



Briefing on the New Hong Kong Companies Ordinance

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Companies Ordinance Rewrite

- **Background to the Hong Kong Companies Ordinance Rewrite**
 - Rewrite of the Companies Ordinance was endorsed by Legislative Council (“LegCo”) and launched mid-2006
 - Phased approach:
 - **1st phase** (the new Companies Ordinance (“new CO”) – deals with all provision relating to live companies
 - **2nd phase** – deals with winding-up and insolvency related provisions
 - provisions on prospectuses will be dealt with in a separate review by the Securities and Futures Commission



Companies Ordinance Rewrite (2)

- The Companies Bill was introduced into LegCo in January 2011
- The Bills Committee conducted 44 meetings totalling over 120 hours and examined over 200 papers and submissions from the Administration and various deputations along with over 800 amendments
- The resumed second reading debate commenced in LegCo on 3rd July 2012 and after 8 days of intense deliberation, the new CO was passed by LegCo on 12 July 2012



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The new CO

- 21 Parts, comprising 921 sections and 11 schedules
- 13 items of subsidiary legislation – [introduced into Legislative Council in batches from February 2013](#)
- Commencement expected in 2014 after enactment of subsidiary legislation



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Structure of the new CO

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

- 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 (2)

- 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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Enhancing corporate governance

- **Enhancing accountability of directors**
 - At least one individual as director for private companies [section 457]
 - There will be a grace period of 6 months from commencement of the new CO to comply
 - Clarifying in the statute directors' duty of care, skill and diligence [section 465]
 - Section 465(1) and (2) of the new CO



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Enhancing corporate governance (2)

- “(1) A director of a company must exercise reasonable care, skill and diligence
- (2) Reasonable care, skill and diligence mean the care, skill and diligence that would be exercised by a reasonably diligent person with –
- (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
 - (b) the general knowledge, skill and experience that the director has.”

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Enhancing corporate governance (3)

- A dual objective and subjective standard
 - In deciding whether there is any breach of the duty, a director's conduct is compared to the standard that would be exercised by a reasonably diligent person having the knowledge etc. as set out in section 465(2)



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Enhancing corporate governance (4)

- **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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Enhancing corporate governance (5)

- **Improving disclosure of company information**
 - Public and large private companies and large guarantee companies to prepare as part of the directors' reports a "business review"
 - provide useful information for shareholders
 - requirement to include information relating to environmental and employee matters with significant effect on the company
 - private companies may opt out by special resolution

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Enhancing corporate governance (6)

- **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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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 by filing a statement of capital

- **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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Ensuring better regulation (2)

- ***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
 - The offences are minor regulatory offences set out in Schedule 7



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Ensuring better regulation (3)

- 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
 - “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 effect of the new formulation is to lower the prosecution threshold to remove the “wilful” element

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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
- Allowing all types of companies (rather than just private companies as in the current CO) to purchase their own shares out of capital subject to a solvency test
- Allowing all types of companies (whether listed or unlisted) to provide financial assistance to another party for the purpose of acquiring the company's own shares or the shares of its holding company, subject to a solvency test

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Business facilitation (2)

- 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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Business facilitation (3)

- **Facilitating simplified reporting**

- Making the summary financial report provisions more user-friendly and extending their application to all companies
- Facilitating private companies and guarantee companies to prepare simplified financial and directors' reports

Current CO position

- 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

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Business facilitation (4)

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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Business facilitation (5)

- ***Facilitating business operation***
 - Permitting a general meeting to be held at more than one location using electronic technology
 - Setting out the rules governing communications to and by companies in electronic form
 - Making the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad



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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



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Modernising the law (2)

- **Abolition of Memorandum of Association**

- Abolition of Memorandum of Association for **all** companies
 - Deeming provisions for existing companies that conditions of the memorandum will be deemed provisions of Articles
 - For companies formed and registered under the new CO, they will require to have mandatory articles set out in the CO and may adopt Model Articles

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Modernising the law (3)

- **Retiring the Concept of Par**

- Abolition of Par Value of Shares for **all** companies
 - Par value does not serve its original purpose of protecting creditors and shareholders and gives no indication of real value of shares
 - Par value gives rise to practical problems, inhibiting raising of new capital and unnecessarily complicating the accounting regime
 - Upon commencement of section 135 of the new CO, a company's shares will have no nominal value. This applies to all companies
 - Relevant concepts such as nominal value and share premium will be abolished



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Modernising the law (4)

- Deeming provisions to ensure that contractual rights defined by reference to par value and related concepts will not be affected by the abolition of par. The deeming provisions will save considerable work, expense and time for companies and reduce the possibility of disputes
- Existing share capital will be amalgamated with any amount standing to the credit of the company's share premium account and capital redemption reserve
- The currently permitted uses of the share premium account are preserved for credit balance of share premium account on date of migration to no-par



Modernising the law (5)

- Section 170 sets out permitted alterations of share capital. In addition to previous permitted alterations, in the no-par regime a company can now:-
 - increase share capital without allotting and issuing new shares if funds / assets are provided by members
 - capitalize profits with / without allotting / issuing new shares
 - allot and issue bonus shares with / without increasing share capital
- The no-par environment provides increased flexibility



The new CO

- *The full text of the new CO can be seen at :*

[<http://www.cr.gov.hk>](http://www.cr.gov.hk)



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Other developments of interest

- **Abolition of Capital Duty**
 - Policy objective to encourage investors to set up companies in Hong Kong, to raise capital and expand business
 - Companies Ordinance (Amendment of Eighth Schedule) Order 2012 was gazetted on 16 March 2012
 - Abolished capital duty levied on local companies with a share capital as from 1 June 2012 (Rate was \$1 for every \$1,000 or part thereof, capped at \$30,000 per case)

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Other developments of interest (2)

- No capital duty is now payable on:
 - (i) new incorporations
 - (ii) increase in nominal share capital; or
 - (iii) shares issued at a premium

as from 1 June 2012

- Enhancing the attractiveness of Hong Kong as a corporate domicile and its competitiveness as an international business centre



Thank you