Suggested Answers

SECTION A

Question 1

(a) A registrable charge is a charge on the assets of a company, which the Companies Ordinance requires to be registered with the Companies Registry within five weeks of its creation. Two examples are charges to secure debentures and charges on land. The legal effects of non-registration are that the charges become void against the liquidator and other creditors in the event of winding up but the company’s obligation to repay the loan is not prejudiced.

(b) A cumulative preferential share entitles the holder not only to a fixed rate of dividend in priority to other classes of shares but also to make-up dividends out of profits in subsequent years if such dividends were not paid in any earlier years for lack of profits. A “B share” is commonly understood to be a share which carries no voting power or less voting power than holders of the other ordinary shares.

(c) An individual shareholder who is unable to attend a general meeting but wishes to vote at the meeting can appoint a proxy to attend the meeting and, on a poll, vote on his behalf. A proxy need not be a member of the company. If he wishes to vote for or against any particular proposed resolutions he should state it clearly on the proxy form. Otherwise, the appointed proxy can vote at his discretion or abstain from voting. The proxy form should be returned to the company not later than the deadline stated in the footnotes of
the notice of the meeting (which should not be more than 48 hours before the holding of the meeting).

(d) A solvent company can be wound up by a Members’ Voluntary Winding Up by a special resolution, or by an ordinary resolution if so provided in the company’s articles, passed by the members of the company at a general meeting. A liquidator or liquidators should be appointed by the same resolution for winding up or by a separate ordinary resolution. A statement of solvency by a majority of the directors that the company will be able to meet all its debts within 12 months after the commencement of the winding up, together with a statement of affairs of the company, should be made within five weeks before the resolution for winding up. The said resolutions and a notice of appointment of liquidator/s should be filed with the Companies Registry within 15 and 21 days after being passed respectively. The said resolutions (within 14 days after being passed) and notice (within 21 days after being passed) should also be published in the Gazette. The statement of solvency should be filed not later than the filing of the resolution to wind up.

(e) An alternate director is appointed by the director, to whom he is an alternate. Power to appoint an alternate director is either contained in the articles of association or in the terms of appointment of the director. The appointment may be confirmed by a resolution of, or noted by, the board of directors. Forms D1 or D2A containing personal particulars of the alternate director, and Form D3 for consent to act as an alternate director, should be filed with the Companies Registry within 14 days of the appointment. In case of a listed company, the Stock Exchange should also be informed.

The alternate director’s appointment will last until the director who appoints him as an alternate director ceased to act as director or revokes the appointment, or the alternate director dies, resigns, or his term of appointment expires.

(f) A private company which is not a financial institution, not an insurance company, not a registered dealer, not an investment or commodity trading adviser or dealer, not a trustee of mandatory provident funds schemes nor a holding company of the aforementioned companies, may pass and file a special resolution with the Companies Registry within 15 days after being passed to declare itself to be a dormant company until a further special
resolution to declare that it intends to enter into a relevant accounting transaction. A dormant company is exempt from holding annual general meetings, filing annual returns and having its accounts audited.

(g) A director of a listed company has a duty to disclose when he becomes interested and when he ceases to be interested in any legal or beneficial interests or short positions in shares, underlying shares or debentures of the listed company of which he is a director and of any associated corporation of the said listed company. In addition, the director must disclose the change in the nature of his interest (e.g. capacity to hold). The disclosure should be made on forms provided by the Stock Exchange and submitted to the Stock Exchange and the listed company within three business days, or within 10 business days of his becoming a director of the listed company.

(h) A single debenture is a deed executed by a company, listed or unlisted, in acknowledgement of a loan or loans. It normally contains a fixed charge on specific assets of the company and a floating charge on all the current assets of the company. A single debenture is normally not transferable. A series of debentures refer to a number of similar debentures and are issued by a listed company with a fixed nominal value to members of the public. They are normally not secured. If they are secured, a trustee for the debenture holders will need to be appointed to hold the security for the debenture holders and to act for the benefits of the debenture holders.

(i) Adjournment of a general meeting means a suspension of the meeting until a future time. It happens when there are long discussions of the matters raised at a general meeting so that there is not enough time to finish the agenda of the meeting. It may also happen when polls are requested during the meeting so that the meeting needs to be adjourned to allow the counting of votes. It may also happen when there is no quorum at the meeting. Adjournment of meeting is proposed by the chairman and approved by a resolution of the meeting.

(j) The Companies Ordinance requires every company to have a metallic common seal bearing the company’s name. The common seal must be adopted by a board resolution and should be affixed on all documents which need to be sealed, such as share certificates, debentures, warrants, powers of attorney and other types of deeds and contracts without consideration. Where
a company transacts business outside Hong Kong, which is provided in the object clause of the Memorandum of Association of the company, its board of directors, if so allowed by the company’s Articles of Association, may pass a resolution to authorize an agent outside Hong Kong to use an official seal on any documents executed outside Hong Kong which normally need to be sealed by the common seal. An official seal is a facsimile of the common seal with the addition of the name of the territory in which the seal is used.
SECTION B

Question 2

The procedures for the change of the name of a listed company are as follows:

(1) Make a search at the Companies Registry to see whether the proposed name is available or not.
(2) Convene a board meeting to authorize the convening of a general meeting to approve the new name.
(3) Send out the notice of the general meeting to all members and parties to whom they are entitled to receive.
(4) Publish a notice in at least one English and one Chinese newspapers.
(5) Notify the Stock Exchange of the proposed change of name and submit a specimen of new share certificates bearing the new name for approval of the Stock Exchange.
(6) Hold the general meeting and pass a special resolution to approve the new name.
(7) File Form NC2 to the Companies Registry within 15 days after the special resolution being passed and pay the requisite fees for change of name.
(8) Send a copy of the special resolution and certificate of incorporation of change of name to the Stock Exchange.
(9) Publish a notice in at least one English and one Chinese newspaper about the change of name.
(10) Reprint the company’s memorandum and articles of association or insert a copy of the special resolution to every copy of the company’s memorandum and articles of association.

In connection with DL’s holding of shares in Yong Heng Ltd, DL should present a certified copy of its certificate of incorporation of change of the new name, together with the share certificate/s, to Yong Heng Ltd for registration. Yong Heng Ltd will cancel the old share certificate/s and issue new share certificate/s in the new name to DL and update its register of members.
Question 3

The five size test ratios are:

Asset ratio = Value of assets acquired or realized / Total assets of the listed company

Profits ratio = Profits attributable to the assets being acquired or realized / Net profits before extraordinary items and before tax and minority interests of the listed company.

Revenue ratio = Revenue attributable to the assets being acquired or realized / Revenue from principal activities of the listed company

Consideration ratio = Consideration given or received / Total market capitalization of the listed company

Equity capital ratio = Nominal value of equity capital to be issued / Nominal value of the issued equity capital of the listed company immediately before the transaction.

NOTE: For the asset, profit and revenue test ratios, the relevant amounts from the consolidated accounts of the listed company should be used.

A “share transaction” is an acquisition of assets including securities by a listed company or any of its subsidiaries where the consideration consists of securities for which listing will be sought. It only applies to an acquisition where all the size test ratios are less than 5%.

A transaction is any transaction whether acquisition or disposal/realization of assets, business or companies.

A “discloseable transaction” is a transaction entered into by a listed company or any of its subsidiaries where any size test ratio is 5% or more but less than 25%.

A “major transaction” is a transaction entered into by a listed company or any of its subsidiaries where any size test ratio is 25% or more but less than 75% for a “major realization”, and 25% or more but less than 100% for a “major acquisition”.
A “very substantial acquisition” is an acquisition of assets, businesses or companies by a listed company or any of its subsidiaries where any size test ratio is 100% or more.

A “very substantial disposal/realization” is a disposal of assets, businesses or companies by a listed company or any of its subsidiaries where any size test ratio is 75% or more.
Question 4

Mr Shing’s concerns may be addressed as follows:

The name “Shing Ki” is not acceptable as the name of a company registered under the Companies Ordinance must be ended with the word “Limited” or its abbreviation “Ltd” except dispensed with by the Registrar for some special reasons. A normal trading company cannot obtain such dispensation. If Mr Shing wants to retain the name “Shing Li”, at least he should add the word “Ltd” at the end, making it “Shing Ki Ltd”. “Shing Ki Ltd” should be acceptable as it does not fall within the prohibited categories of names under the Ordinance, but a search at the Companies Registry should be made to see if it is the same or too similar to another registered name. In case there are similar registered names, Mr Shing can add a description of the nature of his business to the proposed name as classifier for approval.

He can transfer his business assets into the company in exchange for shares credited as fully paid. The required procedures are: to file a return of allotments on form SC1 or Form SC5 (Return of Particulars of a Contract Relating to Share Allotment) and a certified copy of a contract constituting the title of the allottee (Mr Shing) to the allotment. However, a board resolution approving the allotment of shares must be passed. In this case, as he is the sole subscriber and sole director, he can approve the allotment on behalf of the company.

Under the newly amended Ordinance a private company can now have only one shareholder and only one director. Although there is no need for Mr Shing to find additional shareholders, he has to find a reserve director who is at least 18 years old and is not disqualified to be a director, to act as director in the event of his death, and file the relevant forms to the Companies Registry.

Where a private company has two or more directors, one of the directors can also act as the company secretary provided that he/she has the required qualifications. However, where a private has only one director, the amended Cos Ord does not allow him/her to act as the company secretary as well, the reason being that when a document needs to be signed by the director and the company secretary, the same person cannot sign in both capacities. Therefore, Mr Shing, being the sole director, cannot act as the company secretary of the new company and must appoint another qualified person to be the company secretary of his new company.
Under the amended Companies Ordinance, a company does not need to specify objects in its memorandum of association except where the Registrar has dispensed with the word Ltd as the last word of the company name and except where the company is required to have its objects under other enactments. Mr Shing’s new company, therefore, need not specify objects in its memorandum of association and his company would have the capacity, rights, powers and privileges of a natural person.

As the sole director, Mr Shing will make decisions for the company himself and he must provide the company with written records of his decisions within 7 days of the making of the decisions. Such records must be kept by the company as if they are minutes of meetings of directors.

As the sole shareholder of the company, Mr Shing will make decisions for the company which would normally be made by resolutions of members in general meetings. As he is the only one shareholder, he will need to adopt the “written resolution” form instead of physical meetings. Such written resolutions will be kept by the company as if they are written minutes of general meetings.
**Question 5**

When the auditor of a company resigns, the company can appoint a new auditor to fill the vacancy by a resolution of the board of directors to act until the conclusion of the next annual general meeting.

The company should, therefore, hold a board meeting as soon as possible to pass a resolution to appoint C P Chan & Co to fill the vacancy of auditors at a fee on a time basis.

The latest date for sending out notice of the next AGM to be held on 1 December 2005 should be 21 days + 4 days = 25 days, inclusive of the day of meeting and the day of sending out the notice, back from 1 December 2005, i.e., 7 November 2005.

On 1 December 2005 when the chairman raised the matter, it is more than 9 months after the end of the last financial year; the company may need to obtain a court order to extend the 9 months’ period for laying the audited accounts at the annual general meeting or the company and its officers may be liable to a fine or imprisonment.

Under Table A, 1/3 or nearest 1/3 of the directors longest in service should retire at an AGM and are eligible for re-election. As all the 5 directors were equal in their periods of service, they will need to determine, by draw of lots if necessary, which 2 of them to retire and to be re-elected.

Draft notice of next AGM:

**Name of Company**

NOTICE is hereby given that the Annual General Meeting of the Company for the year 2005 will be held at (address of meeting) on 1 December 2005 at (time) for the following purposes:

1. To consider and receive the Company’s audited financial statements for the last financial year ended 31 December 2004 and to receive the reports of the Directors and of the Auditors.
2. To re-elect Mr xx and Mr xx as directors of the Company.
3. To consider and approve a final dividend of $1 per share for the year ended 31 December 2005 as recommended by the directors.
4. To appoint C P & Co to be the Company’s auditors and to authorize the Board of Directors to fix their remuneration.

By Order of the Board

(Company Secretary)

[Date]

Notes: Any member of the Company who is unable to attend the meeting is entitled to appoint a proxy, or two proxies (if he holds more than 1 share of the company) to attend and on a poll, vote on his behalf, at the meeting, who need not be a member of the Company. A proxy form (as enclosed) must be completed and returned to reach the Company’s registered address not later than 48 hours before the time fixed for the holding of the meeting or its adjournment.
Question 6

P is not breaching any law by doing so, but is in breach of the Hong Kong Code on Takeovers and Mergers. As P is a listed company and the Listing Rules require a listed company to observe the said Code, P is in fact in breach of the Listing Rules as well.

The Hong Kong Code on Takeovers and Mergers provides that where any person who acquires voting shares in a company, which, taken together with any such shares held by it and any shares acquired by persons acting in concert, carry at least 30% of the voting rights of the company, such a person should make a general offer to other shareholders of the same class to acquire the remaining shares of the same class. The offer price should not be less than the highest price paid by the person in the preceding 6 months. Such an offer should be made conditional upon acceptance of tenders to enable the offeror to obtain, together with any shares it has in hand, at least 51% voting power of the company.

As P has acquired more than 30% shares in Q, P should make as soon as possible a general offer to all other shareholders of Q to acquire their shares at a price not less than the highest price it has paid in the preceding 6 months, conditional upon acceptance of at least 14% (51% less 37%) of the tenders made by the offerees. The offer document should also contain the following information:

- P’s intention regarding the continuation of Q’s business;
- P’s intention regarding any major changes to be introduced in Q’s business;
- P’s intention regarding the continued employment of Q’s employees’ and the information of the P Ltd as offeror, etc.

On the other hand, M is in breach of law, the Securities and Futures Ordinance Part XIV regarding insider dealings. Under the said Ordinance, an insider dealing takes place when a person contemplating a takeover offer deals in the listed securities of the target corporation unless such dealings are for the purpose of the takeover. As M, acting for P Ltd, is contemplating a takeover and acquired shares in the target company for his own benefits and not for the purpose of the takeover, he has violated or breached the said Ordinance. The way to mitigate the situation would be for him to dispose of the shares before the news of the takeover is announced or leaked out.