Charltons - Hong Kong Law Newsletter - 30 October 2012

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# FSTB And Companies Registry Consult On Subsidiary Legislation To Implement The New Companies Ordinance

## Introduction

The Financial Services and Treasury Bureau (**FSTB**) and the Companies Registry are currently consulting on the creation of new subsidiary legislation for the implementation of the new Companies Ordinance, which was gazetted on 20 August 2012 after the Companies Bill was passed by the Legislative Council of Hong Kong on 12 July 2012.

There are twelve pieces of subsidiary legislation under consideration:

1. the Companies (Summary Financial Reports) Regulation;
2. the Companies (Directors’ Report) Regulation;
3. the Companies (Specification of Names) Order;
4. the Companies (Non-Hong Kong Companies) Regulation;
5. the Company Records (Inspection and Provision of Copies) Regulation;
6. the Companies (Model Articles) Notice;
7. the Companies (Accounting Standards (Prescribed Body)) Regulation;
8. the Companies (Trading Disclosures) Regulation;
9. the Companies (Revision of Financial Statements and Reports) Regulation;
10. the Companies (Disclosure of Information about Benefits of Directors) Regulation;
11. the Companies (Residential Addresses and Identification Numbers) Regulation; and
12. the Companies (Unfair Prejudice Proceedings) Rules.

The consultation is split into two phases. The first seven items above will be covered under the first phase. The second phase will cover the remaining items 8 to 12. Respondents may submit their comments for phase one of the consultation on or before 9 November 2012. The FSTB and the Companies Registry plan to finalise all twelve pieces of subsidiary legislation in the first half of 2013 and put them into effect by 2014.

This note will cover only the pieces of subsidiary legislation under the first phase of consultation. The consultation paper is available on the [FSTB's website](http://www.fstb.gov.hk/fsb/co_rewrite/eng/pub-press/doc/sub_leg_new_comp_ordinance_ph1_e.pdf) ([see archive](sub_leg_new_comp_ordinance_ph1_e.pdf)) and at the [Companies Registry’s website](http://www.cr.gov.hk/en/publications/docs/092012_Consultation_full-e.pdf) ([see archive](092012_Consultation_full-e.pdf)).

## The Companies (Summary Financial Reports) Regulation

### Current Requirements

Sections 141CA to 141CG of the existing Companies Ordinance allow listed companies to send to their members a financial report in summary form (a **summary financial report**) in lieu of their accounts, directors’ report and auditors’ report for the financial year (**Relevant Financial Documents**). A listed company can do so only if members have given it a notice of intent indicating their consent to receiving summary financial reports in response to the listed company sending members a notification. Currently, the forms and contents of the summary financial report, notice of intent and notification are set out under the Companies (Summary Financial Reports of Listed Companies) Regulation (CAP 32M).

### Requirements under the Revised Companies Ordinance and SFR Regulation

The proposed Companies (Summary Financial Reports) Regulation (**SFR Regulation**) would set out the forms and contents of the summary financial report and the notification that a company would send to a member to request a notice of intent. For the most part, the SFR Regulation would cover the provisions that already exist under the Companies (Summary Financial Reports of Listed Companies) Regulation, but will include the following changes, which are introduced in the new Companies Ordinance:

* in addition to listed companies, companies that do not prepare simplified reports will be eligible to prepare summary financial reports;
* potential members of the company (that is, a person who is entitled (conditionally or unconditionally) to become a member of the company) will be able to give notices of intent;
* an opt-out regime will be implemented: members will receive the summary financial report in hard copy form if he does not give a notice of intent to the company before a specified date;
* a member of the company may give a notice of revocation (to revoke a notice of intent) or a notice of cessation of statutory election (to stop receiving summary financial reports in hard copy in cases where the member is deemed to have elected to receive them under section 141CB of the Companies Ordinance);
* companies will be allowed to offer reporting documents (i.e. financial statements, the directors’ report and the auditors’ report) or summary financial reports in electronic form;
* a member that received the summary financial report for the year may request to receive the reporting documents for that year; and
* the provisions in relation to the receipt of a notice of intent have been simplified.

Other changes will also be made, such as changing the statements to be made by auditors in auditors’ reports so that they are consistent with the new provisions on accounts and audits in Part 9 of the new Companies Ordinance. Other changes include expanding the coverage of directors’ reports and the terms “balance sheet” and “profit and loss account” will be replaced by “statement of financial position” and “statement of comprehensive income” respectively.

### Details of the SFR Regulation

The proposed SFR Regulation is divided into three parts. Part 1 includes the interpretation section, Part 2 sets out the contents required of summary financial reports (which must be derived from the reporting documents of the same year) and Part 3 sets out the form and contents of a company’s notification to members to ascertain their intention to receive summary financial reports, which must contain prepaid postage for the member to use to return a notice of intent. Part 3 also covers the contents and effects of notices of intent, notices of revocation and notices of cessation of statutory election. The draft of the proposed SFR Regulation is included in Annex 1 of the consultation paper.

## The Companies (Directors’ Report) Regulation

### New Companies Ordinance Requirements

The new Companies Ordinance will require directors’ reports to be approved by the board of directors, signed and attached to a company’s balance sheets, just as the existing Companies Ordinance requires. Various sections of the new Companies Ordinance set out the required contents of directors’ reports, including section 452(3), which will allow “other matters” that are required to be contained in directors’ reports to be set out in subsidiary legislation. Other relevant provisions include:

* **section 390** requires the inclusion of information about the company’s principal activities;
* **section 543** requires a directors’ report to include information on management contracts. Disclosure of contracts involving directors’ interests will have to be made in the notes to the financial statements under section 383(1)(e) in accordance with the Companies (Disclosure of Information about Benefits of Directors) Regulations which will be covered under phase two of the consultation;
* **section 470** will impose a new requirement for the disclosure in a directors’ report of permitted indemnity provisions for the benefit of directors (including former directors) within a financial year; and
* directors’ reports will be required to contain a new business review section, the contents of which are specified in Schedule 5 to the new Companies Ordinance. A business review section is not however required for a company which: (i) prepares simplified reports; (ii) is a wholly owned subsidiary; or (iii) is a private company which passes a special resolution to dispense with the need to include a business review section.

### Requirements under Subsidiary Legislation

The proposed Companies (Directors’ Report) Regulation (**Directors’ Report Regulation**) would set out information that directors’ reports must include, in addition to the information required by the new Companies Ordinance itself. Information required to be contained in directors’ reports under the Directors’ Report Regulation would include:

* directors’ interests under certain arrangements entered into by the company or any other company in the same corporate group which enable directors to acquire benefits by acquiring shares of a company or any body corporate;
* disclosure of donations of HK$10,000 (rather than the existing HK$1,000) or more made by the company alone or together with its subsidiary undertaking(s);
* shares issued by the company;
* equity-linked agreements entered into by the company, which would be defined as any agreement that will or may result in the company issuing shares (or that will require the company to enter into such an agreement). This will catch share options, employee share schemes and other relevant agreements;
* dividends recommended to be paid by the directors (this information does not need to be included in simplified directors’ reports);
* a summary of reasons for the resignation of a director, if that director resigned or declined to stand for re-election due to disagreement with the board of directors and gave the reasons in a notice (this information does not need to be included in simplified directors’ reports); and
* directors’ permitted indemnity provisions (defined as provisions that provide for indemnity against liability incurred by a director to a third party that meet specific requirements under section 469(2) of the new Companies Ordinance). Failure to comply with this requirement will be an offence under section 388(6) or (7) of the new Companies Ordinance.

It is also proposed that the current requirements under sections 129D(3)(h) and 129D(3)(k) of the existing Companies Ordinance (to provide information in relation to issues of debentures and information in relation to arrangements to enable directors to acquire benefits by means of acquiring shares or debentures) be dropped; those requirements are in neither the new Companies Ordinance nor the proposed Directors’ Report Regulation. The draft of the proposed Directors’ Report Regulation is included in Annex 2 of the consultation paper.

## The Companies (Specification Of Names) Order

### New Companies Ordinance Requirements

Section 100(2)(b) of the new Companies Ordinance will require a company to obtain prior approval to register a company name that contains certain words or expressions (being those set out in the existing Companies (Specification of Names) Order (CAP 32E) (the **Existing SN Order**), as required by section 20 of the existing Companies Ordinance. Section 101 of the new Companies Ordinance will empower Hong Kong’s Financial Secretary make an order specifying any word or expression as one which requires prior approval in order to be included in a company name. Currently, it is the Chief Executive who has that power (under section 22B(1) of the existing Companies Ordinance). The consultation paper proposes a new Companies (Specification of Names) Order to replace the old one.

The proposed Companies (Specification of Names) Order (the **Proposed SN Order**) would set out a total of eighteen words and expressions in its schedule (nine in English and the same nine in Chinese). Fourteen of these would be carried over from the Existing SN Order and the other four would be new ones to be added. The Existing SN Order includes twenty-four words and expressions; ten of them are considered obsolete and would be dropped. They are:

* “Cooperative” and its Chinese translation;
* “Building Society” and its Chinese translation;
* “Mass Transit” and its Chinese translation;
* “Underground Railway” and its Chinese translation; and
* “Municipal” and its Chinese translation.

The four new words and expressions to be included in the Proposed SN Order are:

* “tourism board” and its Chinese translation; and
* “levy” and its Chinese translation.

The draft of the Proposed SN Order is included in Annex 3 of the consultation paper.

## The Companies (Non-Hong Kong Companies) Regulation

### Current Requirements

Sections 333 to 336 of the existing Companies Ordinance require non-Hong Kong companies (i.e. companies that have a place of business in Hong Kong but were incorporated outside Hong Kong) to:

* register with the Registrar of Companies within one month of establishing a place of business in Hong Kong;
* deliver certified copies of the company’s constitutional documents and its certificate of incorporation (if the certificate of incorporation shows the company name in either English or Chinese only, the company may still register its corporate name in both languages by complying with the requirements set out in the Companies Registry’s External Circular No.1/2001s;
* deliver its latest published accounts if the non-Hong Kong company is required (by the laws of its place of incorporation or any other place where it is registered as a company or by the rules of any stock exchange or regulator in those jurisdictions) to publish its accounts or deliver copies of its accounts to an office where they may be inspected by members of the public;
* deliver annual returns to the Registrar within 42 days after each anniversary of the date on which the company registered with the Registrar of Companies;
* provide certified translations of supporting documents in English or Chinese if necessary;
* deliver returns in specified forms to the Registrar of Companies within one month of changing certain key particulars of the company (such as the corporate name); and
* deliver, upon the termination of the authorisation of an authorised representative, a notice in a specified form and a copy of the notice of termination to the Registrar of Companies within one month of the date of the notice of termination.

Section 336A of the Companies Ordinance allows a non-Hong Kong company to revise its published accounts if they are not compliant with the laws of the jurisdiction or the rules of the stock exchange that require their publication. Sections 20 and 21 of the Companies (Revision of Accounts and Reports) Regulation (CAP 32N) set out the requirements applicable to the revised accounts and the effects of revising accounts.

### New Companies Ordinance Requirements

Part 16 of the new Companies Ordinance will contain similar requirements for the registration of non-Hong Kong companies to those currently contained in the Companies Ordinance. The detailed requirements will however be set out in subsidiary legislation to allow the requirements to be updated in line with overseas developments where necessary.

The proposed Companies (Non-Hong Kong Companies) Regulation (the **NHKC Regulation**) would consolidate the detailed requirements that are set currently set out in sections 333 to 336A of the Companies Ordinance, sections 20 and 21 of the Companies (Revision of Accounts and Reports) Regulation and the Companies Registry’s External Circular No.1/2001.

The proposed NHKC Regulation would be divided into seven parts. Part 1 would include the regulation’s interpretation section. Part 2 would set out the requirements for registration with the Registrar of Companies. Part 3 would allow certified translations to be submitted with certain applications or returns. Part 4 would set out the documents required to be submitted to the Registrar of Companies. Part 5 would set out the particulars and documents required to be submitted with an annual return. Part 6 would set out the requirements and effects of revising published accounts. Lastly, Part 7 would set out the particulars of any changes of a non-Hong Kong company that must be included in a return that must be submitted and the documents required to accompany the return. The draft of the NHKC Regulation is included in Annex 4 of the consultation paper.

## Company Records (Inspection And Provision Of Copies) Regulation

### Current Requirements

The existing Companies Ordinance provides the right to inspect and make copies of certain records that are required to be kept by companies. These records include documents such as registers, minutes and resolutions. Generally, a company must keep these records at its registered office (or where the records are made up) and make the records available for inspection or provide copies of them upon request, possibly in exchange for a fee payable to the company. However, the provisions for the rights and requirements in respect of different documents vary. For example, the minutes of shareholders’ meetings can be inspected but the minutes of directors’ meetings cannot be inspected. Specific requirements, such as the time allowed for inspection, the number of days within which copies of requested records must be sent and the maximum fee that the company may charge for those services are set out individually in the existing Companies Ordinance for each type of record.

### New Companies Ordinance Requirements

The basic provisions that cover the rights to inspect and obtain copies of records will be included in Part 12 of the new Companies Ordinance, but the detailed provisions that cover the arrangements for allowing inspections, providing copies of records and other matters will be set out in the proposed Company Records (Inspection and Provision of Copies) Regulation (**IPC Regulation**). The provisions in the Companies Ordinance will apply to all company records, which are defined as any register, index, agreement, memorandum, minutes or other document required by the new Companies Ordinance to be kept by the company, except accounting records. Under sections 657 and 356 of the new Companies Ordinance, the IPC Regulation will set out the detailed requirements in relation to the inspection and provision of copies of (i) company records of Hong Kong companies; and (ii) instruments of non-Hong Kong companies that create charges and registers of charges.

The purpose of consolidating the detailed requirements under the IPC Regulation is to facilitate compliance with and future amendments of those requirements. Under the proposed IPC Regulation:

* company records may be kept in any place in Hong Kong;
* requests for inspection of company records must be submitted as a written notice to the company, specifying the type of records, the time period covered by those records and the date and time for the inspection;
* the notice of inspection must be provided at least seven working days before the date of inspection, but may be provided at least two days before the date of inspection during the notice period for a general meeting, a class meeting or when a written resolution is being circulated;
* when a party requests to inspect company records, the company must inform that party of the place for the inspection (which can be any place in Hong Kong specified by the company) within a prescribed timeframe and by way of a written notification;
* any party that inspects the company’s records must be given at least two hours to do so, during which that party may make copies of the company records (but the company is not required to assist in making copies);
* during the inspection of a register of debenture holders, register of members, index of members, register of directors or register of company secretaries, the company must inform the inspecting party of when that company record was last updated;
* when copies of company records (including trust deeds or any document securing the issue of debentures) are requested, the company must provide them within seven days and in either hard copy or electronic form (depending on availability and the preference of the requesting party);
* the maximum fees payable for the inspection of company records would be revised to $50 per inspection and, for the provision of copies of company records, $50 per 100 entries in a register and $2 per 100 words for other documents;
* contravention of the provisions of the IPC Regulation would attract a level 4 fine (which is the same level of fines the new Companies Ordinance prescribes for failing to keep company records) except in the case of a company failing to provide copies of company records in the requested form, in which case a level 3 fine would be imposed instead;
* if a company does not comply with a request for inspection or provision of copies of company records, an application may be made to the Court to compel the company to allow the inspection immediately (during which copies of the company records may be made) or to provide copies of the requested company records; and
* if the inspection or the provision of copies of the register of directors or register of company secretaries is requested, the company may withhold the usual residential address and identification number of a director, reserve director or company secretary.

There are five parts to the proposed IPC Regulation. Part 1 contains the commencement of the regulation. Part 2 prescribes where company records may be kept. Part 3 provides the detailed requirements in relation to the inspection of company records (including the right to make copies of company records during the inspection). Part 4 provides the detailed requirements in relation to the provision of copies of company records. Part 5 allows companies to withhold certain information from inspection and copying. The Schedule to the IPC Regulation prescribes the fees payable for inspections or provisions of copies of company records. The draft of the IPC Regulation is included in Annex 5 of the consultation paper.

## Companies (Model Articles) Notice

### New Companies Ordinance Requirements

Division 2 of Part 3 of the new Companies Ordinance sets out the provisions in relation to the articles of association of Hong Kong incorporated companies, which regulate their internal management. In that division, the memorandum of association is abolished and the provisions of the memoranda of association of existing companies are deemed to be articles of association. For companies to be formed under the new Companies Ordinance, provisions that were previously set out in the memorandum will now be part of the articles of association.

As before, articles of association must be printed in English or Chinese and in numbered paragraphs. Currently, companies may adopt standard articles of association which are set out in Schedule 1 to the existing Companies Ordinance. Under section 78 of the new Companies Ordinance, the Financial Secretary may prescribe model articles of association (**Model Articles**) that companies may adopt wholly or in part. These Model Articles would be set out in the proposed Companies (Model Articles) Notice (the **MA Notice**).

Currently, there are five sets of standard articles of association for different companies. Table A of Schedule 1 to the existing Companies Ordinance sets out the standard articles for companies limited by shares (one set for non-private companies and one set for private companies). Table C is applicable to companies limited by guarantee without a share capital. Table D is for companies limited by guarantee with a capital, but such companies have been prohibited since 2004. Table E is for unlimited companies that have a capital. The proposed MA Notice would set out Model Articles for three types of companies:

* public companies limited by shares (set out in Schedule 1 to the MA Notice);
* private companies limited by shares (set out in Schedule 2 to the MA Notice); and
* companies limited by guarantee (set out in Schedule 3 to the MA Notice).

The draft of the MA Notice is included in Annex 6 of the consultation paper.

### Model Articles for Public Companies Limited by Shares

#### Directors

##### Convening of Directors’ Meetings

According to the Model Articles for public companies (**Schedule 1 Articles**), in determining whether a director has participated in a directors’ meeting, it would no longer be relevant to consider where the director was or how the director was communicating at the meeting. This would allow for meetings where directors may participate from anywhere in the world using modern communications technology.

##### Quorum

The quorum for board meetings would remain as two people, but directors could no longer fix a quorum less than two people.

##### Conflicts of Interest

In respect of conflicts of interest, declarable directors’ interests would include transactions, arrangements, proposed transactions and proposed arrangements of material interest in addition to contracts and proposed contracts. As before, a director would not be allowed to vote on matters in which he is interested. However, where directors are currently allowed to vote in certain exempted cases, these exemptions would not be kept in the Schedule 1 Articles. A new exemption would be introduced to allow directors to vote on arrangements for the benefit of both employees and directors, as long as the arrangement is not more favourable to directors. The director that chairs a meeting would not be allowed to vote if he is not to be counted as participating in the decision-making process. The Schedule 1 Articles would include the procedures that directors may use to propose written resolutions. Directors would be allowed to make any rules in relation to their collective decision-making process.

##### Appointments and Rotation of Directors

In relation to the appointment and rotation of directors, the Schedule 1 Articles would introduce articles that provide for the retirement and appointment of directors by rotation where the company has dispensed with the holding of annual general meetings (**AGM**). They would also provide for composite resolutions to appoint multiple directors and the timeframe for sending notices for the proposed appointment of directors, which would be at least seven days before the date of the AGM instead of between three and twenty-one days. The rights and responsibilities of alternate directors would be included in the Schedule 1 Articles as well as the manner in which they are appointed, removed and terminated. Lastly, the reimbursement of directors’ expenses would be expanded to cover those incurred in the exercise of powers or discharge of responsibilities in relation to the company.

#### General Meetings

##### Notice of General Meetings

In accordance with the new Companies Ordinance, the Schedule 1 Articles would require notices of annual general meetings to be issued at least twenty-one days in advance and those of other general meetings to be issued at least fourteen days in advance. The contents requirements of notices of general meetings would be amended in the Schedule 1 Articles to be consistent with those in the new Companies Ordinance.

##### Non-members’ Attendance at General Meetings

Non-members and members otherwise entitled to the rights of members in general meetings would be entitled to attend and speak at general meetings unless permission to do so is withheld by the chairperson. This is to account for situations where the directors are not necessarily shareholders of the company.

##### Polls, Proxies, Amendments to Proposed Resolutions and Class Meetings

The Schedule 1 Articles would provide for polls that may be demanded in advance of a general meeting, the appointment and revocation of proxies and the possibility of amending resolutions (and the manner for proposing them). The Schedule 1 Articles in relation to general meetings would apply to class meetings, subject to modifications.

#### Shares of the company

##### Fees

Under the Schedule 1 Articles, members would receive their share certificates for free, avoiding the current HK$5 charge.

##### Partly-paid Shares

The Schedule 1 Articles would also set out in greater detail the matters that may be prescribed in a call notice and the effects of (and procedures for) a forfeiture of shares.

##### Surrender of Shares

An article would be added to provide for the surrender of shares which, when adopted in lieu of an enforcement of a call payment), could simplify the settlement process.

##### Transfer and Transmission of Shares

If a company refuses to register a transfer of shares, it must return the instrument of transfer together with a notice of refusal except in cases of suspected fraud. Transferees would be bound by notices given to members prior to the transfer, in respect of the shares transferred.

#### Share Capital, Dividends and Distributions

The Schedule 1 Articles would allow dividends to bear interest if it is required under the terms of the issue of shares or the provisions of a shareholder agreement. Companies would be allowed to capitalise profits without an issue of new shares. The Schedule 1 Articles would provide for the payment of dividends and distributions by bank transfer, the deduction of dividends (or other sums payable in respect of shares) for the enforcement of a lien against a member and how to deal with unclaimed dividends and distributions (and members’ waivers of entitlement). The new Companies Ordinance’s introduction of a no-par value regime for shares would also be reflected. Articles on accounts and audit (which are in the Standard Articles of Association of Table A) would not be included in the Schedule 1 Articles, but will be set out in Part 9 of the new Companies Ordinance.

The draft of the Schedule 1 Articles is included in Annex 6A of the consultation paper.

### Model Articles for private companies limited by shares

The Model Articles for private companies limited by shares (**Schedule 2 Articles**) are much simpler than those for public companies. The Schedule 2 Articles on alternate directors, written resolutions, managing directors, partly-paid shares and the retirement of directors by rotation would be omitted. Unlike the Schedule 1 Articles, the Schedule 2 Articles would provide for sole directorships. The draft of the Schedule 2 Articles is included in Annex 6B of the consultation paper.

### Model Articles for companies limited by guarantee

The Model Articles that cover matters in relation to directors and general meetings for companies limited by guarantee would be similar to the ones for private companies limited by shares. The Model Articles would provide for the admission and termination of membership of a company limited by guarantee. The draft of the Schedule 3 Articles is included in Annex 6C of the consultation paper.

## Companies (Accounting Standards (Prescribed Body)) Regulation

The Professional Accountants Ordinance (CAP 50) requires certified public accountants to observe the professional standards of the Hong Kong Institute of Certified Public Accountants (**HKICPA**). Therefore, companies must comply with the reporting standards issued by the HKICPA. To cope with constantly evolving accounting standards, the new Companies Ordinance will simply require companies’ financial statements to comply with the standard accounting practices issued or specified by “a body prescribed by subsidiary legislation”.

The consultation paper proposes to create a Companies (Accounting Standards (Prescribed Body)) Regulation (**ASPB Regulation**). Section 1 of the ASPB Regulation would provide that it will commence on the same date as the new Companies Ordinance. Section 2 of this regulation would prescribe the HKICPA as the body to issue or specify the accounting standards with which companies’ financial statements must comply.

## Responding To The Phase 1 Consultation

Comments should be submitted to the Financial Services and Treasury Bureau no later than 9 November 2012 by one of the following methods:

Mail:

“Public Consultation on Subsidiary Legislation for Implementation of the new Companies Ordinance” 15/F, Queensway Government Offices 66 Queensway Hong Kong

Fax:

(852) 2869 4195

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**Charltons - Hong Kong Law Newsletter - Issue 169 - 30 October 2012**