

## PART 12

### COMPANY ADMINISTRATION AND PROCEDURE

#### Introduction

1. Part 12 contains provisions on company administration and procedure. The provisions are grouped into five divisions:
  - Division 1: Resolutions and meetings;
  - Division 2: Registers (including registers of members, directors and secretaries);
  - Division 3: Company records;
  - Division 4: Registered office and publication of company names; and
  - Division 5: Annual return.
2. In relation to resolutions and meetings, a number of significant changes are proposed with a view to:
  - (a) enhancing shareholder engagement in the decision-making process of a company;
  - (b) simplifying and deregulating the decision-making process of a company; and
  - (c) improving the transparency of the decision-making process of a company.
3. We also update the provisions relating to registers, registered offices and annual returns so that they are commensurate with the needs of the modern economy and on par with similar legislation in other jurisdictions.

- The significant changes to be introduced under this Part are highlighted below:

#### **Resolutions and meetings**

- (a) **Introducing a comprehensive set of rules for proposing and passing a written resolution;**

- (b) Enhancing members' powers to require directors to circulate members' resolutions;**
- (c) Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, AGMs, if they are received in time for sending with the notice of the meeting;**
- (d) Permitting a general meeting to be held at more than one location by using audio-visual technology;**
- (e) Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights;**
- (f) Giving members a right to inspect voting documents (including proxies and voting papers);**
- (g) Clarifying the rights and obligations of a proxy;**
- (h) Allowing companies to dispense with AGMs by unanimous shareholders' consent;**

**Registers**

- (i) Clarifying that the court may refuse to compel compliance with a request for inspection or a copy of the register of members, directors or secretaries if the right is being abused;**

**Registered office and publication of company names**

- (j) Empowering the Financial Secretary to make regulations to require a company to display its name and related information in certain locations and state prescribed information in documents or communications.**

## Significant Changes

### (a) **Introducing a comprehensive set of rules for proposing and passing a written resolution**

#### Background

4. At present, section 116B of the CO provides that anything which may be done by a company by resolution in a general meeting may be done, without a meeting and without any previous notice, by a resolution signed by all members of a company. We note the widespread use of such written resolutions, especially by SMEs, for their decision-making process. However, there are no established statutory rules for proposing and passing a written resolution, for example, who may propose a written resolution, and how a written resolution is to be circulated among the members.

#### Proposal

5. **Subdivision 2 of Division 1** provides for the procedures for proposing, passing and recording written resolutions. **Clause 12.3** provides that the directors of a company or the members of a company representing not less than 2.5% of the total voting rights or a lower percentage specified in the company's articles may propose a resolution as a written resolution. In addition, members of the company who propose the resolution may also require the company to circulate with the resolution a statement of not more than 1,000 words on the subject matter of the resolution (**Clause 12.5**). Once a written resolution is proposed, the company has a duty to circulate the resolution to every member for agreement. In circulating a resolution proposed as a written resolution, the company may send either a hard copy form or electronic form or by making the copies available on a website (**Clauses 12.6 and 12.7**). It is proposed that the period for agreeing to the proposed written resolution be 28 days or such period as specified in the company's articles (**Clause 12.12**). Members may signify their agreement to a proposed written resolution and send it back to the company either in hard copy or electronic form (**Clause 12.10**).
6. The procedures set out in this subdivision will not replace the common law doctrine of unanimous consent or so-called *Duomatic* principle<sup>1</sup> that, if all the members of a company actually agree on a particular decision which can

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<sup>1</sup> See *Re Duomatic Ltd* [1969] 2 Ch 365.

be made at a general meeting, the decision is binding and effective without a meeting. (**Clause 12.1(3)**). In addition, a company's articles may also set out alternative procedures for passing a resolution without a meeting, provided that it cannot replace the procedures set out in the CB (**Clause 12.15**).

7. The new procedures concerning written resolutions would facilitate the use of written resolutions for decision-making, which is often more expeditious and less costly than passing a resolution in a general meeting.

**(b) Enhancing members' powers to require directors to circulate members' resolutions**

*Background*

8. Under section 113 of the CO, members of a company holding not less than 5% of the paid-up capital of the company shall have the right to require the directors of the company to convene a general meeting. The request must state the objects of the meeting. However, the section does not expressly provide members with the right to propose a resolution to be moved at the meeting. As such, directors may refuse to circulate any resolution proposed by members for consideration in a general meeting. This will defeat the purpose of requesting a meeting to be convened.

*Proposal*

9. **Clauses 12.22 to 12.23** restate section 113 of the CO with some improvements. **Clause 12.22** provides that a request may include the text of a resolution that may properly be moved and is intended to be moved at the meeting. If such a resolution is included in a request, the directors will be obliged to include the proposed resolution in the notice of the meeting to be circulated among members.

**(c) Requiring a company to bear the expenses of circulating members' statements relating to business of, and proposed resolutions for, AGMs, if they are received in time for sending with the notice of the meeting**

*Background*

10. Section 115A of the CO enables members representing at least 2.5% of the total voting rights of a company or 50 or more members who have paid up

an average sum of not less than \$2000 per member, to request the company to circulate a proposed resolution for the next AGM or a statement of not more than 1000 words relating to any proposed resolution or business to be dealt with at any general meeting. Under section 115A(1), members making the requisition need to bear the expenses unless the company resolves otherwise.

11. To strengthen the right of minority shareholders, we propose that the expenses of circulating members' proposed resolutions for AGMs and members' statements relating to the proposed resolution or the business to be dealt with at AGMs should be borne by the company if such documents are received in time for sending with the notice of the meeting.

### Proposal

12. **Clause 12.37** provides members a power to request circulation of statements concerning the business to be dealt with at general meetings along the lines of section 115A of the CO. **Clause 12.38** imposes a duty on the company to circulate members' statements in the same manner as the notice of meeting. Under **Clause 12.39**, if the meeting concerned is an AGM and a members' statement is received in time for sending with the notice of the meeting, the expenses will be borne by the company. Otherwise, the expenses will be paid by the members concerned.
  13. **Clauses 12.78** and **12.79** contain similar provisions in respect of members' proposed resolutions for AGMs. A circulation request must be received by the company not later than 6 weeks before the AGM, or if later, before the time at which notice of meeting is given. The company is obliged to circulate the resolution at the company's expense.
- (d) **Permitting general meeting to be held at more than one location by using audio-visual technology**

### Background

14. With the development of electronic communications, it is not uncommon for a company to hold its general meeting at two or more venues with audio-visual links. The CO does not have express provision permitting a general meeting to be held at two or more places.

### Proposal

15. To keep up with technological development, **Clause 12.42** is introduced to permit a company to hold a general meeting at two or more places using any audio-visual technology that enables the members of the company to exercise their right to speak and vote at the meeting. The section has effect subject to any provision of the company's articles. A company may set out rules and procedures for holding a dispersed meeting.
- (e) **Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights**

### Background

16. Under section 114D of the CO, members have the right to demand a poll and such right cannot be excluded by the articles. It may be exercised on any question except the election of the chairman of the meeting or the adjournment of the meeting and is effectively demanded if made by:
- (a) not less than 5 members having the right to vote at the meeting;
  - (b) members representing not less than 10% of the total voting rights; or
  - (c) members holding not less than 10% of the total paid up share capital of the company carrying the right to vote at the meeting.

A proxy has the same right as the member for whom he is proxy to join in demanding a poll.

17. It is proposed that the threshold requirement should be lowered from 10% to 5% of the total voting rights. This is in line with the provision that shareholders holding not less than 5% of the voting rights are able to requisition an extraordinary general meeting.

### Proposal

18. **Clause 12.50** basically restates section 114D of the CO, except reducing the threshold requirement for demanding a poll to 5% of the total voting rights of all the members having the right to vote at the meeting.

(f) **Giving members a right to inspect voting documents (including proxies and voting papers)**

*Background*

19. There is no legislative provision for inspection of voting documents in the CO.

*Proposal*

20. To improve the transparency of the voting process, **Clause 12.54** requires a company to keep record or document relating to a vote cast at a general meeting on a resolution, including the instrument appointing a proxy to vote at the meeting, and if a poll is taken at the meeting, the voting paper relating to the poll. The record or document must be made available for inspection by members. In addition, **Clause 12.55** allows any member of the company to inspect the record or document without charge.

(g) **Clarifying the rights and obligations of a proxy**

*Background*

21. The rights of a proxy are subject to certain limitations under the CO:
- (a) unless the articles otherwise provide, a proxy is not entitled to vote on a show of hands (section 114C(1A)(a) of the CO); and
  - (b) there is no statutory provision expressly providing that a proxy may be elected as a chairman of a meeting.
22. At present, there is no requirement for any person put forward by the company board as a proxy to vote the proxies on any poll according to their terms. The SCCLR has recommended introducing such a statutory requirement so as to overcome the possibility of the shareholders being disenfranchised by a person, who is put forward by the board as a proxy deliberately failing to vote that proxy in accordance with the shareholders' instructions.<sup>2</sup>

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<sup>2</sup> SCCLR, *Corporate Governance Review by the Standing Committee on Company Law Reform – A Consultation Paper on Proposals made in Phase II of the Review* (June 2003), paragraphs 21.95 to 21.98.

23. In the absence of any contractual obligation, a member retains the right, after appointing a proxy, to attend and vote in person to give his own vote according to his own volition. If the member does so, the proxy may implicitly be regarded as revoked. The common law principle that the appointment of a proxy will be revoked if the appointor attends and votes at the meeting is not currently set out in the CO.

Proposal

24. The CB clarifies the rights and obligations of a proxy in the following manner:
- (a) **Clause 12.58(1)** provides that a proxy may exercise all or any of the member's rights to attend and to speak and vote at a general meeting (i.e. including voting on a show of hands);
  - (b) **Clause 12.64** provides that a proxy may be elected as the chairperson of the general meeting, subject to any provisions of the company's articles;
  - (c) Where a proxy put forward by a company is appointed by a member to be his proxy, **Clause 12.65** requires the proxy to vote in the way specified in the appointment of the proxy; and
  - (d) **Clause 12.67** codifies the common law principle that the appointment of a proxy will be revoked if the appointor attends and votes at the meeting.
- (h) **Allowing all companies to dispense with the holding of AGMs by unanimous members' consent**

Background

25. Every company is required to hold AGMs. Under section 111(6) of the CO, a company may dispense with holding AGMs if everything that is required or intended to be done at the meeting is done by written resolutions in accordance with section 116B of the CO, provided that a copy of each of the documents (including any accounts or records) which under the CO would be required to be laid before the meeting is provided to each member of the company.



26. For many private companies, the obligation to hold AGMs could be redundant and potentially burdensome. In order to simplify the decision-making process, we suggest that all companies should be allowed to dispense with AGMs if unanimous members' consent is obtained, and that dispensation should be in force unless a member, by notice, requires an AGM to be held in a particular year or until the dispensation is revoked by passing an ordinary resolution to that effect. In practice, it is much less likely for public and guarantee companies to dispense with holding AGMs by unanimous members' consent but the possibility could not be ruled out. The written resolution procedure under section 111(6) is retained in case a company might wish to dispense with an AGM on a specific occasion by a written resolution.

### Proposal

27. **Clause 12.76** allows a company to dispense with the requirement for holding of AGMs by passing a written resolution or a resolution at a general meeting by all members. After passing such a resolution, the company will no longer be required to hold any subsequent AGMs. However, the financial statements and reports originally required to be laid before an AGM will still need to be sent to the members under Part 9. Also any member may request the company to convene an AGM for a particular year. The company may revoke the resolution by passing an ordinary resolution to that effect and in which case, the company will be required to hold subsequent AGMs. For a single member company, **Clause 12.75(2)(a)** provides that such a company is not required to hold an AGM.
- (i) **Clarifying that the court may refuse to compel compliance with a request for inspection or a copy of the register of members, directors or secretaries if the right is being abused**

### Background

28. Under section 98(1) of the CO, the register of members of a company and the index of members' names are open to inspection by any member without charge and by any other person on a payment of a fee. Upon receipt of a request for a copy of the register of members, the company must send the copy within 10 days after the date on which the request is received.

29. Section 98 of the CO was constitutionally challenged by the Democratic Party in *The Democratic Party v The Secretary for Justice*<sup>3</sup> on the ground that the public availability of the register of members is, in so far as it applies to a political party, inconsistent with the freedom of association and freedom from arbitrary or unlawful interference with the privacy of its members, which are guaranteed by Articles 27 and 30 of the Basic Law and articles 14 and 18 of the Hong Kong Bill of Rights.
30. In his judgment, Mr Justice Hartmann held that the restrictions on the right to privacy imposed by section 98 of the CO, insofar as they may affect political parties that have chosen to incorporate, are no more than necessary. The court has discretion not to make an order under section 98(4) of the CO to compel inspection or production if it considers that the purposes of the request amount to an abuse. We propose to specifically provide for the court's discretion in the CB.
31. We have considered but decided against introducing changes along the lines of sections 116 to 118 of the UKCA 2006. Under section 117, a company may apply to the court for an order directing the company not to comply with a request for inspection or a copy of the register of members if the request was not made for a proper purpose. We believe such a proposal would unnecessarily increase the compliance costs of companies, especially SMEs, as companies would have to apply to court every time they wanted to refuse a request. Under the existing arrangement, the burden rests with the person making the request to apply to the court if his request is refused. In addition, in case a company refuses a request for inspection, the enquirer could still search the information from the CR, with the exception of companies limited by guarantee and listed companies. For the latter, we have proposed to only require listed companies to file with the Company Registry particulars of members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return (please see paragraph [51]).

### Proposal

32. **Clause 12.96(8)** states that the court must not make an order to direct a company to provide a copy of the register of members or index of members' names to the person requesting it if it is satisfied that the right to request the copy is being abused. There are similar provisions in respect of the

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<sup>3</sup> HCAL 84/2006.

register of directors and the register of secretaries (**Clauses 12.110(7) and 12.117(7)**). The court's power not to direct inspection of the registers where there is abuse will be set out in the regulations made by the Financial Secretary under **Clause 12.125(4)(e)**.

**(j) Empowering the Financial Secretary 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**

*Background*

33. Under section 93(1) of the CO, every company shall display its name on the outside of every office or place in which its business is carried on and mention its name in its public documents (e.g. business letters, notices, official publications, and contracts).
34. The SCCLR has recommended some changes to the rules on publication of company names:
  - (a) every company should also display its name on the company's website and the outside of the company's registered office;
  - (b) basic rules for electronic display of company names should be set along the lines that where an office is shared by more than six companies, each of such companies is only required to display its registered name in such a manner that it can be read for at least twenty continuous seconds at least once in every four minutes or, where impracticable, the electronic system used for the display should be capable of calling up such information on request within 4 minutes; and
  - (c) every company should also be required to mention its company registration number in its public documents, in addition to the current requirement of mentioning its registered name in such documents.

*Proposal*

35. As the rules involve technical details and may change with developments in technology, they should be stated in subsidiary legislation to facilitate future

amendments. **Clause 12.127** and **12.128** empowers the Financial Secretary to make the relevant regulations, including the offence provisions. The regulations will be made after the enactment of the CB and will be subject to negative vetting by the LegCo.

## **Other Changes**

### **(a) Facilitating the use of electronic communications between the company and members**

36. Part 18 of the CB introduces rules to facilitate communications between a company and its members in electronic form or by means of a website. Part 12 contains provisions to the effect that a company is regarded as having agreed that certain documents or information may be sent by electronic means to an electronic address if the company has given an electronic address when sending a relevant document to its members.<sup>4</sup>
37. **Clause 12.30** specifies how a company may give notice of a general meeting by making it available on a website in addition to the provisions on website communications in Part 18. The notice should be available on the website throughout the period beginning on the date of the notification and ending on the conclusion of the meeting.

### **(b) Shortening the notice period for passing a special resolution**

38. At present, section 114 of the CO provides that a company must give at least 21 days' notice to every member of the company for convening an AGM, and 14 days' notice for convening a meeting other than either an AGM or a meeting for the passing of a special resolution. Under section 116 of the CO, a company is required to give at least 21 days' notice for a general meeting in which a special resolution is proposed to be passed.
39. To simplify the notice requirement, **Clause 12.28** only provides for the notice requirements in respect of AGMs and for other general meetings. The notice requirement under section 116 is abolished. In effect, a company may convene a meeting other than an AGM for passing a special resolution by giving 14 days' notice only.

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<sup>4</sup> See for example, in the CB, **Clause 12.14** concerning written resolutions, **Clause 12.29(2)** concerning documents and information relating to proceedings at a general meeting, and **Clause 12.61** concerning documents relating to proxies.

**(c) Giving members a right to appoint a proxy irrespective of whether the company has share capital, while allowing a company limited by guarantee to impose certain restrictions by its articles**

40. The system of proxy voting helps to ensure that the views of members who are unable to attend a meeting in person will still be voiced and considered. Under section 114C of the CO, the right to appoint a proxy is effectively limited to companies having a share capital. Members of companies limited by guarantee (“guarantee companies”) may have a right to appoint a proxy only if it is provided in the company’s articles. We note that some guarantee companies may wish to exclude non-members from attending their meetings and to confine a proxy to another member. Nevertheless, a better way to protect the right of members of guarantee companies would be to give all members, irrespective of whether the company has share capital or not, a right to appoint a proxy while allowing guarantee companies to confine a proxy to another member. The amendment is reflected in **Clause 12.58(1) and (2)**.

**(d) Enhancing the right of members of a company having a share capital to appoint multiple proxies**

41. Unless the articles otherwise provide, the number of proxies that may be appointed by a shareholder to attend on the same occasion is limited to two (section 114C(2) of the CO). Such a default cap on the maximum number of proxies that a shareholder may appoint on the same occasion is considered to be unnecessarily restrictive. **Clause 12.58(3)** allows multiple proxies without imposing any cap on the number of proxies that may be appointed.

**(e) Application of provisions relating to general meetings to class meetings**

42. Section 63A(6) of the CO provides that subject to certain exceptions, sections 114, 114A, 114AA and 115A of the CO relating to general meetings shall, so far as applicable, apply with necessary modifications in relation to any meeting of shareholders in connection with the variation of rights attached to a class of shares. Currently, there is no separate provision under the CO on class meetings or variation of class rights that relate to companies without a share capital.

43. **Clause 12.88** provides that subject to certain exceptions and with necessary modifications, the provisions in relation to a general meeting apply in relation to a class meeting. Examples of the exceptions are **Clause 12.22** (please see paragraph 9), members' power to call general meeting at company's expense, power of court to order meeting, and the provisions in relation to quorum and right to demand a poll for a variation of class rights meetings. **Clause 12.89** provides for class meetings of companies without a share capital in a similar way.

**(f) Shortening the period for keeping the records of past members from 30 years to 20 years**

44. Under section 95(1) of the CO, a company is required to keep not only the records of present members, but also records of past members for 30 years after they ceased to be members. We consider that a period of 30 years is unnecessarily long. **Clause 12.92(6)** reduces the period for which a company should keep the record of a past member to 20 years after that person ceased to be a member.

**(g) Exempting listed companies from giving notice of closure of register of members by newspaper advertisement**

45. Section 99(1) of the CO requires a Hong Kong incorporated company to give notice of closure of its register of members/debenture holders by advertisement in a newspaper. The Listing Rules have been amended in 2007 to require a listed company to publish notices (including a notice of closure of register of members) on the SEHK's website instead of in a newspaper.<sup>5</sup> As a result, a Hong Kong incorporated listed company has to publish its notice of closure of register of members both in a newspaper and on the SEHK's website. To streamline the requirements and to ensure a level playing field between listed companies incorporated in Hong Kong and elsewhere, **Clause 12.98** allows listed companies to give notice in accordance with the Listing Rules instead of by advertisement in a newspaper.

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<sup>5</sup> See Rule 2.07C and Rule 13.66 of the Main Board Listing Rules which were implemented on 25 June 2007.

**(h) Empowering the Financial Secretary to make regulations for keeping, inspection and provision of copies of company records**

46. At present, every company must keep and make its registers (including registers of members, debenture holders, charges, directors and secretaries) available for public inspection. In addition, every company must make its minute books available for members' inspection.<sup>6</sup> The registers and minute books must be open for inspection during business hours. Though a company may impose reasonable restriction, the minimum inspection time should not be less than 2 hours in each day.<sup>7</sup> The maximum fees that a company may charge for inspection and copy of the registers or minutes are prescribed in the CO.<sup>8</sup> However, there is no legal requirement for prior appointment.
47. We propose to streamline the provisions in the CB and put the technical details in subsidiary legislation. This will also facilitate regular updating of the law in the future. There will be a requirement for prior appointment before inspection in the subsidiary legislation.
48. **Clause 12.122** 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. The provisions on accounting records will be dealt with in Part 9. **Clause 12.123** allows the company records to be kept in hard copy form or electronic form. **Clause 12.125** empowers the Financial Secretary to make regulations for the keeping, inspection and provision of copies of any company records, such as alternative locations for keeping and inspection of registers and minute books, time, duration and manner of inspection, and the amount of fee payable on production of copies.

**(i) Prescribing the contents of annual returns and the accompanying documents in a Schedule which may be amended by the Registrar by order published in the Gazette**

49. Every company is required to file an annual return with the Registrar to update information of the company, including its share capital, registered

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<sup>6</sup> See sections 95(2) (register of members), 158A(1) (registers of directors and secretaries), 74A(2) (register of debentures holders), 89(2) (register of charges) and 119A(1) (minute books) of the CO.

<sup>7</sup> See sections 98(1) (register of members), 158(7) (registers of directors and secretaries), 75(1) (register of debenture holders), 90(1) (register of charges), 120(1) (minute books) of the CO.

<sup>8</sup> See sections 75(1) (register of debenture holders), 98(1) of and item 1 of 14th Sch (register of members), 90(1) (register of charges), 158(7) (registers of directors and secretaries), 120(1) and (2) (minute books) of the CO.

office, members, directors and secretaries. In the case of public companies, the balance sheet and auditor's report must also be filed. Sections 107 and 109 of the CO prescribe the contents of an annual return and deal with the general administrative provisions relating to annual returns.

50. The information that should be contained in annual returns may change over time. To facilitate regular updating of the law in the future, we propose to prescribe the technical details in a Schedule and empower the Registrar to amend the Schedule by order published in the Gazette. The order will be subject to negative vetting by the LegCo.
  
51. **The Schedule** in Part 12 sets out the details of the information to be contained in annual returns and the required accompanying documents. The requirements are essentially the same as the current provisions in the CO, except that the requirement for listed companies to file all the members' details in their annual returns will be relaxed. Given the frequent share transactions of listed companies, a snapshot of the membership of a listed company at a particular point of time is not very meaningful. Instead, paragraph 2 of Part 1 of the Schedule will only require listed companies to file particulars of members who held 5% or more of the issued shares in any class of the company's shares at any time since the return date of the last annual return. It would still be possible for anyone to have access to information regarding all the listed company's shareholders by inspecting the company's own register at its registered office.