

## PART 19

### INVESTIGATIONS AND ENQUIRIES

#### Introduction

1. Part 19 deals with investigations and enquiries into a company's affairs. Currently, the CO provides the following:
  - (a) investigation of a company's affairs: the FS may appoint an inspector with extensive powers to conduct an investigation into the affairs of a company (sections 142 to 151); and
  - (b) inspection of books and papers: the FS or a person authorised by him may, in specified circumstances, require a company and any person who appears to be in possession of the company's books and papers to produce those documents and to provide explanation of them (sections 152A to 152F).

The CO also provides that a company may appoint an inspector to investigate its own affairs (section 152).
2. Part 19 reorganises, with some modifications, the existing provisions in sections 142 to 152F of the CO. The relevant provisions are clarified or modernised, making reference to the more updated provisions on investigations in the SFO and the FRCO. The power to inspect books and papers is rephrased as power to "enquire into company's affairs" to better described the nature of the power. The Part also provides a new power for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute an offence under **Clause 15.7(7)** (concerning giving false or misleading information in connection with an application for deregistration of a company<sup>1</sup>) or **20.1(1)** (concerning making a statement that is misleading, false or deceptive in any material particular<sup>2</sup>) has taken place.
3. Background information on the needs for the powers is provided in Chapter 4 of the consultation paper.

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<sup>1</sup> The equivalent of section 291AA(14) in the CO.

<sup>2</sup> The equivalent of 349 in the CO.

- The significant changes to be introduced under this Part are highlighted below:
  - (a) **Enhancing the investigatory powers of an inspector, for example, requiring a person under investigation to preserve records or documents and to verify statements by statutory declaration;**
  - (b) **Extending the categories of companies that may be subject to investigation;**
  - (c) **Providing better safeguards for confidentiality of information and protection of informers; and**
  - (d) **Providing for a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the CB has taken place.**

## **Significant Changes**

### **(a) Enhancing the investigatory powers of an inspector**

#### *Background*

4. The provisions in sections 142 to 151 of the CO deal with investigations of a company's affairs by independent inspectors appointed by the FS. The FS may appoint an inspector on application by members (section 142) or a company by special resolution, upon an order made by the Court<sup>3</sup> or on his own initiative where there is fraud or mismanagement involved (section 143). Inspectors appointed under these sections are vested with extensive investigative powers, including the power to:
  - (a) require production of books or documents;
  - (b) require attendance and examination of persons on oath;
  - (c) require reasonable assistance to be given;

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<sup>3</sup> The appointment must be made under this scenario.

- (d) apply to the Court to punish a person who failed to comply with a requirement made by an inspector as if the person had been guilty of contempt of the Court; and
- (e) apply for a search warrant.

At the end of the investigation, an inspector is required to make a final report to the FS.

- 5. The SFO and the FRCO both contain provisions which empower the SFC and the FRC respectively to carry out investigations. We have made reference to these two pieces of legislation in the enhancement of the powers of an inspector.

*Proposal*

- 6. **Clause 19.9(1)(b)** gives the inspector a new power to require a person to preserve records or documents before production to the inspector.
- 7. **Clause 19.11(2)** gives the inspector a new power to require a person to verify by statutory declaration any answer or explanation given to the inspector. **Clause 19.11(3)** provides another new power in that if a person does not give any answer for the reason that the information is not within the person's knowledge or possession, the inspector may require the person to verify that reason and fact by statutory declaration.
- 8. **Clause 19.26** introduces criminal sanctions for non-compliance with a request made by an inspector. Under the CO, criminal sanctions are imposed for non-compliance with a request made by the FS or an authorised person for the inspection of books and papers, but there is no such sanction for non-compliance with a request made by an inspector. This clause therefore addresses the anomaly.
- 9. **Clause 19.27** introduces express provisions allowing the Court to not only punish a person who failed to comply with an inspector's requirement as if he had been guilty of contempt of the Court but also to order the person to comply with the requirement made by the inspector.

**(b) Extending the categories of companies that may be subject to investigation**

*Background*

10. Currently under the CO, companies which may be subject to investigations by an inspector are:
- (a) companies formed and registered in Hong Kong;
  - (b) companies which have, or had a place of business in Hong Kong even though the company is incorporated elsewhere<sup>4</sup>. This provision does not apply to those investigations on the application of a company's members (section 142); and
  - (c) bodies corporate which are related to the company being investigated (e.g. its subsidiary or holding company or body corporate substantially under the control of the same person as the company being investigated).
11. Inspection of books and papers under section 152A may cover both companies formed and registered in Hong Kong and companies incorporated elsewhere which are carrying on or have carried on business in Hong Kong.
12. Nowadays, companies incorporated elsewhere may conduct business activities in Hong Kong (for example over the Internet) although they are not registered or have a place of business here. For investigations in general, a broader scope covering all companies incorporated elsewhere that are doing business in Hong Kong is therefore preferred. As regards the appointment of inspectors on the application of members, there is also room to extend the right to members of registered non-Hong Kong companies, i.e. those registered under Part 16 of the CB.

*Proposal*

13. **Clause 19.2** provides for the definition of "company". In relation to appointment of inspectors on the application of members of a company

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<sup>4</sup> The investigatory powers are subject to such adaptations and modifications as may be specified by Regulations to be made by the FS under section 146A. So far, no regulations have been made.

under **Clause 19.3(2)**, an application may be made by members of registered non-Hong Kong companies, in addition to companies incorporated in Hong Kong. Appointment of inspectors under other scenarios in **Clause 19.4** may cover companies incorporated outside Hong Kong but doing business in Hong Kong (whether or not having a place of business in Hong Kong or registered in Hong Kong) and any other companies within a group comprising such companies, wherever incorporated.

(c) **Providing better safeguards for confidentiality of information and protection of informers**

*Background*

14. Currently, section 152C of the CO provides for security of information or documents relating to a company which have been obtained by section 152A (inspection of books and papers) or section 152B (documents seized by search warrant). There is however no confidentiality or statutory “gateway” provision concerning the information obtained by an inspector.
15. There is also no provision dealing with the protection of an informer’s identity in the CO. Such provisions (such as section 52 of the FRCO) would encourage persons to volunteer information to facilitate investigations.

*Proposal*

16. **Clauses 19.43, 19.44 and 19.45** enhances the confidentiality of matters or information obtained pursuant to an investigation of a company’s affairs or enquiry into company’s affairs. It defines expressly how such information may be disclosed to other regulatory authorities, through the introduction of a statutory regime along the lines of section 378 of the SFO, section 51 of the FRCO and section 120 of the Banking Ordinance.
17. **Clause 19.47** introduces provisions to give protection (by granting immunity from liability for disclosure) to persons who volunteered information to facilitate an investigation of a company’s affairs or enquiry into company’s affairs. **Clause 19.48** gives additional protection by keeping the identity of an informer anonymous in civil, criminal or tribunal

proceedings. These clauses are also applicable to the new power for the Registrar to obtain documents, records and information.

- (d) **Providing for a new power for the Registrar to obtain documents or information for ascertaining whether any conduct that would constitute certain offences under the CB has taken place.**

### Background

18. Currently, investigation of a company's affairs and inspection of books and papers are initiated by the FS and not by the Registrar. We will provide for a new but limited power for the Registrar to obtain documents, records and information for the purposes of ascertaining whether any conduct that would constitute an offence under **Clause 15.7(7)** or **20.1(1)** has taken place.
19. These offences, which relate to the provision of false information in documents delivered to the CR, help to safeguard the integrity of the Companies Register and the quality of information disclosed to the public. The proposed power would help CR's enforcement efforts and facilitate the handling of public complaints by improving the quality of the evidence needed for successful prosecution against breaches of the relevant obligations under the CB.

### Proposal

20. **Clause 19.36** gives the Registrar the new power to require production of records or documents, to make copies of the records or documents and to require information or explanations in respect of the records or documents. The clause also sets out safeguards in exercising the power. **Clause 19.37** states that the Registrar may delegate to any public officer the power.
21. **Clause 19.38** provides for the criminal sanctions for non-compliance with the Registrar's requirement.

## **Other Changes**

### **Minor improvements of the law**

22. **Clause 19.1** updates the definitions of "books", "document", "information" and "record" to cover electronic or other types of records (this definition is

also applicable to the new power for the Registrar to obtain documents, records and information).

23. **Clauses 19.3(4) and 19.4(3)** provide expressly that the FS would be guided by the public interest in appointing an inspector to investigate a company's affairs. This reflects the existing position where the FS will only appoint an inspector if significant or great public interest is involved.
24. **Clause 19.4(2)** restates the existing section 143(1)(c) of the CO on the circumstances where the FS may appoint an inspector, except that section 143(1)(c)(iii) (i.e. a company's members have not been given all the information with respect to its affairs that they might reasonably expect) is not restated as there are other provisions, such as **Clause 19.3** (appointment of inspectors by application of members) and **Clause 14.22** (court may order inspection of records), which are concerned with this type of situation.
25. **Clauses 19.6 to 19.8** provide expressly that the FS may give direction to an inspector, define the terms of the appointment of an inspector, limit or expand the scope of an investigation, suspend an investigation at his discretion, or terminate an investigation.
26. **Clauses 19.14 to 19.17** introduce express provisions on the resignation of an inspector, the revocation of an inspector's appointment by the FS, the replacement of an inspector and the handing over of documents and information that an inspector has obtained or generated during the course of an investigation.
27. **Clauses 19.22 and 19.23** gives the FS greater discretion to prevent premature access to a copy of the report filed with the Court and to decide whether to provide a copy of the report to the company or its shareholders.
28. **Clause 19.25** provides that the findings of fact by an inspector stated in his/her report should be regarded as evidence of that fact in civil proceedings (as compared with "evidence of the opinion" under the CO<sup>5</sup>).
29. **Clauses 19.28 and 19.35** provide for an express obligation for an inspector or the FS or a person authorised by him (for enquiry into company's affairs) to inform or remind a person required to provide answers or explanations (to

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<sup>5</sup> Except for disqualification order under section 168J of the CO where the findings are already currently regarded as evidence of fact.

the inspector) or information or explanations (to the FS or a person authorised by him) in respect of the record or document obtained of the limitations concerning the use in criminal proceedings against the person of self-incriminating evidence. **Clause 19.39** provides for the equivalent obligation in exercising the new Registrar's power to obtain information or explanation in respect of the record or document obtained.

30. **Clause 19.29** clarifies the provisions relating to the recovery of expenses of an investigation from other parties. Specifically, **Clause 19.29(8)** provides that expenses recoverable should include general staff costs and overhead expenses of the Government and the cost of insurance for the inspector.
31. **Clause 19.40** improves the existing provisions in the CO regarding search warrants by incorporating relevant features of the SFO and the FRCO, including: a search warrant application may be made to the Magistrate before or after a formal request for the document has been made; the duration of a search warrant is shortened from 1 month to 7 days; receipt should be issued for any record or document removed; and a search warrant could be issued to a specified person or a police officer (i.e. not just to a police officer).