

PART 18

COMMUNICATIONS TO AND BY COMPANIES

Introduction

1. Part 18 introduces a new set of rules governing communications between a company and its members, debenture holders, and other persons in electronic or hard copy form. The rules, modelled on similar provisions in the UKCA 2006¹, will also facilitate communications sent by companies (particularly listed companies) to their shareholders by means of a website. Some of the proposed changes will be incorporated into a Companies (Amendment) Bill to be introduced into the LegCo in early 2010, so that they can be implemented ahead of the CO rewrite exercise.
2. The Part also restates section 356 of the CO regarding service of documents on a company (**Clause 18.7**) and adopts regulations 133 (notice given by a company to the joint holders of a share) and 134 (notice given by a company to the persons entitled to a share in consequence of the death or bankruptcy of a member) in Table A of the First Schedule to the CO to be the default rules in the CB (**Clauses 18.15 and 18.16**).

- The significant changes to be introduced under this Part are highlighted below:
 - (a) **Setting out the rules governing communications to and by companies in electronic form; and**
 - (b) **Facilitating communications sent by companies to their members by means of a website**

¹ Sections 1144 to 1148 of and Schedules 4 and 5 to the UKCA 2006.

Significant Changes

(a) **Setting out the rules for communications with companies in electronic form**

Background

3. As a result of the rapid growth of new information technology over recent years, communications by electronic means have presented opportunities to reduce costs and increase the efficiency of communications with companies. In this regard, both the CO and Electronic Transactions Ordinance (Cap 553) (“ETO”) contain some general provisions which enable electronic communications with companies. Specifically, Regulation 1 of Table A in the First Schedule to the CO provides that, wherever any provision of Table A (except a provision for appointment of a proxy) requires that a communication as between a company, its directors or members be effected in writing, the requirement may be satisfied by the communication being given in the form of an electronic record if the person to whom the communication is given consents to it being given to him in that form.²
4. The ETO is permissive and facilitatory in nature, and where applicable, it confers on electronic records the same legal status as that of their paper-based counterparts. However, consent of the recipient is required for receiving electronic records. Under the ETO (section 15), where neither the provider nor the recipient of information is (or is acting on behalf of) a government entity, if the recipient consents to the information being given in the form of an electronic record, then sections 5 and 5A of the ETO shall apply (unless otherwise specifically excepted or excluded by reason of sections 11(1), 13, 14 and 16(1) of the ETO). Section 5 of the ETO provides that if a rule of law requires or permits information to be given in writing, the use of electronic records satisfies the rule of law if the information contained in the records is accessible so as to be usable for subsequent reference. Section 5A of the ETO further provides that if a rule of law requires or permits a document to be served on a person by personal service or by post, the service of the document in the form of an electronic record to an information system designated by the recipient satisfies the rule of law if the information contained in the records is accessible so as to be usable for subsequent reference.

² This provision was inserted into regulation 1, effective for companies adopting Table A on or after 13 February 2004.

5. However, while section 23 of the CO provides that the articles of a company shall have effect as a contract between the company and each member and shall be deemed to contain covenants on the part of the company and of each member to observe all the provisions of the articles, it is unlikely that a provision in the articles in the form of Regulation 1 of Table A would itself be sufficient to constitute a consent on the part of the recipient for the purposes of the ETO.
6. Furthermore, there is a lack of ground rules in the CO, which comprehensively deal with electronic communications (as well as non-electronic communications)³ to or by companies. There is a need to provide a set of comprehensive rules in the CB to govern electronic communications to and by companies in order to encourage more widespread use of electronic communications in Hong Kong.

Proposal

7. Division 3 (**Clauses 18.8 to 18.10**) contains provisions dealing with communications from natural persons to a company. **Clause 18.8** deals with documents or information sent to the company in electronic form. It provides that a document may be sent to a company in electronic form if the company has so agreed, generally or specially, or is regarded as having so agreed under a provision of the CB. There are provisions in Part 12 of the CB which deem the company to have agreed to receive a document sent in electronic form. For example, under **Clause 12.14**, if a company has given an electronic address when sending to its members a document containing or accompanying a proposed written resolution, it is regarded as having agreed that any document or information relating to that resolution may be sent by electronic means to that address. **Clauses 12.29(2) and 12.61** contain similar provisions in respect of a notice calling a meeting and an instrument of proxy or an invitation to appoint a proxy in relation to a meeting respectively.
8. Division 4 (**Clauses 18.11 to 18.13**) contains provisions dealing with communications by a company to other persons (whether a company or natural person). **Clause 18.11** provides that a document may be sent by a

³ There are some provisions in the CO which deal with non-electronic communications with a company under the CO, such as section 356 (service of documents on company), section 338 (service of documents on non-Hong Kong company), regulations 132 (notice given by a company to its member), 133 (notice given by a company to the joint holders of a share) and 134 (notice given by a company to the persons entitled to a share in consequence of the death or bankruptcy of a member) of Table A in the First Schedule of the CO.

company to another person in electronic form if the recipient has agreed, generally or specifically, that it be sent in electronic form or, where the recipient is a company, is regarded as having so agreed under a provision of the CB. Under **Clause 18.3**, a document is deemed to have been received by the recipient 48 hours after it is sent by electronic means, or any longer period as specified in the company's articles (for members), instrument creating the debenture (for debenture holders) or any other agreement (for other persons).

9. Any person who has agreed to receive electronic communications may revoke the agreement at any time. Under **Clause 18.2**, the agreement may be revoked by the recipient by giving a notice of revocation of at least 7 days or such longer period as specified in the articles of association (for members), instrument creating the debenture (for debenture holders) or any other agreement (for other persons).
10. **Clauses 18.8** and **18.11** also provide for the manner of authentication of a document sent in electronic form. A document will be sufficiently authenticated if the sender's identity is confirmed in a manner specified by the recipient or where no such manner has been specified, the communication contains or is accompanied by a statement of the sender's identity and the recipient has no reason to doubt the truth of the statement.
11. It should be noted that a document in electronic form may also be sent by hand or by post (e.g. by sending a diskette or CD containing the document in electronic form).

(b) Facilitating communications sent by companies to their members by means of website

Background

12. At present, the CO requires companies to send to every shareholder the full annual report and accounts or a summary version thereof. Unless the shareholder positively opts for electronic communication, this must be in paper. Recent amendments to the Listing Rules⁴ have allowed a listed company, subject to the applicable laws in its home jurisdiction, to send corporate communications to its shareholders by making them available on the listed company's website if the shareholders agree, or are deemed to

⁴ See Main Board Listing Rule 2.07A and GEM Rule 16.04(2A) which came into effect on 1 January 2009.

have so agreed. In the absence of enabling provisions in the CO, listed companies which are incorporated in Hong Kong would not be able to make use of such flexibility. There is a need to amend the law so that companies incorporated in Hong Kong can take advantage of the new procedure relating to website communications as companies incorporated outside Hong Kong .

Proposal

13. **Clause 18.13** provides that a company may communicate with its members, debenture holders and other persons by means of a website, if so permitted by its articles or a members' resolution and if the recipient consents to the use of website communications. If the recipients are members or debenture holders, they will be taken to have agreed to receive information from the company via a website if they have been asked individually for their acceptance and have not responded within 28 days of the company's request. Where a member or debenture holder has not agreed to accept website communications, the company may not ask the member or debenture holder again within a period of 12 months. Companies are required to notify intended recipients each time material is published on a website. The document or information should be available on the website throughout the period specified by the applicable provision of the CB, or where no such period is specified, a period of 28 days.

Other Changes

- (a) **Providing members and debenture holders a right to require hard copy version of documents**
14. **Clause 18.17** allows the members or debenture holders to require information to be provided in hard copy form within 28 days from the date of receipt of a document otherwise than in hard copy form. This will enable a member or debenture holder to obtain a paper copy of the document in case of temporary failure to access the document through the website or other electronic devices. A company is required to send a paper copy of the document or information within 21 days of receiving the request; or if the document or information requires an action to be taken by the member or debenture holder on or before a date, at least 7 days before that date. If the company fails to comply with the request, the company and every responsible person will be liable to a fine.

- (b) **Stating rules for communications with company in hard copy and other agreed forms**
15. **Clauses 18.9** and **18.12** state the existing practice that a document may be sent to a company or by a company to another person in hard copy form by hand or by post. If the recipient is a company, the document can be sent to the company's registered office, an address specified by the company, or an address authorised or required under the relevant provision of the CB. **Clause 18.5** lists the addresses to which a company may send documents to other persons. Where the company does not have the intended recipient's address as specified in **Clause 18.5**, the company may use the recipient's last known address.
16. **Clauses 18.10** and **18.14** provide that communications between a company and another person may be effected by any other means as agreed between the parties. These provisions contemplate oral communications and such other kinds of communications as may be developed in the future arising from new information and telecommunications technologies.