



THE
LAW SOCIETY
OF HONG KONG
香港律師會

**The FSTB and Companies Registry Consultation Paper
Subsidiary Legislation for Implementation of the new Companies
Ordinance – Phase Two**

Law Society's submissions

**The FSTB and Companies Registry Consultation Paper on Subsidiary Legislation for
Implementation of the new Companies Ordinance – Phase Two (Consultation Paper)**

The Law Society's Company Law Committee reviewed the Consultation Paper which covers five remaining pieces of draft subsidiary legislation required to implement the new Companies Ordinance (Ordinance). We have the following comments:

1. Companies (Trading Disclosures) Regulation

Regulation 3(2): The following words should be added to the end of this regulation

"...and it is indicated clearly on or next to the electronic device that such a request may be made".

**2. Companies (Revision of Financial Statements and Reports)
Regulation**

General

It is confusing to refer to provisions in the Ordinance and in the Regulations both as "sections".

We recommend referring to provisions in the Regulations as "paragraphs" or "regulations" so that they can be readily distinguished from provisions in the Ordinance. For the purposes of this submission we refer to sections in the Ordinance as "*section*" and sections in the Regulations as "*Regulation*".

Part 2 – Contents of Revised Documents

Section 430(1) provides that if a company is required to hold an annual general meeting, the company must send a copy of the reporting documents for the financial year to every member at least 21 days before the date of the meeting.

Section 449 provides that if a copy of any financial statements has been sent to a member and it subsequently appears to the directors the financial statements did not comply with the Ordinance; the directors may cause the financial statements to be revised. Consequential revisions may be made to the summary financial report or directors' report.

However, the Regulations do not require the revised financial statements and reports be sent to the members at a reasonable time before the annual general meeting is held. In fact, Regulation 22(1) and Regulation 24(2) only provide that the revised documents be sent to the members within 28 days after the date of revision. Regulation 25(3) deals with communication made available on a website and simply provides that the notification of revision be made during the period beginning on a date falling within 28 days after the date of revision and ending on the date of the following general meeting.

We are of the view that the lack of clear requirement to send the revised reports to the members well in advance of the annual general meeting may create uncertainty and unfairness to members. Members may not have adequate time to fully understand the changes made before they are required to resolve on the approval of the revised reports. We suggest that the Regulations be amended to provide that the revised reports be sent or notified to members not less than 3 business days before the date of the general meeting.

Regulation 2(1)

It is confusing to have “*audit report*” and “*auditor’s report*” defined as they are in the Regulations.

We suggest amending “*audit report*” to read “*revised auditor’s report*”.

Regulations 3(4), 5(2) and 6(2)

The Regulations set out the required contents of the revised documents. Regulations 3(4), 5(2) and 6(2) all provide that the revised documents must contain a statement as to the material revisions to the original documents. Indeed section 449 of the Ordinance provides that only those aspects of the financial statements that did not comply with the Ordinance and necessary consequential revisions can be made to the documents after the documents have been sent to the members.

We are of the view that in order to help the members fully comprehend the revisions and ensure good corporate governance, the revised documents should also contain an explanation why the original financial statements did not comply with the Ordinance. We therefore suggest that the Regulations be amended accordingly.

Regulations 10(2) and 11(2)

The language of Regulations 10(2) and 11(2) is unclear and difficult to understand.

We suggest the words are changed to read:

Regulation 10(2)

Without limiting subsection (1),

- (a) where a copy of the original financial statements has not yet been sent to a member under section 430(1) of the Ordinance; or*
- (b) where a copy of the original financial statements has not yet been sent to a member under section 430(3) of the Ordinance,*

the revised financial statements are, as from the date of revision, the financial statements of the company for the relevant financial year for the purposes of that section and sections 429(1), 435(1) or 662 of the Ordinance (as the case may be).

Regulation 11(2)

Without limiting subsection (1),

- (a) where a copy of the original financial statements has not yet been sent to a member under section 430(1) of the Ordinance; or*
- (b) where a copy of the original financial statements has not yet been sent to a member under section 430(3) of the Ordinance,*

the revised directors' report is, as from the date of revision, the directors' report of the company for the relevant financial year for the purposes of that section and sections 429(1), 435(1) or 662 of the Ordinance (as the case may be).

3. Companies (Disclosure of Information about Benefits of Directors) Regulation

Regulation 3(2)

It is unclear why the amount to be disclosed under Regulation 3(2) should be restricted to emoluments paid or receivable for a person accepting office as a director when under Regulation 3(1) the amount to be disclosed relates to emoluments paid or receivable by directors in respect of their qualifying services.

Regulation 5(2)

We note the reference to a "person's" retirement or "person's" office in the Regulation.

Please clarify who the Regulation is referring to other than a director.

Regulation 9(1)

We suggest the words are changed to read:

“In this Part, a reference to a payment to a director includes – (a) all relevant sums paid to or receivable by an entity connected with the director; and (b) all relevant sums paid to or receivable by a person made at the direction of, or for the benefit of, the director or an entity connected with the director.”

**4. Companies (Residential Addresses and Identification Numbers)
Regulation**

General

Should an applicant who applies for access to withheld or protected information be required to promptly notify the Registrar if any information submitted to the Registrar has changed before the withheld or protected information is released to him?

Should the Registrar be required under the Regulation to respond to an application within a prescribed period as both the Ordinance and the Regulation are currently silent on this point?

Regulation 1

Replace “*Ordinances*” with “*Ordinance*”.

Regulations 8(1)(c) and 12(1)(c)

Both Regulations list out the classes of persons to whom, upon an application made to the Registrar, the Registrar may disclose withheld or protected information (“*permitted applicant*”). Both lists include “*a member of a company*” and “*a public body*”.

Regulations 8(1)(c) - A member of a company

We are concerned that applications could lead to potential abuse by members, in particular members of a listed company, seeking withheld or protected information without legitimate reasons.

We note the Registrar *may* disclose withheld or protected information to a permitted applicant (other than the data subject or a member of a company) if, and only if, the permitted applicant provides the Registrar with written confirmation that he needs the information for the performance of his functions and that the information would be used only for that purpose. A member of the company only needs to confirm that he is a member of the company concerned.

Sections 52 and 59 deal with cases where service of documents at the correspondence address given by a director is not effective or where disclosure is necessary or expedient

for the enforcement of a court order. FSTB should clarify the rationale for allowing a member of a company to have access to withheld or protected information about the company's directors.

Regulation 12(1)(c) - Public body

It is unclear how a public body as defined in Regulation 2 would make an application under the Regulations and who within the public body could have access to the information" e.g. Is the Legislative Council entitled to make an application? If so, who within the Legislative Council is entitled to have access to the information? Will the Legislative Council act through a public officer?

5. Companies (Unfair Prejudice Proceedings) Rules

Rule 4(3) – Presentation of Petition

For the sake of clarity, we recommend that "return day" be defined and the sub-rule be revised as follows:

"(3) The Court is to fix a hearing for a day (the "return day") on which, unless the Court otherwise directs, the petitioner and any respondent (including the company) must attend before the Registrar or a judge of the Court for directions to be given in relation to the procedure on the petition".

Rule 5 – Service of Petition

We recommend that this rule should set out the details for the service of the unfair prejudice petition. In this regard, (a) the Winding-up Rules will not apply to an unfair prejudice petition that does not include a prayer to wind up the company; and (b) section 356 of the Companies Ordinance does not contain sufficient details on how a document will be considered to be served effectively.

Can a provision could be adopted which is similar to Rule 25 of the Winding-up Rules?

We recommend that the following sub-rule (3) be added to Rule 5:

"(3) Every petition shall, unless presented by the company, be served upon the company at the registered office, if any, of the company, and if there is no registered office, then at the principal or last known principal place of business of the company, if any such can be found, by leaving a copy with any member, officer, or servant of the company there, or in case no such member, officer, or servant can be found there, then by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer, or servant of the company as the court may direct."

Rule 6(b) – Return of petition

The Judiciary's Practice Direction 3.1, Part II, paragraph 5.6.6(b) (which currently applies to unfair prejudice petitions under section 168A of the Companies Ordinance) provides for filing of particulars of claim, defence and reply. Given that a petitioner should have the

right to the last word, **we recommend that Rule 6(b) should also include delivery of the reply (if any).**

Rule 8 – Service of order, etc.

We recommend that Rule 8(1) should be revised in the following manner to set out the details as to how the order should be served (similar to the provision in Rule 36(1)(b) of the Winding-up Rules):

“(1) Unless the Court otherwise directs, the petitioner must cause an office copy of the order to be served upon the company by prepaid letter addressed to it at the registered office of the company (if any), or if there is no registered office at its principal or last known principal place of business, and on the Registrar of Companies.”

The Law Society of Hong Kong

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