Note —

Please also see sections 356(5)(b) and 657(5)(b) of the Ordinance which provide that nothing in any provision of the Ordinance or in the regulations made under section 356 or 657 of the Ordinance is to be construed as preventing a company from charging a lesser fee than that prescribed or none at all.

## COMMENTARY

### Overview

Section 6 prescribes the fee payable for making an inspection of company records. The prescribed maximum inspection fee under the Ordinance is

I6.01

HK\$50. However, a company can charge a lesser sum according to ss.356 and 657 of the Ordinance.

## 7. Making company records available for inspection

(1) A company must make its company records available for inspection, by any person entitled to inspect those records under a relevant provision, during business hours (subject to any reasonable restrictions imposed by the company by resolution, as long as at least 2 hours per day are allowed for inspection).

(2) Subsection (1) does not apply in relation to—

- (a) (for inspection of a register of debenture holders) any part of the register that is closed under section 311 of the Ordinance;
- (b) (for inspection of a register of members) any part of the register that is closed under section 632 of the Ordinance; and

(c) (for inspection of an index of members' names) any part of the index that is compiled by reference to a part of the register of members that is closed under section 632 of the Ordinance.

(3) If subsection (1) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4. (4) In this section—

*index of members' names* (成員的姓名或名稱索引) means an index of the names of the members of a company kept under section 630 of the Ordinance;

*register of debenture holders* (債權證持有人登記冊) means a register of debenture holders as defined by section 307 of the Ordinance;

*register of members* (成員登記冊) means a register of members kept under section 627 of the Ordinance.

## COMMENTARY

### Overview

17.01

Section 7 provides for the obligation of companies and registered non-Hong Kong companies to make their company records available for inspection during business hours. A company must make its company records available for inspection for at least 2 hours during business hours per day except when the register of debenture holders and register of members are closed pursuant to ss.311 and 632 of the Ordinance.

## 8. Making copy of company records during inspection

(1) If a company makes its company records available under section 7 for a person's inspection, the company must permit the person to make a copy of the whole or any part of those records in the course of inspection.

(2) The company is not required to assist the person to make any copy of company records.

(3) If subsection (1) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

## COMMENTARY

### Overview

Under this s. 8, companies and registered non-Hong Kong companies are obliged to permit a copy of company records to be made in the course of inspection. A company must permit the person during inspection to make copy of the whole or any part of the records.

However, a company is *not required* to assist the person to make any copy of records. In the case of *Lam Kit Sing v Chungshan Commercial Association, Hong Kong* [2011] 3 HKLRD 323, which looked at the right to copy books of account during an inspection by a director pursuant to (former) s.121 of the predecessor CO, there was no specific copying power under this (former) s.121 of the predecessor CO. Harris J held that during an inspection under this section:

...a director might take copies by any method that modern technology makes practical. This includes copying by hand or by using some photographic process, e.g. photocopying. If the person inspecting could not use the company's photocopier or if it did not have one, then the director would be entitled to remove the documents for a short time in order to copy them. There was no requirement for the company itself to provide photocopies.

But there were some provisions in the predecessor CO which specifically provided for the provision of copies. For example, (former) s.120 of the predecessor CO provided that a member inspecting the minute books of a company is entitled to be furnished with a copy of any minutes requested at a charge not exceeding \$1 for every 100 words. As a result of this express

18.01



provision in (former) s.120 of the predecessor CO on making copies during inspection, such provision has been added in this section 8 of the Regulation.

Moreover, as to requests for the provision of copies, this privilege has also been enlarged under the relevant sections of the Ordinance.

#### 9. Order of Court relating to inspection of company records

(1) If in relation to a person entitled to inspect any company records of a company under a relevant provision, section 7(1) is contravened, the Court may, on application by the person—

- (a) make an order to compel the company to permit an immediate inspection by the person of the company records concerned; and
- (b) make an order as to the time, duration and manner of inspection.

(2) If in relation to a person inspecting any company records of a company, section 8(1) is contravened, the Court may, on application by the person—

- (a) make an order to compel the company to permit the person to make a copy of the whole or any part of the company records concerned in the course of inspection; and
- (b) make an order as to the time, duration and manner of inspection, including the circumstances in which and the extent to which the copying of information is permitted in the course of inspection.

(3) If the company records of a company are kept at the office of a person other than the company, and because of any default of that other person, section 7(1) or 8(1) is contravened, then the power of the Court under subsection (1) or (2) extends to the making of an order against that other person and that other person's officers and other employees.

#### COMMENTARY

##### Overview

Section 9 of this Regulation empowers the Court of First Instance to make certain orders relating to the inspection of company records.

I9.01

Where an inspection of documents is not permitted, a person originally entitled to inspect the documents may apply to the Court for an order to compel the company to permit an immediate inspection at the specified time, manner and duration. This order also includes the right of the person inspecting the copies to also make the necessary copies of them.

If the order is not complied with, a person entitled to inspect the documents may apply to the Court for another order to compel the company to permit the person to make a copy of the whole or any part of the company records concerned at the specified time, manner and duration.

If the company records are kept at the office of other person, then the Court may also be asked to make an order against that other person and that other person's officers and other employees.

#### PART 4

#### PROVISION OF COPY OF COMPANY RECORDS BY COMPANY

#### 10. Interpretation of Part 4

In this Part—

*relevant provision* (相關條文) means a provision of the Ordinance which provides that a person is entitled, on request and on payment of a prescribed fee, to be provided with a copy of the company records mentioned in that provision in accordance with regulations made under section 657 of the Ordinance.

#### COMMENTARY

##### Overview

The whole of ss.10 to 13 of this Record Regulation provide that a person is entitled, on request and payment of a prescribed fee,<sup>4</sup> to be supplied with copies of the company records in accordance with regulations made under s.657 of the Ordinance. Such requests for copies of records under the Ordinance also include those requests under: (i) s.620 on records of resolutions and meetings; (ii) s.642(3) on register of directors; and (iii) s.649 on register of company secretaries.

I10.01

<sup>4</sup> For amount of specified fee, see section 12 of this Record Regulation (Cap.622I).

The nature of the records under the provisions are:

Relevant sections in the Companies Ordinance	Types of records
620	Records of resolutions and meetings
631	Register of members
642	Register of directors
649	Register of company secretaries

### 11. Provision of copy of company records

(1) If by making a request and paying the fee prescribed in section 12, a person is entitled under a relevant provision to be provided with a copy of the whole or any part of any company records of a company, the company must, within 10 business days after the date of receipt of the request or payment (whichever is the later), provide the copy to the person. (L.N. 128 of 2013)

(2) For the purposes of subsection (1)—

- (a) if the person requests the copy to be in hard copy form, the company must provide the copy in hard copy form; and
- (b) if the person requests the copy to be in electronic form, the company must provide the copy in any electronic form that the company thinks fit.

(3) Subsections (1) and (2) do not require a company to provide a copy in electronic form if it keeps the company records concerned in hard copy form only.

(4) If subsection (1) is contravened, the company, and every responsible person of the company, commit an offence, and each is liable to a fine at level 4.

(5) In this section—

*business day* (辦公日) means a day that is not—

- (a) a general holiday; or
- (b) a black rainstorm warning day or gale warning day as defined by section 71(2) of the Interpretation and General Clauses Ordinance (Cap.1);

*in electronic form* (電子形式) has the meaning given by section 655(7) of the Ordinance;

*in hard copy form* (印本形式) has the meaning given by section 655(7) of the Ordinance.

## COMMENTARY

### Overview

Section 11 of this Regulation pertains to the request for a *copy* of the record itself in a certain form. A person may request for hard copy *or* electronic copy of the company records, unless the company records are kept only in hard copy form. The company must provide the copy to the requested person within 10 business days after the date of the receipt of the request or payment (whichever is the later).

This s.11 also provides for the obligation of companies to provide copies of company records or *trust deeds* or any other documents securing the issue of *debentures*.

I11.01

### 12. Prescribed fees for provision of copy of company records

(1) For the purposes of a relevant provision, the fee prescribed for a copy of company records that is a register is the aggregate of the following—

- (a) the amount calculated by reference to the number of entries in the register that are requested to be copied, and the rate is—
  - (i) for the first 2000 of the entries, \$5 for each 10 entries (or any part of those 10 entries); and
  - (ii) for the remainder of the entries, \$1 for each 100 entries (or any part of those 100 entries); and
- (b) any reasonable costs to be incurred by the company in delivering the copy to the person requesting it.

(2) For the purposes of a relevant provision, the fee prescribed for a copy of company records that is not a register is the aggregate of the following—

- (a) \$5 for each page (or a portion of a page) of the company records requested to be copied; and
- (b) any reasonable costs to be incurred by the company in delivering the copy to the person requesting it.

### Note —

Please also see section 657(5)(b) of the Ordinance which provides that nothing in any provision of the Ordinance or in the regulations made under section 657 of the Ordinance is to be construed as preventing a company from charging a lesser fee than that prescribed or none at all.