



OFFICIAL RECEIVER'S OFFICE

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9 February 2017

OFFICIAL RECEIVER'S OFFICE CIRCULAR NO. 6/2017

Disqualification of Directors

(I) Background

1. Upon commencement of the Companies Ordinance (Cap. 622) ("Cap. 622") on 3 March 2014, the Companies Ordinance (Cap. 32) was re-titled as Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("Cap. 32"). Amendments made by the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016) ("CWUMP(A)O") to Cap. 32 will commence operation on 13 February 2017 (except Division 7 of Part 8). This Circular is an update of the general guidelines on the information to be provided in Form D1¹ relating to different types of unfit conduct including the related changes brought about by the enactment of CWUMP(A)O.

(II) General principle

2. The Official Receiver may, if it appears to him that it is in the public interest, make application to the court for a disqualification order against any person who is or has been a director of a company which has at any time become insolvent².
3. The statutory provisions for disqualification of directors are contained in
 - S. 168C to 168T of Part IVA of Cap. 32
 - Companies (Disqualification Orders) Regulation (Cap. 32 sub. leg. I)
 - Companies (Reports on Conduct of Directors) Regulation (Cap. 32 sub. leg. J)
 - Companies (Disqualification of Directors) Proceedings Rules (Cap. 32 sub. leg. K)
4. If it appears to the liquidator of an insolvent company or the receiver ("office holders") that the conditions for disqualification contained in S. 168H(1) of

Cap. 32 may apply to former directors of that company, he is required to report the matter to the Official Receiver by completing Form D1. The reporting requirement extends to members' voluntary winding-up where it becomes apparent to the office-holder that the company is insolvent notwithstanding the making of a statutory declaration of solvency.

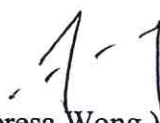
5. General information to assist liquidators with the completion of Form D1 is set out in **Appendix I**.

(III) Reporting of unfit conduct to the Official Receiver

6. The Notes at **Appendix II** hereto provide some general guidelines as to the details to be provided in relation to each type of suspected unfit conduct and set out common considerations in support of the allegation of such unfit conduct.
7. The office-holder is required to consider matters of unfit conduct on the basis of information acquired in the course of his normal duties and by reference to available books and records; and is not obliged to undertake investigations which he would not otherwise have considered necessary to make.
8. It is also recognized that various categories of unfitness are often inextricably linked with other allegations of unfitness. Each category should not be considered in isolation.

(V) Effective Date

7. This Circular takes effect on 13 February 2017 and supersedes ORO Circular No. 7/2014.


(Ms Teresa Wong)
Official Receiver

To all insolvency practitioners

- via (1) The Hong Kong Institute of Certified Public Accountants
(2) The Hong Kong Institute of Chartered Secretaries
(3) The Law Society of Hong Kong

(A) Definitions

Company

“Company” means

- (i) a company formed and registered under Cap. 622 or an existing company³,
- (ii) an unregistered company within the meaning of Part X of Cap. 32 (other than a partnership, whether limited or not or an association) -
 - wherever incorporated
 - carrying on business in Hong Kong or which has carried on business in Hong Kong, and
 - which is capable of being wound up under Cap. 32⁴; or
- (iii) a registered non-Hong Kong company⁵.

Director

- “Director” includes any person occupying the position of director by whatever name called⁶
- “Director” includes a shadow director, i.e. a person on whose directions or instructions (excluding advice given in a professional capacity) the directors or a majority of the directors of a company are accustomed to act⁷.
- “Director” is not confined to an individual. A disqualification order can be made against a company or other body corporate⁸.

Insolvent

For the purpose of S. 168H of Cap. 32, a company becomes insolvent if

- the company goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding-up, or
- a receiver of the company is appointed⁹.

(B) Jurisdiction of the Court

The court shall make a disqualification order if it is satisfied that:

- (i) the person is or has been a director of a company which has at any time become insolvent while he was a director or subsequently, and
- (ii) his conduct as a director of that company, either taken alone or together with that as a director of other companies, makes him unfit to be concerned in the management of a company¹⁰.

(C) The effect of a disqualification order

1. During the period of disqualification, the person concerned must not, without leave of the court:
 - (i) be a director of a company,
 - (ii) be a provisional liquidator or liquidator of a company,
 - (iii) be a receiver or manager of a company's property, or
 - (iv) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company¹¹.

2. A contravention of a disqualification order involves both criminal penalties and personal financial liability.
 - (i) Criminal penalties
 - (a) If a person acts in contravention of a disqualification order, he is guilty of an offence and is liable to imprisonment and a fine¹².
 - (b) The maximum punishment on summary conviction is a fine of \$25,000 and 6 months imprisonment¹³.

 - (ii) Personal liabilities
 - (a) A person is personally responsible for all the relevant debts of the company if at any time:
 - in contravention of a disqualification order, he is involved in the management of a company, or
 - as a person who is involved in the management of a company, he acts or is willing to act on instructions given without the leave of the court by a person whom he knows at that time to be the subject of a disqualification order¹⁴.

 - (b) "Relevant debts" means, where S. 168O(1)(a) of Cap. 32 applies, such debts and other liabilities of the company as are incurred at a time when that person was involved in the management of the company and, where S. 168O(1)(b) of Cap. 32 applies, such debts and other liabilities of the company as are incurred at a time when that person was acting or was willing to act on the instructions referred to there¹⁵.

(D) The statutory meaning of unfitness

Matters to which the court must have regard where it has to determine whether a person's conduct as a director of a company makes him unfit to be concerned in the management of a company¹⁶ include:

1. Matters applicable to all cases

- (i) Any misfeasance or breach of any fiduciary or other duty by the director in relation to the company¹⁷.
- (ii) Any misapplication or retention by the director of, or any conduct by the director giving rise to an obligation to account for, any money or other property of the company¹⁸.
- (iii) The extent of the director's responsibility for any failure by the company to comply with :
 - (a) the following provisions of Cap. 32 as in force from time to time before 3 March 2014¹⁹ ("the pre-amended Companies Ordinance") :
 - S. 81 - duty to register charges created by the company
 - SS. 95 and 96 - obligation to keep register and index of members and location thereof
 - SS. 107 and 109 - duty of company to make and file annual returns
 - S. 119A - location of minute book
 - S. 121 - duty to keep and preserve proper books of account
 - SS. 158 and 158A - duty to keep register of directors and secretaries, and location thereof
 - (b) the following provisions of Cap. 622²⁰ :
 - S. 335 - duty to register specified charge created by the company
 - S. 336 - duty to register specified charge created by non-HK company
 - S. 341 - duty to register particulars of debentures
 - S. 342 - duty to register particulars of commission etc. relating to debentures
 - S. 373 - duty to keep accounting records
 - S. 374 - location of accounting records
 - S. 377 - duty to preserve accounting records
 - S. 619 - location of records of resolutions etc.
 - S. 627 - duty to keep register of members
 - S. 628 - location of register of members
 - S. 630 - duty to keep index of members
 - S. 641 - duty to keep register of directors
 - S. 642(1) - inspection of register of directors
 - S. 643 - particulars of register of directors
 - S. 645 - duty to notify Registrar of appointment and change of directors
 - S. 648 - duty to keep register of company secretaries

- S. 649(1) - inspection of register of company secretaries
 - S. 650 - particulars of register of company secretaries
 - S. 652 - duty to notify Registrar of appointment and change of company secretaries
 - S. 662 - duty to deliver annual return
 - S. 664 - contents of annual return
- (iv) The extent of the director's responsibility for any failure by the director to comply with the following provisions²¹:
- (a) provisions of the pre-amended Companies Ordinance :
- S. 122 - duty to lay profit and loss account and balance sheet in general meeting
 - S. 129B - duty to approve and sign balance sheet
- (b) provisions of Cap. 622 :
- S. 387 - duty to approve and sign statement of financial position
 - S. 429 - duty to lay financial statements etc. in general meeting

2. Matters applicable where the company has become insolvent

- (i) The extent of the director's responsibility for the causes of the company becoming insolvent²².
- (ii) The extent of the director's responsibility for any failure by the company to supply any goods or services which have been paid for (in whole or in part)²³.
- (iii) The extent of the director's responsibility for the company entering into any transaction or giving any unfair preference, being a transaction or unfair preference liable to be set aside under S. 182, S. 265D or S. 266 of Cap. 32²⁴.
- (iv) The extent of the director's responsibility for any failure by the directors of the company to comply with S. 241 of Cap. 32 regarding rules on holding of creditors' meeting in creditors' voluntary winding-up²⁵.
- (v) Any failure by the director to comply with an obligation imposed on him by the following provisions of Cap. 32:
- S. 190 - duty to submit statement of affairs of the company or a supplementary affidavit²⁶
 - S. 211 - duty to deliver property, books and papers to the liquidator²⁷

The powers of S. 211 of Cap. 32 are exercised by the liquidator²⁸. A director who is also a contributory is required, upon receipt of notice²⁹, to deliver to the liquidator any property, books and papers to which the company is prima facie entitled. A contributory is a person liable to contribute to the assets of a company in the event of its being wound up³⁰

- S. 228A - to use the procedure only where there are reasonable grounds (a) for the opinion that the company cannot by reasons of its liabilities continue its business; (b) to consider that the winding up of the company should be commenced under that section because it is not reasonably practicable for the winding-up to be commenced under another section; and (c) for certifying any of the matters referred to in s. 228A(1B)(c) (i.e. (i) a resolution has been passed under s.228A(1); (ii) a meeting of the company has been summoned for the date and time stated in the winding-up statement; and (iii) a provisional liquidator of the name and address stated in the winding-up statement has been appointed and that the appointment will take effect from the commencement of the winding up)³¹.
- S. 241 - duty to follow rules on holding of meeting of creditors in creditors' voluntary winding-up³²
- S. 274 - duty to keep accounting records that comply with S. 373(2) and (3) of Cap. 622 for any part of the period of 2 years immediately preceding the commencement of winding-up³³
- S. 300A - duty to submit statement of affairs of the company to the receiver appointed³⁴

(E) Other circumstances triggering the disqualification process

1. Conviction for an indictable offence

The Court may make a disqualification order against a person where he is convicted of:-

- (i) an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management or liquidation of a company, or
- (ii) any other indictable offence his conviction for which necessarily involves a finding that he acted fraudulently or dishonestly³⁵.

Offences involving the element of dishonesty include those under the Theft Ordinance³⁶.

2. Fraud in winding-up

The court may make a disqualification order against a person if in the course of the winding-up of a company, it appears that he has

- (i) been guilty of an offence for which he is liable (whether he has been convicted or not) under S. 275 of Cap. 32 (fraudulent trading), or
- (ii) otherwise been guilty, while an officer of a company of any fraud in relation to the company or any breach of his duty as such officer³⁷.

3. Fraudulent trading

Where the court makes a declaration under S. 275 of Cap. 32 that a person is liable for debts or liabilities of a company, the court may make a disqualification order against the person to whom the declaration relates³⁸.

NOTE [Sections quoted below are sections in Cap. 32 (unless otherwise stated)]

1. S. 168I(3)
R. 2 of and Schedule to the Companies (Reports on Conduct of Directors) Regulation (Cap. 32 sub. leg. J)
2. S. 168I(1)(b)
3. S. 168C(1)(a) and S. 2(1)
4. S. 168C(1)(b)
5. S. 168C(1)(c) and S.2(1)
6. S. 2(1)
7. S. 168H(3), S. 2(1)
8. S. 168N
9. S. 168H(2)
10. S. 168H(1)
11. S. 168D(1)
12. S. 168M
13. S. 351(1A) and Twelfth Schedule
Schedule 8 to the Criminal Procedure Ordinance (Cap. 221)
14. S. 168O(1)
15. S. 168O(3)
16. S. 168K(1) and Fifteenth Schedule
17. Fifteenth Schedule Part I paragraph 1
18. Fifteenth Schedule Part I paragraph 2
19. Fifteenth Schedule Part I paragraph 3(a)
20. Fifteenth Schedule Part I paragraphs 3(b)
21. Fifteenth Schedule Part I paragraph 4
22. Fifteenth Schedule Part II paragraph 1
23. Fifteenth Schedule Part II paragraph 2
24. Fifteenth Schedule Part II paragraph 3
25. Fifteenth Schedule Part II paragraph 4
26. Fifteenth Schedule Part II paragraph 5(a)
27. Fifteenth Schedule Part II paragraph 5(b)
28. R. 67 of the Companies (Winding-up) Rules (Cap. 32 sub. leg. H)
29. Form 41 in the Companies (Winding-up) Rules (Cap. 32 sub. leg. H)
30. S. 171
31. Fifteenth Schedule Part II paragraph 5(c)
32. Fifteenth Schedule Part II paragraph 5(d)
33. Fifteenth Schedule Part II paragraph 5(da)
34. Fifteenth Schedule Part II paragraph 5(e) and S. 300A(1)(b) and S. 300B
35. S. 168E(1)
36. S. 9, S.16A and S.17 of the Theft Ordinance (Cap. 210)
37. S. 168G(1)
38. S. 168L

Notes on details to accompany Form D1

(I) Financial management and accounting records

(A) *S. 121 of the pre-amended Companies Ordinance
S. 274 of Cap. 32
*SS. 373, 374 and 377 of Cap. 622***

1. State particulars of breach of any of the above sections (with reference to ORO Circular No. 6/2014 – Prosecution of Insolvency Offences and ORO Circular No. 5/2017 – Prosecution of Insolvency Offences – Supplemental to ORO Circular No. 6 of 2014).
 - Whether accounting records have been recovered.
 - If some accounting records have been recovered, state particulars as to non-compliance with the relevant section, such as auditor’s qualification regarding adequacy of records.
2. The director who failed to comply with the obligation imposed by the above sections and his explanation therefor.

(B) *S. 122 of the pre-amended Companies Ordinance
*SS. 429 and 431 of Cap. 622***

1. Whether any financial statements of the company were made for the period from the date of incorporation to the date of winding-up order? Whether audited accounts were prepared during the last 3 years?
2. If the answer to (B)1 is yes, when was the last financial statement made?
3. Were any of the auditor’s reports qualified in relation to matters other than the quality of the records?
4. The director’s responsibility for any of the deficiencies disclosed in the auditor’s qualification, and breach of any of the aforesaid section; and his explanation therefor.

(C) *S. 129B of the pre-amended Companies Ordinance*

1. Has the balance sheet to the audited accounts been signed by the company’s officers?

* S.121 and S.122 of the pre-amended Companies Ordinance continue to apply to books of account or accounts (as the case may be) for a financial year beginning before 3 March 2014 and ending on or after that date.

2. The directors' responsibility for the default.

(D) S. 387 of Cap. 622

1. Has the statement of financial position been approved and signed by the directors?
2. The director's responsibility for the default.

(E) S. 211 of Cap. 32

1. Date of S. 211 notice.
2. Is the director also a contributory?

(F) Misuse of bank account

1. State the number of cheques dishonoured, the amount involved and the length of time over which such activities took place.
2. Did the director know or ought to have known that the cheques he had caused to be drawn on the company's account would not be met on presentation?

(II) Failure to comply with the following provisions

**(A) S. 107, S. 109 of the pre-amended Companies Ordinance
S.662, S.664 of Cap. 622**

1. The dates of last 3 annual return filed with the Companies Registry, and the dates of the AGM to which each return corresponds.
2. Provide details of any material omission or deficiencies in respect of the annual return.
3. The extent of the director's responsibility for failure by the company to comply with S. 107 and S. 109 of the pre-amended Companies Ordinance; and his explanation therefor.

**(B) S. 95, 96, 158, 158A and 119A of the pre-amended Companies Ordinance
S.619, 627, 628, 630, 641, 642(1), 643, 645, 648, 649(1), 650, 652 of Cap. 622**

1. Did the company keep registers required by the following provisions?

- register of members
 - S. 95 of the pre-amended Companies Ordinance
 - SS. 627, 630 of Cap. 622
- location of register of members
 - S. 96 of the pre-amended Companies Ordinance
 - S. 628 of Cap. 622
- register of directors and secretaries
 - S. 158 of the pre-amended Companies Ordinance
 - SS. 641, 642(1), 643, 648, 649(1), 650 of Cap. 622
- location of register of directors and secretaries
 - S. 158A of the pre-amended Companies Ordinance
 - SS. 641, 648 of Cap. 622
- location of minute book
 - S. 119A of pre-amended Companies Ordinance
 - S. 619 of Cap. 622

2. The director's responsibilities for the default; and his explanation therefor.
3. Has lack of records hindered administration of the company's estate?

(C) S. 81 of the pre-amended Companies Ordinance
S.335, 336 of Cap. 622

1. Has every charge created by the company been registered with the Companies Registry pursuant to S. 80 the pre-amended Companies Ordinance? If not, give particulars.
2. The director's responsibility for the default; and his explanation therefor.

(D) S. 341, 342 of Cap. 622

1. Has the statement of particulars of debentures or statements of particulars of commissions etc. required to be registered under the above sections been registered? If not, give particulars.
2. The director's responsibility for the default; and his explanation therefor.

(E) S. 228A of Cap. 32

1. What were the reasons specified in support of the consideration that it was not reasonably practicable for the winding-up to be commenced under another section of the Cap. 32?
2. Were the reasons justified in the circumstances of the case?
3. Has the director caused a meeting of the company to be summoned and appointed a provisional liquidator before delivering a winding-up statement to the Registrar?
4. Has the director complied with their obligation under S. 228A of Cap. 32? If not, what was the director's responsibility for any default, omission or delay and what was the explanation given?
5. Has the director produced a statement of affairs in accordance with S. 241(3) and (3A) of Cap. 32?

(F) S. 241 of Cap. 32

1. What was the date of the resolution of the company for voluntary winding-up?
2. When was the subsequent meeting of the company's creditors held and on what date was notice sent to creditors?
3. When was notice given in the Gazette?
4. When did advertisement of the meeting appear?
5. Has the director produced a statement of affairs in accordance with S. 241(3) and (3A) of Cap. 32?
6. If the correct procedure was not followed, what was the director's responsibility for any default, omission or delay and what was the explanation given?

(III) Misfeasance/breach of duty

(A) Misfeasance or breach of duty

1. Has the director received any monies or other consideration from the company in the nature of a gift out of capital, rather than the remuneration of a service which has resulted in a material loss to the company?
2. Has the director otherwise authorised any payment or other disposition of property to himself or connected persons which were in the nature of a gift out of capital?

3. Has the director been responsible for the non-disclosure to the company of any contracts, dealings or other transactions in which use was made of the company's assets or property (including goodwill) and which resulted in a material loss to the company?
4. Has the director been responsible for any material loss to the company occasioned by the sale, assignment, transfer or other disposal of any company assets or property?
5. Supply details including the director's explanation for his action.
6. Supply details of proceedings for recovery against the director.

(B) Misapplication or retention of company money or property

1. Has the director retained or misapplied, or been responsible for, any money or other property of the company resulting in -
 - an obligation to account which has not been fulfilled, or
 - a trading, capital or other loss.
2. Supply details, with the director's explanation for his action.
3. Supply details of proceedings for recovery against the director.

(IV) Matters applicable where the company has become insolvent

(A) SS. 190, 228A, 241 and 300A of Cap. 32

1. Has the director submitted a signed statement of affairs acceptable for filing?
2. If no statement of affairs has been submitted, what was the director's responsibility for the default and his explanation therefor, such as no accounting records available, lack of funds to engage an accountant to prepare the statement, etc.?
3. If a statement of affairs has been lodged, are there any material omissions or deficiencies. What was the director's responsibility for such omission or deficiency, and his explanation therefor?
4. Has the director failed to submit any supplementary affidavit required?

(B) Non-cooperation with office holders

1. The extent to which non-cooperation has a serious impact on administration of the winding-up, such as delay, problems with recovery of book debt or realisation of assets.

(C) Trading whilst knowing the company to be insolvent (S. 275 of Cap. 32)

1. On what date did the company first become insolvent?
2. Was the date in (C)1 evidenced by the company's accounts, or events such as dishonoured cheques, distraint, judgment debt, execution, statutory demand, etc?
3. When did the director first become aware of the date in (C)1?
4. How quickly did the director respond once he was aware that matters were starting to go wrong?
5. Did the director have valid reasons to believe the company would restore to solvency?
6. Did any individual director resign and make his concerns known to others?
7. Did the director inject further capital?
8. Did the director seek professional advice, and was the advice acted upon?
9. For how long after the date in (C)1 did the company continue to trade, and by what amount did the company's debts increase as a result?
10. Having regard to the size and nature of its business, and his own qualification and experience, did the director have available sufficient management accounts and information to make effective policy decisions?
11. Throughout the company's period of trade was sufficient regard given to the potential viability of the business?

(D) Causes of the company becoming insolvent

1. Those matters referred to in (C)1, 2, 9, 10 and 11 are also applicable.
2. What event(s) occasioned the company's insolvency?
3. State the cause of the company's failure in the liquidator's opinion.
4. The director's responsibility for such causes.

(E) Failure by the company to supply any goods or services which have been paid for (in whole or in part)

1. Was any of the company's outstanding debts at the date of winding-up the result of non-supply of goods and/or service for which customers/consumers paid, wholly or partly in advance?
2. Over what period had the deposits been received?
3. The director's responsibility in relation to acceptance of prepayment; and his explanation therefor.

(F) Transactions liable to be set aside under S. 182, S. 265D and S. 266 of Cap. 32

1. Supply details of disposition of property after date of commencement of winding-up, which is void under S. 182 of Cap. 32.
2. Supply details of transaction by the company at any time in the period of 5 years ending with the day on which the winding up of the company commences, which is liable to be set aside under S. 265D of Cap. 32.
3. Supply details of transaction by the company at any time in the period of 2 years ending with the day on which the winding up of the company commences, which is liable to be set aside under S. 266 of Cap. 32.
4. The director's responsibility for such transactions and the explanation therefor.

(V) CWUMP(A)O

1. The CWUMP(A)O (except Division 7 of Part 8) commences operation on 13 February 2017 ("commencement date"). The provisions in sections 190, 228A, 241, 265D, 266, 274, 276 and 300A of Cap. 32 are to be introduced, amended or substituted by CWUMP(A)O. The relevant transitional and savings arrangements can be found in Schedule 26 to Cap. 32.
2. Where in a particular case, a provision of Cap. 32 as in force immediately before the commencement date continues to apply or to have effect as a result of the transitional and savings arrangements, the details to accompany the Form D1 should be suitably modified accordingly.