

Briefing on the New Companies Ordinance

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The new Companies Ordinance



- Passed by the Legislative Council on 12 July 2012
- 21 Parts, comprising 921 sections and 11 schedules
- 13 pieces of subsidiary legislation – [public consultation in progress](#)
- Commencement expected in 2014 after enactment of subsidiary legislation

Structure of the new CO



- Divided into 21 Parts, comprising 921 sections and 11 Schedules

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- Part 1 – Preliminary
 - Part 2 – Registrar of Companies and Companies Register
 - Part 3 – Company Formation and Related Matters, and Re-registration of Company
 - Part 4 – Share Capital
 - Part 5 – Transactions in relation to Share Capital
 - Part 6 – Distribution of Profits and Assets
 - Part 7 – Debentures
 - Part 8 – Registration of Charges
 - Part 9 – Accounts and Audit
 - Part 10 – Directors and Company Secretaries

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Structure of the new CO... (cont'd)



- Part 11 – Fair Dealing by Directors
- Part 12 – Company Administration and Procedure
- Part 13 – Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back
- Part 14 – Remedies for Protection of Companies' or Members' Interests
- Part 15 – Dissolution by Striking Off or Deregistration
- Part 16 – Non-Hong Kong Companies
- Part 17 – Companies not Formed, but Registrable, under this Ordinance
- Part 18 – Communications to and by Companies
- Part 19 – Investigations and Enquiries
- Part 20 – Miscellaneous
- Part 21 – Consequential Amendments, and Transitional and Saving Provisions

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Four major objectives of the new CO



- Enhancing corporate governance
- Ensuring better regulation
- Facilitating business
- Modernising the law



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Major issues (1) Simplified reporting



- **CO position**
 - Section 141D – a private company may, with the written agreement of all its members, prepare simplified accounts and simplified directors' reports
 - Not applicable to groups of companies
- **New CO**
 - Private company or a holding company of a group that satisfies any two of the following conditions
 - total annual revenue of not more than HK\$100 million
 - total assets of not more than HK\$100 million
 - no more than 100 employees
 - Allowing private companies/groups meeting the higher size criteria (HK\$200 million assets, HK\$200 million revenue and 100 employees) to prepare simplified reports if members of the company holding 75% of the voting rights so resolve and no other member objects

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Major issues

(2) Responsible Person



- **Strengthening the enforcement regime**
 - Lowering the threshold for contravention by officers through a new definition of “responsible person”.
 - The Companies Ordinance attributes criminal liability to an officer in default if he knowingly and wilfully authorizes or permits the default. The evidential burden is very high because of the requirement of “wilfulness”.
 - The offences involved are mostly regulatory in nature and the majority (over 90%) are summary offences punishable by fine.

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Major issues

(2) Responsible Person... (cont'd)



- **Strengthening the enforcement regime**
 - “Responsible person” is defined in the new CO as an officer of a company who authorizes or permits or participates in the contravention or failure.
 - The proposed formulation of “failing to take all reasonable steps to prevent [the contravention]” has been dropped.
 - The effect of the new formulation is to lower the prosecution threshold to remove the “wilful” element.

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Major issues

(3) Headcount test



- **CO position**
 - Section 166 – majority in number (headcount test) representing $\frac{3}{4}$ in value (share value test)

- **New CO**
 - Adopt the concept of the 10% objection rule of Takeovers Code with suitable modifications to replace headcount test

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Major issues

(3) Headcount test... (cont'd)



- **New CO**
 - In short, the number of votes cast against the resolution should not be more than 10% of votes attached to all disinterested shares

 - Apply to two types of schemes:
 - takeover offer
 - general offer for share buy-back

 - Court may only make an order about costs against the dissenting member if the objection is frivolous or vexatious

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Major issues

(4) Auditor's Report



- **New Offence relating to Inaccurate Auditor's Reports [section 408]**
 - If the auditor is of the opinion that the financial statements of a company are not in agreement with its accounting records in any material respect or
 - the auditor has failed to obtain all the information or explanations that are necessary and material for the purpose of the audit
 - the auditor must state that opinion or fact in the auditor's report
 - The offence would be committed if the auditor in question knowingly or recklessly caused any of the two statements to be omitted from the auditor's report
 - The penalty for the offence is a fine not exceeding \$150,000

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(1) Enhancing corporate governance



- **Enhancing accountability of directors**
 - At least one individual as director for private companies
 - Clarifying in the statute directors' duty of care, skill and diligence
- **Enhancing shareholder engagement in decision-making process**
 - Companies to bear expenses of circulating members' statements and proposed resolutions for Annual General Meetings (AGMs)
 - Threshold for members to demand a poll reduced from 10% to 5% of the total voting rights

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(1) Enhancing corporate governance... (cont'd)



- **Improving disclosure of company information**
 - Public and large private companies and large guarantee companies to prepare “business review” including information on e.g. environmental and employee matters of significant impact
- **Strengthening auditors’ rights**
 - Power to require a wider range of persons (e.g. officers ^{Note} of a company’s Hong Kong subsidiary) to provide information and explanation reasonably required in auditors’ performance of duties

^{Note} An “officer” means a director, manager or company secretary

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(2) Ensuring better regulation



- **Ensuring accuracy of information on the public register**
 - Clarifying and enhancing the Registrar of Companies (the Registrar)’s powers regarding keeping of the register including rectifying typos or clerical errors, requiring companies to resolve inconsistency, etc
 - Requiring companies to notify change of its capital structure to ensure information on the register is up-to-date
- **Enhancing regulation of voluntary deregistration of companies**
 - Applicant to confirm that the company is not a party to any legal proceedings and that it has no immovable property in Hong Kong, so as to minimise any potential abuse of the procedure

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(2) Ensuring better regulation... (cont'd)



- ***Strengthening the enforcement regime***

- New power for the Registrar to obtain documents or information for ascertaining whether any misconduct, that would constitute certain offences relating to giving false or misleading statement, has taken place
- Empowering the Registrar to compound specified offences so as to optimise the use of judicial resources

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(3) Business facilitation



- ***Streamlining procedures***

- Allowing companies to dispense with AGMs by unanimous shareholders' consent
- Introducing an alternative court-free procedure for reduction of capital based on a solvency test
- Introducing a new court-free statutory amalgamation procedure for wholly-owned intra-group companies
- Introducing a new procedure of "administrative restoration" of a dissolved company by the Registrar in straight-forward cases without the need for recourse to the court

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(3) Business facilitation... (cont'd)



- **Facilitating simplified reporting**
 - Facilitating private companies and guarantee companies to prepare simplified financial and directors' reports
 - Making the summary financial report provisions more user-friendly and extending their application to all companies
- **Facilitating business operation**
 - Permitting a general meeting to be held at more than one location
 - Setting out the rules governing communications to and by companies in electronic form

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(4) Modernising the law



- **Rewriting the law in modern plain language**
 - New CO is written in modern-day drafting language to make it more user-friendly. There will be some footnotes and examples designed to assist readers' understanding
- **Retiring the concept of par value**
 - Adopting a mandatory system of no-par for all companies with a share capital as par value is an antiquated concept and gives rise to practical problems
- **Better protection of personal data**
 - Introducing new provisions for withholding residential addresses and full identity card/passport numbers from public inspection in order to foster the protection of personal data

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Thank you

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Companies Registry : www.cr.gov.hk**