

# The New Companies Ordinance

(From a CPA's Perspective)

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## Today's Agenda

I. Introduction

II. Brief Notes on Certain Parts  
in particular Part 9

III. Major Initiatives (as Summary)



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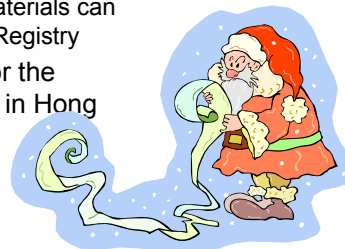
# Today's Agenda

## I. Introduction



# Introduction

- The New Companies Ordinance ("the new CO")
  - consists of
    - Original text:
      - 21 parts,
      - 921 sections,
      - 11 schedules, and
      - totally, 1428 pages
    - Subsidiary legislation: 12 regulations
    - Key changes, brief note, FAQ and other materials can be found in the website of the Companies Registry
  - provides a modernised legal framework for the incorporation and operation of companies in Hong Kong



## Introduction: 21 Parts

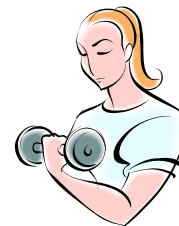
- Part 1 – Preliminary
- Part 2 – Registrar of Companies and Companies Register
- Part 3 – Company Formation and Related Matters, and Re-registration of Company
- Part 4 – Share Capital
- Part 5 – Transactions in relation to Share Capital
- Part 6 – Distribution of Profits and Assets
- Part 7 – Debentures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

## Introduction: Key Changes (by CR)

1. Abolition of Par Value of Shares
2. Restricting Corporate Directorship in Private Companies
3. Headcount Test
4. Offences relating to contents of auditor's reports
5. Enhancement of Auditor's rights
6. Restricted Disclosure of Residential Addresses and Identification Numbers
7. Abolition of Memorandum of Association and Matters relating to Company Articles
8. Annual Returns of Local Companies
9. Deregistration and Restoration
10. Types of companies under the new Companies Ordinance and changes affecting companies limited by guarantee
11. Major Changes Affecting Directors
12. Meetings, Resolutions and Company Records
13. Registration of Charges and their Discharge
14. Disclosure of Company Name and Liability Status
15. Major Changes in Filing Requirements under the New Companies Ordinance
16. Non-Hong Kong Companies
17. Accounts and Audit

# Introduction: Major Initiatives

- The comprehensive rewrite of the Companies Ordinance (Cap. 32) allows Hong Kong to
  - leverage the developments of company law in other comparable jurisdictions and
  - further enhance its competitiveness and attractiveness as a major international business and financial centre.
- The new CO aims to achieve 4 main objectives, namely, to
  1. Enhance corporate governance,
  2. Ensure better regulations,
  3. Facilitate business, and
  4. Modernise the law.



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# Introduction: Major Initiatives

## 1. Enhancing Corporate Governance

- a. Strengthening the accountability of directors
- b. Enhancing shareholder engagement in the decision-making process
- c. Improving the disclosure of company information
- d. Fostering shareholder protection
- e. Strengthening auditors' rights

## 2. Ensuring Better Regulation

- a. Ensuring the accuracy of information on the public register
- b. Improving the registration of charges
- c. Refining the scheme for deregistration of companies
- d. Improving the enforcement regime, incl. The original S. 399

## 3. Facilitating Business

- a. Streamlining procedures
- b. Facilitating simplified reporting
- c. Facilitating business operations

## 4. Modernising the Law

- a. Abolishing par value for shares
- b. Removing the power to issue share warrants
- c. Clarifying the rules on indemnification of directors against liabilities to third parties

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Source: Website of Companies Registry - <http://www.cr.gov.hk>

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# Introduction: Sub. Legislations



- To facilitate implementation of the new CO, 12 regulations has been made.
  - The plan is to bring the subsidiary legislation into operation together with the new CO in the first quarter of 2014.

1. Companies (Accounting Standards (Prescribed Body)) Regulation
2. Companies (Directors' Report) Regulation
3. Companies (Disclosure of Company Name and Liability Status) Regulation
4. Companies (Disclosure of Information about Benefits of Directors) Regulation  
Companies (Disclosure of Information about Benefits of Directors) (Amendment) Regulation 2013
5. Companies (Fees) Regulation
6. Companies (Model Articles) Notice
7. Companies (Non-Hong Kong Companies) Regulation
8. Companies (Revision of Financial Statements and Reports) Regulation  
Companies (Revision of Financial Statements and Reports) (Amendment) Regulation 2013
9. Companies (Summary Financial Reports) Regulation
10. Companies (Words and Expressions in Company Names) Order
11. Company Records (Inspection and Provision of Copies) Regulation
12. Companies (Unfair Prejudice Petitions) Proceedings Rules

# Introduction: T



Co. Ord. (Commencement) Notice 2013 was gazetted on 25 Oct. 2013 appointing **3 Mar. 2014** as the day on which the new Companies Ordinance (Cap. 622) comes into operation

- tentat... (later)
- The original CO (Cap. 32) would remain in force until the new CO comes into operation
- When the new CO comes into operation,
  - the original CO (Cap. 32) will be retitled as "Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)"
    - the core provisions affecting the operation of companies repealed
    - however, those provisions relating to winding-up and insolvency of companies and prospectuses remain in force

# Today's Agenda

## II. Brief Notes on Certain Parts in particular Part 9



## Brief Notes on Certain Parts

- 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
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- Part 21 – Consequential Amendments, and Transitional and Saving Provision

## Brief Notes on Certain Parts

Part 1	Part 2	Part 3	Part 4	Part 5	Part 6
Part 7	Part 8	Part 9	Part 10	Part 11	Part 12
Part 13	Part 14	Part 15	Part 16	Part 17	Part 18
Part 19	Part 20	Part 21			

## Brief Notes on Certain Parts

Part 1					
	Preliminary				

# Part 1 – Preliminary

## Introduction

- Part 1 is an introductory part that sets out
  - the title of the new CO,
  - its commencement,
  - the interpretation and definitions of various terms and expressions that are used throughout the new CO, including
    - “responsible person”,
    - “subsidiary”,
    - “parent undertaking” and
    - “subsidiary undertaking”, and
  - the types of companies that can be formed under the new CO.



# Part 1 – Preliminary

## Policy Objectives and Major Changes

- Part 1 contains initiatives that aim at improving regulation and modernising the law, namely –
  - (a) Replacing the formulation of “officer who is in default” with “**responsible person**” to strengthen the enforcement regime; and
  - (b) Streamlining the types of companies that can be formed.
- Part 1 also provides for the application of the new CO to
  - existing companies and
  - other types of companies.

Major Initiative  
2d(iv)





# Part 1 – Preliminary

## Streamlining the Types of Companies that Can Be Formed (ss 7 – 12)

- In the new CO, the types of companies that may be formed are reduced to 5 (from 8)
- Sections 7 to 12 provide for the definitions whereas section 66 in Part 3 sets out the types of companies that may be formed under the new CO, namely –
  - a. private companies limited by shares
  - b. public companies limited by shares ← **Named as “public co.”**
  - c. companies limited by guarantee without a share capital ← **Combined as “limited by guarantee”**
  - d. private unlimited companies with a share capital
  - e. public unlimited companies with a share capital ← **Named as “public co.”**

# Part 1 – Preliminary

## Streamlining the Types of Companies that Can Be Formed (ss 7 – 12)

- ❖ Section 11(1) defines a **private company** (same as section 29 of Cap. 32) being a company if
  - (a) its articles —
    - (i) restrict a member's right to transfer shares;
    - (ii) limit the number of members to 50; and
    - (iii) prohibit any invitation to the public to subscribe for any shares or debentures of the company; and
  - (b) it is not a company limited by guarantee (s. 29).
- ❖ Section 12 defines a **public company** being a company if
  - (a) it is not a private company; and
  - (b) it is not a company limited by guarantee (s. 12).

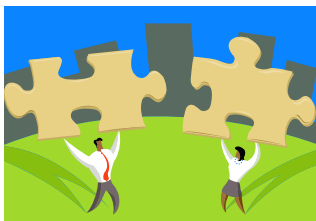
## Brief Notes on Certain Parts

		Part 3			
	Company Formation and Related Matters, and Re-registration of Company				

## Part 3 – Co. Formation and etc.

### Introduction

- Part 3 (Company Formation and Related Matters, and Re-registration of Company)
  - deals with company formation, registration and related matters
  - provides for new requirements for the articles of association of a company following the abolition of the memorandum of association
  - makes the keeping and use of a common seal by a company optional to facilitate business operation



## Part 3 – Co. Formation and etc.

### Policy Objectives and Major Changes

- Part 3 contains initiatives that aim at facilitating business operation and modernising the law, namely
  - (a) Abolishing the Memorandum of Association;
  - (b) Reforming company re-registration provisions;
  - (c) Providing statutory protection for persons dealing with a company;
  - (d) Making the keeping and use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad; and
  - (e) Widening the scope of documents an attorney can execute on behalf of a company locally or outside Hong Kong

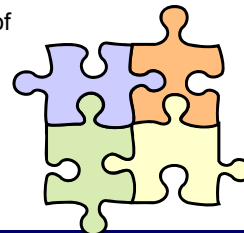
Major Initiative  
3c(i)



## Part 3 – Co. Formation and etc.

### Policy Objectives and Major Changes

- Part 3 also
  - provides for a company to appeal to the Administrative Appeals Board instead of to the court against a direction issued by the Registrar concerning the company's name
  - sets out the types of companies that may be formed
  - incorporates changes introduced through the Companies (Amendment) Ordinance 2010,
    - which provided for an improved company name registration system following the implementation of the new electronic company registration and filing of document services.



## Brief Notes on Certain Parts

			Part 4		
	Share Capital				

## Part 4 – Share Capital

### Introduction

- Part 4 (Share Capital) deals with
  - the core concepts about share capital, its creation, transfer and alteration.
- In particular, this Part introduces
  - a mandatory no-par regime for all companies with a share capital to modernise the share capital regime.



## Part 4 – Share Capital

### Policy Objectives and Major Changes

- Part 4 contains initiatives that aim at modernising the law, enhancing corporate governance, ensuring better regulation, and facilitating business operation, namely
  - (a) Adopting a mandatory system of no-par for all companies with a share capital;
  - (b) Removing the power of companies to issue share warrants to bearer;
  - (c) Extending the requirement of shareholders' consent for allotments of shares
    - to the grants of rights to subscribe for shares, or
    - to convert securities into shares;
  - (d) Requiring a company to give reasons explaining its refusal to register a transfer of shares upon request;

Major Initiative  
4a

Major Initiative  
4b



## Part 4 – Share Capital

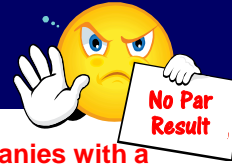
### Policy Objectives and Major Changes

- Part 4 contains initiatives that aim at modernising the law, enhancing corporate governance, ensuring better regulation, and facilitating business operation, namely
  - (e) Requiring a company to deliver to the Companies Registry (“CR”) a return or notification, including a statement of capital whenever there is a change to its capital structure;
  - (f) Clarifying and simplifying the requirements relating to class rights; and
  - (g) Simplifying the publication procedures for replacement of lost share certificate of a listed company.

Major Initiative  
2a(iv)



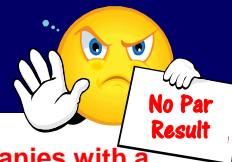
## Part 4 – Share Capital



### **Adopting a mandatory system of no-par for all companies with a share capital (Section 135 and Division 2 of Part 4 of Schedule 11)**

- The new CO
  - adopts the mandatory system of no-par and
  - abolishes relevant concepts such as nominal value, share premium, and requirement for authorised capital.
- Deeming provisions are introduced 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.
  - will not prevent individual companies from reviewing their documents and introducing more specific changes having regard to their own circumstances before the new CO comes into force.

## Part 4 – Share Capital



### **Adopting a mandatory system of no-par for all companies with a share capital (Section 135 and Division 2 of Part 4 of Schedule 11)**

- ❖ Section 135 “No nominal value” states that:
  - (1) Shares in a company have no nominal value (i.e. no par).
  - (2) This section applies to shares issued before the commencement date of this section as well as shares issued on or after that date (s. 135).
    - Note — Division 2 of Part 4 of Schedule 11 contains transitional provisions relating to the abolition of nominal value.
- Section 170 modified from section 53 of Cap. 32,
  - empowers a company to alter its share capital in a number of ways under a no-par environment.

## Part 4 – Share Capital

### Requiring a Company to Give Reasons Explaining its Refusal to Register a Transfer of Shares Upon Request (Section 151(3) and (4))

#### – In Cap. 32

- section 69(1) requires a company which refuses to register transfer of shares or debentures to send a notice of such refusal to the transferor and transferee within two months after the transfer was lodged with the company.
- Currently, there is no requirement for the notice to be accompanied by the reasons for the refusal.

#### – In the new CO

- Section 151(3) and (4) require companies to give reasons explaining their refusal to register a transfer of shares upon request and within 28 days after receiving the request,
  - so as to enhance transparency and to ensure that directors only exercise their powers for proper purposes.

## Part 4 – Share Capital

### Requiring a Company to Deliver to the CR a Return or Notification including a Statement of Capital Whenever There is a Change to its Capital Structure (Section 201)

#### – In the new CO

- it requires a company to deliver to the CR such a statement to be contained in a return or notification, whenever there is a change to its capital,
  - e.g. where there is an allotment of shares (section 142) or a permitted alteration of share capital (section 171).
  - a statement of capital will show the company's share capital information as at the time the company has so changed its share capital.



## Part 4 – Share Capital

### **Requiring a Company to Deliver to the CR a Return or Notification including a Statement of Capital Whenever There is a Change to its Capital Structure (Section 201)**

- ❖ Section 201(2) clarifies that a statement of capital must state—
  - (a) the total number of issued shares in the company;
  - (b) the amount paid up or regarded as paid up and the amount (if any) remaining unpaid or regarded as remaining unpaid on the total number of issued shares in the company;
  - (c) the total amount of the company's issued share capital; and
  - (d) for each class of shares—
    - (i) the particulars specified in subsection (3);
    - (ii) the total number of issued shares in the class;
    - (iii) the amount paid up or regarded as paid up and the amount (if any) remaining unpaid or regarded as remaining unpaid on the total number of issued shares in the class; and
    - (iv) the total amount of issued share capital of the class (s. 201(2)).

## Part 4 – Share Capital

### **Requiring a Company to Deliver to the CR a Return or Notification including a Statement of Capital Whenever There is a Change to its Capital Structure (Section 201)**

- ❖ Section 201(3) further clarifies that the particulars in a statement of capital are—
  - (a) particulars of any voting rights attached to shares in the class, including rights that arise only in certain circumstances;
  - (b) particulars of any rights attached to shares in the class, as respects dividends, to participate in a distribution;
  - (c) particulars of any rights attached to shares in the class, as respects capital, to participate in a distribution (including on a winding up); and
  - (d) whether or not shares in the class are redeemable shares (s. 201(3)).



## Brief Notes on Certain Parts

				Part 5	
	Transactions in relation to Share Capital				

## Part 5 – Transactions re Share Capital

### Introduction

- Part 5 (Transactions in relation to Share Capital) contains the provisions concerning
  - capital maintenance (reduction of capital and purchase of a company's own shares) and
  - the giving of financial assistance by a company to another party for the purpose of acquiring shares of that company or its holding company.
- To facilitate business operation, Part 5 streamlines and rationalises the existing rules by
  - introducing new exceptions based on the solvency test for
    - reduction of capital,
    - buy-backs and
    - financial assistance



## Part 5 – Transactions re Share Capital

### Policy Objectives and Major Changes

- Part 5 contains initiatives that aim at facilitating business operation, namely -
  - (a) Adopting a uniform solvency test based on cash-flow for different types of transactions under this Part;
  - (b) Introducing an alternative court-free procedure for reduction of capital based on a solvency test;
  - (c) Allowing all companies to purchase their own shares out of capital, subject to a solvency test;
  - (d) Allowing all types of companies (listed or unlisted) to provide financial assistance for acquisitions of the companies' shares, subject to satisfaction of the solvency test and certain specified procedures; and
  - (e) Relaxing the rules on giving of financial assistance for the purposes of employee share schemes.



## Part 5 – Transactions re Share Capital

### Adopting a Uniform Solvency Test Based on Cash-flow for Different Types of Transactions under This Part (Sections 204 To 208)

- In the new CO,
  - There is no requirement for attaching an auditors' report to the solvency statement.
    - Auditors would not be in a better position than the directors
    - Directors should be expected to have reasonable grounds in forming their opinion as to the company's solvency and judgment in deciding whether professional assistance is needed.
    - Requiring an auditors' report in every case would add expense and cause delay for relatively little gain.
- Section 204 provides that a uniform solvency test will be applicable to all three categories of transactions, namely

Reduction of Capital

Buy-Backs

Financial Assistance

## Brief Notes on Certain Parts

					Part 6
	Distribution of Profits and Assets				

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## Part 6 – Distribution of Profits and Assets

### Introduction

- Part 6 (Distribution of Assets and Profits)
  - contains provisions that deals with the distribution of profits and assets to members.
- The usual form of distribution is through payment of dividends.
- While there is no fundamental change to the current rules in the Cap. 32, the modernised language should facilitate easier understanding.
  - as the rules under Cap. 32 have generally worked well and provided certainty.
  - mainly reorganises the provisions in Cap. 32 and proposes some minor technical amendments.



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# Part 6 – Distribution of Profits and Assets

## In the New CO

- Part 6 mainly
  - reorganises, with some modifications, the provisions under Cap. 32 in a more logical, user-friendly and readable way
  - modernises the language to facilitate easier understanding.
- Part 6 is divided into 4 Divisions (each has a specific function):
  - Division 1 defines or otherwise explains the expressions used in Part 6.
  - Division 2 deals with the prohibitions and restrictions on distributions by a company to its members.
  - Division 3 contains provisions supplementary to Division 2, for example section 302 provides that the amount of a distribution that may be made lawfully is to be determined by reference to certain financial items as stated in the financial statements specified in Division 4.
  - Division 4 specifies the financial statements for the purposes of section 302. The specified financial statements for distribution purpose are the annual financial statements, the interim financial statements and the initial financial statements. These are the same under Cap. 32.



# Brief Notes on Certain Parts

Part 7					
	Debentures				

# Part 7 – Debentures

## Introduction

- Part 7 (Debentures)
  - deals with a miscellany of matters concerning debentures,
  - covers, for example,
    - keeping of the register of debenture holders,
    - rights to inspect and make copies of the register, debenture, trust deed and other documents, and
    - convening meetings of debenture holders
  - introduces new requirements for
    - registration of the allotment of debentures and
    - filing of a return of allotment,to align with similar requirements for shares



# Part 7 – Debentures

## Policy Objectives and Major Changes

- Part 7 contains initiatives that aim at modernising the law and ensuring better regulation, namely -
  - (a) Improving clarity by separating
    - provisions applicable to debentures from
    - those applicable to shares.
  - (b) Aligning provisions for keeping of the register of debenture holders with similar provisions for register of members in Part 12;
  - (c) Introducing new requirements for registration of allotment of debentures to align with similar requirements for shares introduced in Part 4; and
  - (d) Allowing debenture holders to apply to the Court to order a meeting to be held to give directions to the trustee for the protection of debenture holders



## Brief Notes on Certain Parts

	Part 8				
	Registration of Charges				

## Part 8 – Registration of Charges

### Introduction

- Part 8 (Registration of Charges)
  - deals with the registration of charges by both Hong Kong and registered non-Hong Kong companies.
    - sets out the types of charges which require registration, the registration procedures and the consequences of non-compliance
    - contains provisions to regulate related matters, such as requiring companies to
      - » keep, and
      - » allow inspection of,  
copies of instruments of charges and registers of charges
    - introduces improvements to the current registration system, including
      - » revising the list of registrable charges and
      - » requiring a certified copy of the charge instrument to be registered and available for public inspection to enhance transparency.



## Part 8 – Registration of Charges

### Policy Objectives and Major Changes

- Part 8 basically retains the registration regime under Part III of Cap. 32”, with the following initiatives that aim at ensuring better regulation by enhancing disclosure and improving the registration system -

- (a) Updating the list of registrable charges;
- (b) Replacing the automatic acceleration of the repayment obligation with a choice given to the lender as to whether the secured amount should be immediately payable where a charge is rendered void for non-compliance with the registration requirements;
- (c) Requiring a certified copy of the charge instrument to be registered and made available for public inspection;
- (d) Shortening the period for delivery to the Registrar of a certified copy of the charge instrument and the prescribed particulars from five weeks to one month;



Major Initiative  
2b(i)

Major Initiative  
2b(ii)

Major Initiative  
2b(iii)

Major Initiative  
2b(iv)

## Part 8 – Registration of Charges

### Policy Objectives and Major Changes

- Part 8 basically retains the registration regime under Part III of Cap. 32”, with the following initiatives that aim at ensuring better regulation by enhancing disclosure and improving the registration system -

- (e) Requiring a certified copy of the written evidence of debt satisfaction or release of a charge to be registered and made available for public inspection;
- (f) Clarifying the effect of a Court order to extend the time for registration as regards criminal liability already incurred; and
- (g) Empowering the Court to rectify the particulars in the registered charge instrument and evidence of discharge.



Major Initiative  
2b(v)

# Part 8 – Registration of Charges

## Updating the List of Registrable Charges (Section 334)

- In the new CO,
  - to remove the ambiguities and dispense with redundant items, the following changes have been made:

Items	Changes in the new CO
a. Charge on an aircraft or any share in an aircraft	➤ Registrable under s.334(1)(h)
b. Instalments due, but not paid, on the issue price of shares	➤ <u>Registrable</u> under s.334(1)(f)
c. Charges for the purpose of securing any issue of debentures	➤ Not registrable as this head of registrable charge is removed
d. Lien on subfreights	➤ Not registrable as clarified by s.334(4)
e. Cash deposits	➤ Not registrable as clarified by s.334(3)(b)

# Brief Notes on Certain Parts

		<b>Part 9</b>			
	<b>Accounts and Audit</b>				



# Part 9 – Accounts and Audit

## Introduction

- Part 9 (Accounts and Audit) contains
  - the accounting and auditing provisions in relation to the keeping of accounting records,
  - the preparation and circulation of annual financial statements, directors' reports and auditor's reports and
  - the appointment and rights of auditors.
- New provisions are introduced
  - to facilitate **SMEs** to take advantage of simplified accounting and reporting requirements,
  - to require **public and large companies** to include an analytical business review in directors' reports, and
  - to enhance auditors' right to information.
- This Part also introduces new sanctions relating to the contents of auditor's reports (so-called "S. 399" but now S. 408).



# Part 9 – Accounts and Audit

## Policy Objectives and Major Changes

- Initiatives to enhance corporate governance:
  - (1) Requiring public companies and other companies that do not qualify for simplified reporting to prepare a "business review" within the directors' report, whilst allowing private companies to opt out by special resolution; Major Initiative 1c(i)
  - (2) Empowering auditors to obtain information from a wider range of persons for the performance of their duties; and Major Initiative 1e(i)
  - (3) Improving transparency with regard to circumstances of cessation of office of an auditor.
- Initiatives to ensure better regulation:
  - (4) Introducing a new offence in relation to inaccurate auditor's reports (so-called "S. 399", now S. 408) Major Initiative 2d(v)

## Part 9 – Accounts and Audit

### Policy Objectives and Major Changes

- Initiatives that aim at business facilitation:
  - (5) Relaxing the criteria for companies to prepare simplified financial and directors' reports i.e. the **“reporting exemption”**; and
  - (6) Making the summary financial report provisions more user-friendly and extending their application to all companies.
- Initiative to modernise and improve the law:
  - (7) Clarifying the financial year of a company, requiring companies to hold annual general meetings (“AGMs”) and requiring public companies or companies limited by guarantee to file annual returns in respect of every financial year of the company; and
  - (8) Streamlining disclosure requirements that overlap with the accounting standards

Major Initiative  
3b

## Part 9 – Accounts and Audit

### **1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)**

#### – In Cap. 32

- The directors’ report is basically a report of the company’s information that people may wish to know about but is not included in the accounts.
  - Section 129D of Cap. 32 sets out the detailed information required.
  - The report must be approved by the board of directors.
  - A copy of the report must be sent to every member and debenture holder of the company together with a copy of the accounts and auditors’ report



## Part 9 – Accounts and Audit

### 1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)

- In the new CO
  - All companies (except those stated in section 388(3)) are required to prepare, as part of the directors’ report, a business review which is more analytical and forward-looking than the information required under Cap. 32.
  - The business review will provide additional information for shareholders and help assess how the directors have performed their duties.
  - In particular, the requirement to include information relating to environmental and employee matters that have a significant impact on the company is in line with international trends to promote corporate social responsibility.



## Part 9 – Accounts and Audit

### 1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)

- **Section 388** and **Schedule 5**
  - provide for the directors’ duty to prepare a directors’ report and the detailed requirements of a business review.
- The exemptions from preparation of a business review are set out in section 388(3) which include wholly-owned subsidiary companies.
  - The holding company of such companies will prepare the business review unless it is exempted on other grounds.

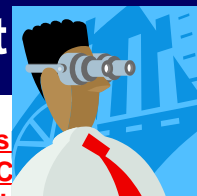


## Part 9 – Accounts and Audit

### 1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)

- ❖ Section 388(3) allows certain companies not prepare “business review” in the directors’ report as follows:
  - ... not require the directors’ report for a financial year to comply with Schedule 5 (i.e. “Contents of Directors’ Report: Business Review”) if—
    - (a) the company falls within the reporting exemption for the financial year;
    - (b) the company is a wholly owned subsidiary of another body corporate in the financial year; or
    - (c) the company is a private company that does not fall within the reporting exemption for the financial year, and a special resolution is passed by the members to the effect that the company is not to prepare a business review required by that Schedule for the financial year (s. 388(3)).

## Part 9 – Accounts and Audit



### 1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)

- ❖ Schedule 5 “Contents of Directors’ Report: Business Review”:
  - 1. A directors’ report for a financial year must contain a business review that consists of—
    - (a) a fair review of the company’s business;
    - (b) a description of the principal risks and uncertainties facing the company;
    - (c) particulars of important events affecting the company that have occurred since the end of the financial year; and
    - (d) an indication of likely future development in the company’s business.
  - 2. To the extent necessary for an understanding of the development, performance or position of the company’s business, a business review must include—

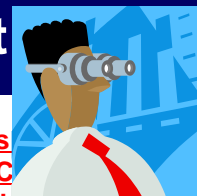
## Part 9 – Accounts and Audit



### 1. Requiring Certain Companies to Prepare a “Business within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)”

- ❖ Schedule 5 “Contents of Directors’ Report: Business Review”:
  - (a) an analysis using financial key performance indicators;
  - (b) a discussion on—
    - (i) the company’s environmental policies and performance; and
    - (ii) the company’s compliance with the relevant laws and regulations that have a significant impact on the company; and
  - (c) an account of the company’s key relationships with its employees, customers and suppliers and others that have a significant impact on the company and on which the company’s success depends.
- 3. This Schedule does not require the disclosure of any information about impending developments or matters in the course of negotiation if the disclosure would, in the directors’ opinion, be seriously prejudicial to the company’s interests.

## Part 9 – Accounts and Audit



### 1. Requiring Certain Companies to Prepare a “Business within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)”

- ❖ Schedule 5 “Contents of Directors’ Report: Business Review”:
  - 4. This Schedule has effect in relation to a directors’ report required to be prepared under section 388(2) as if a reference to the company were a reference to—
    - (a) the company; and
    - (b) the subsidiary undertakings included in the annual consolidated financial statements for the financial year.
  - 5. In this Schedule —  
key performance indicators (關鍵表現指標) means factors by reference to which the development, performance or position of the company’s business can be measured effectively.

## Part 9 – Accounts and Audit

### 1. Requiring Certain Companies to Prepare a “Business Review” within the Directors’ Report, whilst Allowing Private Companies to Opt Out by Special Resolution (S. 388 and Sch. 5 to the new CO)

- To encourage meaningful reporting and to limit directors’ civil liability for statements or omissions in the directors’ report,
  - section 448 provides a “safe harbour” so that directors are liable to the company only in respect of loss suffered by it as a result of any untrue or misleading statements or the omission of anything required to be included
  - The directors are only liable if they knew, or was reckless as to whether,
    - a statement was untrue or misleading, or
    - an omission was dishonest concealment of a material fact.



## Part 9 – Accounts and Audit

### 2. Empowering Auditors to Obtain Information from a Wider Range of Persons for the Performance of their Duties (Section 412)

- In the new CO
  - The provisions under the new CO empower auditors to require a wider range of persons, including persons holding or accountable for accounting records, to provide them with information and explanation as they reasonably require for the performance of their duties.

### 3. Improving Transparency with Regard to Circumstances of Cessation of Office of an Auditor (Sections 421 to 427)

- In the new CO
  - To improve transparency and corporate governance, an outgoing auditors’ right to make a statement of circumstances is extended to an auditor who has been removed and a retiring auditor who has not been reappointed.



## Part 9 – Accounts and Audit



### 4. Introducing a New offence in relation to Inaccurate Auditor's Reports, i.e. 399 Regime (Section 408)

- In the new CO
  - There is a new offence in section 408 of the new CO relating to omissions in an auditor's report.
  - Section 407 of the new CO provides that 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 specified statements"),
      - » the auditor must state that fact in the auditor's report.
  - The offence in section 408 will safeguard the reliability and integrity of auditor's reports and enhance enforcement.

## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

- In Cap. 32
  - Section 141D provides that a private company (other than those specifically excluded) may, with the written agreement of all its shareholders, prepare simplified accounts and simplified directors' reports in respect of one financial year at a time.
  - According to the Small and Medium-sized Entity-Financial Reporting Framework ("SME-FRF") issued by the HKICPA
    - a HK company qualifies for reporting based on the SME-Financial Reporting Standard ("SME-FRS") if it satisfies the requirement under section 141D
  - The SME-FRF is not applicable to groups of companies or guarantee companies at all under Cap. 32.



## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

- In the new CO
  - The criteria for simplified reporting are relaxed by
    - relaxing the criteria for eligibility limits for automatic qualification,
    - introducing a higher size criteria for private companies/groups that opt for simplified reporting, and
    - retaining the exception in section 141D of Cap. 32.
  - A summary of the qualifying conditions for companies to prepare simplified financial and directors' report is set out



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

Company	Qualifying Conditions
A. a private co. is a "small private co.", or a private co. is the holding co. of a group of "small private companies"	➤ Size test, meeting any 2 of the following: (i) < \$100M revenue, (ii) < \$100M assets, (iii) < 100 employee
B. an eligible private co., or an eligible private co. is the holding co. of a "group of eligible private companies"	➤ Size test, meeting any 2 of the following: (i) < \$200M revenue, (ii) < \$200M assets, (iii) < 100 employee ➤ 75% members' approval without any member objection
C. a "small guarantee co.", or a guarantee co. is the holding co. of a "group of small guarantee companies"	➤ Size test, less than \$25M revenue
D. option similar to s. 141D of Cap. 32	➤ S. 359(1)(b)

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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### A. Small private company (or a group of small private companies)

- qualified for simplified reporting if it satisfies any 2 of the following conditions:
  - (i) total (or aggregate total) annual revenue of not more than HK\$100 million;
  - (ii) total (or aggregate total) assets of not more than HK\$100 million;
  - (iii) no more than 100 employees.



- for small private company : sections 359(1)(a)(i), 361, Schedule 3 section 1(1), (2)
- for group of small private companies : sections 359(2)(a), (b) and (c)(i), 364, Schedule 3 section 1(7), (8) and (9)

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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### A. Small private company (or a group of small private companies)

##### ❖ Section 1 of Schedule 3:

The conditions specified for the purposes of s. 361(1), (2) and (3) are—

- (a) that the amount of the company's total revenue for the financial year, as would be reflected in the company's annual financial statements for the financial year if the company were qualified as a small private company for the financial year, does not exceed \$100 million;
- (b) that the amount of the company's total assets at the date of the statement of financial position for the financial year, as would be reflected in the company's annual financial statements for the financial year if the company were qualified as a small private company for the financial year, does not exceed \$100 million; and
- (c) that the average number of the company's employees during the financial year does not exceed 100.



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### A. Small private company (or a group of small private companies)

##### ❖ Section 2(3) of Schedule 3:

For the purposes of section 1(9), 1(12) and (14)(b) of this Schedule, the aggregate amount of the group's total revenue or assets—

- (a) is to be calculated by aggregating the total revenue or assets (as the case may be) of each company in the group, as reflected in the company's annual financial statements or annual consolidated financial statements for the financial year; and
- (b) is to be calculated on the basis that the set-offs and other adjustments for transactions between companies in the group have been made.



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### A. Small private company (or a group of small private companies)

##### ❖ Section 2(5) of Schedule 3:

For the purposes of subsection (4) and of section 1(1)(c), (2)(c), (3)(c) and (4)(c) of this Schedule, the average number of a company's employees during a financial year is to be calculated by using the following formula—

$$\frac{M}{N}$$

where—

- M represents the aggregate of the number of the company's employees as at the end of each month during the financial year;
- N represents the number of months in the financial year.



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### B. Eligible private company (or a group of eligible private co.)

- qualified for simplified reporting if it satisfies any 2 of the following conditions:
    - (i) total (or aggregate total) annual revenue of not more than HK\$200 million;
    - (ii) total (or aggregate total) assets of not more than HK\$200 million;
    - (iii) no more than 100 employees.
- for eligible private company : sections 359(1)(c), 360(1), 362, Schedule 3 section 1(3) and (4)
  - for group of eligible private companies : sections 359(2)(a),(b) and (c)(ii), 360(2), 365, Schedule 3 section 1(10), (11) and (12)



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### B. Eligible private company (or a group of eligible private co.)

##### ❖ Section 3 of Schedule 3:

The conditions specified for the purposes of s. 362(1), (2) and (3) are—

- (a) that the amount of the company's total revenue for the financial year, as would be reflected in the company's annual financial statements for the financial year if the company were qualified as an eligible private company for the financial year, does not exceed \$200 million;
- (b) that the amount of the company's total assets at the date of the statement of financial position for the financial year, as would be reflected in the company's annual financial statements for the financial year if the company were qualified as an eligible private company for the financial year, does not exceed \$200 million; and
- (c) that the average number of the company's employees during the financial year does not exceed 100.



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## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### B. Eligible private company (or a group of eligible private co.)

##### ❖ Section 360(1) states:

The conditions specified for the purposes of section 359(1)(c)(iii) are—

- (a) subject to subsection (3), a resolution is passed at a general meeting by the members holding at least 75% of the voting rights in the company to the effect that the company is to fall within the reporting exemption for the financial year; and
- (b) the members holding the remaining voting rights do not vote against the resolution.



## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### B. Eligible private company (or a group of eligible private co.)

##### ❖ Section 360(3) states:

If—

- (a) a resolution is passed for the purposes of subsection (1)(a) or (2)(a)(i), (b)(i) or (c)(i) to the effect that a company is to fall within the reporting exemption for a financial year;
- (b) by notice in writing to the company, a member objects to the company falling within the reporting exemption for the financial year; and
- (c) the notice is given at least 6 months before the end of the financial year to which the objection relates, the resolution is regarded as not being passed in relation to the financial year to which the objection relates.



## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### B. Eligible private company (or a group of eligible private co.)

- ❖ Section 360(4) states:  
Within **14 days** after receiving a notice under subsection (3)(b), a company **must notify** its members of the objection.
- ❖ Section 360(5) states:  
**Special notice** is required for a resolution mentioned in subsection (1)(a) or (2)(a)(i), (b)(i) or (c)(i).



## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### C. Small guarantee company (or a group of small guarantee companies)

- a company limited by guarantee and
- qualified for simplified reporting if its total (or aggregate total) annual revenue does not exceed HK\$25 million



- for small guarantee company : sections 359(1)(a)(i), 363, Schedule 3 section 1(5), (6)
- for group of small guarantee companies : sections 359(3), 366, Schedule 3 section 1(13) and (14)

## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### D. Option Similar to Section 141D of Cap. 32

❖ Section 359(1)(b) states that:

(1) For the purposes of this Part, a company falls within the reporting exemption for a financial year—

(b) if—

- (i) it is a private company at all times, and is not a company specified in subsection (4) at any time, during the financial year;
- (ii) it does not have any subsidiary and is not a subsidiary of another company; and
- (iii) all members of the company agree in writing that the company is to fall within the reporting exemption for the financial year only (s. 359(1)(b))



## Part 9 – Accounts and Audit

### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

#### Companies specified not entitled to reporting exemption

❖ Section 359(4)(b) states that:

(a) one that carries on any banking business and holds a valid banking licence granted under the Banking

(b) one that is a corporation licensed under Part V of the Securities and Futures Ordinance (Cap. 571) to carry on a business in any regulated activity within the meaning of that Ordinance; or

(c) one that—

- (i) carries on any insurance business otherwise than solely as an agent; or
- (ii) accepts, by way of trade or business (other than banking business), loans of money at interest or repayable at a premium, otherwise than on terms involving the issue of debentures or other securities. (s. 359(4))



## Part 9 – Accounts and Audit



### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial Statements and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

- Companies which are qualified for simplified reporting are referred to in the new CO as
  - companies "**falling within the reporting exemption**".
- The reporting exemptions are in respect of the specific requirements relating to the preparation of
  - financial statements, and
  - directors' reports.



## Part 9 – Accounts and Audit



### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial Statements and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

- The exemptions are set out in the following sections –
  - Section 380(3) → no requirement to disclose auditor's remuneration in financial statements
  - Section 380(7) → no requirement for financial statements to give a "true and fair view"
  - Section 381(2) → subsidiary undertakings may be excluded from consolidated financial statements in accordance with applicable accounting standards
  - Section 388(3)(a) → no requirement to include business review in directors' report
  - Section 406(1)(b) → no requirement for auditor to express a "true and fair view" opinion on the financial statements

## Part 9 – Accounts and Audit



### 5. Relaxing the Criteria for Companies to Prepare Simplified Financial Reports and Directors' Reports i.e. the "Reporting Exemption" (Sections 359 to 366 and Schedule 3 to the new CO)

- Under section 380(4)(b), the financial statements of a company must be prepared in compliance with the applicable accounting standards.
  - The intention is that the accounting standards that will be applicable to a company falling within the reporting exemption is the SME-FRS and FRF issued or specified by the HKICPA which is the body prescribed in the Companies (Accounting Standards (Prescribed Body)) Regulation for issuing or specifying the applicable accounting standards under section 380(8)(a).
  - The accounting standards applicable to companies that prepare simplified financial reports are less onerous than the HKFRS applicable to listed, public or other companies not qualified for simplified reporting.
- Audit of the financial statements is still required for all companies, except dormant companies (section 447), under the new CO.

## Part 9 – Accounts and Audit

### 6. Making the Summary Financial Report Provisions More User-Friendly and Extending Application to all Companies (Ss 437 to 446)

- In Cap. 32,
  - a listed co. may send a summary financial report in place of the accounts
    - provided that it has obtained the agreement of those persons
      - » Very few listed companies have offered the alternative, partly due to cost considerations and partly due to the complex rules
  - There is also no exemption for listed companies incorporated in Hong Kong not to send out accounts and reports or summary financial reports
- In the new CO
  - The summary financial report provisions in the new CO are applicable to all companies (other than those qualified for simplified reporting) rather than being only applicable to listed companies as in Cap. 32
  - Unlike Cap. 32, members' consent is not required before a company can send a copy of a summary financial report to its members

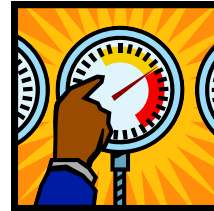


## Part 9 – Accounts and Audit

### 7. Clarifying the Financial Year of a Company, Requiring companies to Hold AGMs and Requiring Companies to File ARs in respect of Every Financial Year (Sections 367 to 371, 610, 662(3), (4))

#### – In Cap. 32,

- It does not provide for a company's accounting reference period.
- The financial year is defined in section 2(1) of Cap. 32 as the period in respect of which the accounts so laid are made up.
- Section 111 of Cap. 32 requires every company to hold an AGM in each year and not more than 15 months is to elapse between the date of one AGM and the next but there are no rules on shorter accounting periods.
- In addition, there is no provision to regulate the first accounting period, except that the first AGM has to be held within 18 months of incorporation.

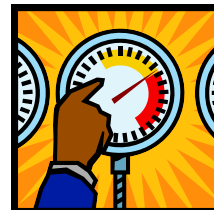


## Part 9 – Accounts and Audit

### 7. Clarifying the Financial Year of a Company, Requiring companies to Hold AGMs and Requiring Companies to File ARs in respect of Every Financial Year (Sections 367 to 371, 610, 662(3), (4))

#### – In the new CO

- It provides for the determination of the financial year of a company which is the same as the accounting reference period.
- It also provides for alteration of the accounting reference period.
- Unless exempted under sections 612 or 613, companies are required to hold an AGM within
  - 6 months (for public companies) or
  - 9 months (for private companies or companies limited by guarantee)after the end of the accounting reference period.



## Part 9 – Accounts and Audit

### 8. Streamlining Disclosure Requirements that Overlap with the Accounting Standards (Schedule 4 to the new CO)

#### – In Cap. 32,

- There are certain inconsistencies between the accounting requirements under Cap. 32 and the accounting standards,
- Cap. 32 also provides for certain disclosure requirements as to the contents of the accounts in
  - the Eleventh Schedule (for companies that apply section 141D) and
  - the Tenth Schedule (for other companies)which overlap with the disclosure requirements in the SME-FRS and HKFRS respectively
- As accounting standards are constantly evolving, it is very difficult to keep the statutory requirements up-to-date
- This can give rise to potential conflict between the two



## Part 9 – Accounts and Audit

### 8. Streamlining Disclosure Requirements that Overlap with the Accounting Standards (Schedule 4 to the new CO)

#### – In the new CO

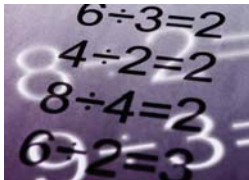
- To avoid any potential conflict between the Tenth Schedule and HKFRS and between the Eleventh Schedule and SME-FRS,
  - both Schedules are repealed, with only a small number of public interest disclosure requirements not covered by the HKFRS or SME-FRS being retained in **Schedule 4**
- The HKFRS and SME-FRS will be given indirect statutory recognition,
  - as financial statements are required to comply with the applicable accounting standards issued by a body prescribed by the Companies (Accounting Standards (Prescribed Body)) Regulation (section 380(4)(b)).

## Part 9 – Accounts and Audit

### 8. Streamlining Disclosure Requirements that Overlap with the Accounting Standards (Schedule 4 to the new CO)

#### ❖ Schedule 4 “Accounting Disclosures” – Part 1 “Disclosures for Companies whether or not Falling within Reporting Exemption”

1. Aggregate amount of authorized loans
2. Statement of financial position to be contained in notes to annual consolidated financial statements
3. Subsidiary’s financial statements must contain particulars of ultimate parent undertaking
4. Compliance with applicable accounting standards



#### ❖ Schedule 4 “Accounting Disclosures” – Part 2 “Disclosures for Companies not Falling within Reporting Exemption”

1. Remuneration of auditor

## Part 9 – Accounts and Audit

### 9. Other Amendments in Part 9

- In the new CO
  - The exemption to preparation of consolidated financial statements is amended

#### ❖ Section 379(1) and (2) “Directors must prepare financial statements” require that:

- (1) A company’s directors must prepare for each financial year statements that comply with sections 380 and 383.
- (2) Despite subsection (1), if the company is a holding company at the end of the financial year, the directors must instead prepare for the financial year consolidated statements that comply with sections 380, 381 and 383.

- However, section 379(3) exempts the preparation of consolidated financial statements ...

## Part 9 – Accounts and Audit

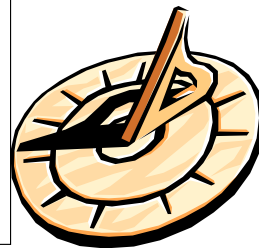
### 9. Other Amendments in Part 9

- ❖ Section 379(3) exempts the preparation of consolidated financial statements as follows:
  - (3) Subsection (2) does not apply—
    - (a) if the company is a wholly owned subsidiary of another body corporate in the financial year; or
    - (b) if—
      - (i) the company is a partially owned subsidiary of another body corporate in the financial year;
      - (ii) at least 6 months before the end of the financial year, the directors notify the members in writing of the directors' intention not to prepare consolidated statements for the financial year, and the notification does not relate to any other financial year; and
      - (iii) as at a date falling 3 months before the end of the financial year, no member has responded to the notification by giving the directors a written request for the preparation of consolidated statements for the financial year.

## Schedule 11 – Part 9

### Transitional and Saving Arrangements for Part 9

- ❖ Section 77 Financial year and related matters
  - Sections 127 and 141D of, and the Eleventh Schedule to, the predecessor Ordinance, as in force immediately before their repeal, continue to apply in relation to a financial year beginning before the commencement date of Division 3 of Part 9 and ending on or after that commencement date.
- ❖ Section 78 Accounts and directors' report:
  - (1) Sections 122, 123, 124, 125, 126, 128, 129, 129A, 129B, 129C, 129D, 129G, 141C, 161, 161A, 161B, 161BA and 161BB of, and the Tenth Schedule to, the predecessor Ordinance, as in force immediately before their repeal, continue to apply in relation to accounts for a financial year beginning before the commencement date of Subdivision 3 of Division 4 of Part 9 and ending on or after that commencement date ...



## Brief Notes on Certain Parts

			Part 10		
	Directors and Company Secretaries				

## Part 10 – Directors and Co. Secretaries

### Introduction

- Part 10 (Directors and Company Secretaries)
  - deals with directors and company secretaries of a company.
- It mainly reorganises, with some modifications, the existing provisions of the Companies Ordinance (Cap. 32) relating to the appointment, removal and resignation of directors and company secretaries.
- Part 10 also clarifies the standard of directors' duty of care, skill and diligence.



## Part 10 – Directors and Co. Secretaries

### Policy Objectives and Major Changes

– Initiatives to enhance corporate governance:

- (a) restricting corporate directorship in private companies;
- (b) clarifying the standard of directors' duty of care, skill and diligence; and
- (c) requiring ratification of conduct of directors by disinterested members' approval.

Major Initiative  
1a(i)

Major Initiative  
1a(ii)

Major Initiative  
1d(iii)

– Initiatives to improve regulation and modernising the law:

- (a) enabling the Registrar to give directions to a company relating to the appointment of directors and company secretaries; and
- (b) clarifying the rules on indemnification of directors against liabilities to third parties.

Major Initiative  
4c(i)

## Part 10 – Directors and Co. Secretaries

### Policy Objectives and Major Changes

– Apart from the above major changes, Part 10 also restates a miscellany of provisions in Cap. 32 concerning directors and company secretaries, including

- directors' vicarious liability for the acts of their alternates (section 478),
- the avoidance of acts done by a person in a dual capacity as director and company secretary (section 479),
- prohibition of undischarged bankrupt from acting as director (section 480) and
- the keeping of minutes of proceedings at directors' meetings (sections 481 and 482).



## Brief Notes on Certain Parts

				Part 11	
	Fair Dealing by Directors				

## Part 11 – Fair Dealing by Directors

### Introduction

- Part 11 (Fair Dealing by Directors)
  - covers fair dealing by directors
  - deals with specified situations in which a director is perceived to have a conflict of interest
  - governs transactions involving directors or their connected entities which require members' approval (namely loans and similar transactions, long-term service contracts and payments for loss of office), and
  - covers disclosure by directors of material interests in transactions, arrangements or contracts.
  - introduces new statutory provisions requiring members' approval for director's long-term employment by a company
  - requires disinterested members' approval in the case of public companies and subsidiaries of public companies.



## Part 11 – Fair Dealing by Directors

### Policy Objectives and Major Changes

- Initiatives to enhance corporate governance include:
  - (a) expanding the prohibitions on loans and similar transactions to cover a wider category of persons connected with a director;
  - (b) requiring disinterested members' approval for various prohibited transactions;
  - (c) expanding the prohibitions on payments for loss of office;
  - (d) requiring members' approval for directors' employment exceeding 3 years; and
  - (e) widening the ambit of disclosure currently required under section 162 of Cap. 32 (i.e. director's interests in contract)



Major Initiative  
1d(ii)

Major Initiative  
1d(i)

## Part 11 – Fair Dealing by Directors

### Policy Objectives and Major Changes

- Initiatives to facilitate business and modernising the law include:
  - (a) introducing new exemptions from prohibitions on loans and similar transactions in favour of directors and connected entities;
  - (b) modifying the scope of private companies that are subject to more stringent restrictions similar to a public company; and
  - (c) removing the criminal sanction for breach of the provisions on prohibition of loans and similar transactions in favour of directors and connected entities





## Brief Notes on Certain Parts

	Dissolution by Striking Off or Deregistration				
		Part 15			

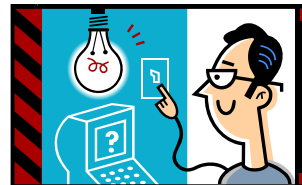
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## Part 15 – Striking Off or Deregistration

### Introduction

- Part 15 (Dissolution by Striking Off or Deregistration)
  - sets out the provisions on
    - striking off and deregistration of defunct companies,
    - restoration of companies that have been struck off or deregistered, and
    - related matters (including treatment of properties of dissolved companies)
  - introduces changes which streamline the existing procedures for striking-off and restoration of companies
  - imposes new requirements to prevent any possible abuse of the deregistration procedure



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## Part 15 – Striking Off or Deregistration

### Policy Objectives and Major Changes

- Part 15 contains initiatives that aim at facilitating business and improving regulation, namely –
  1. extending the voluntary deregistration procedure to guarantee companies;
  2. imposing additional conditions for deregistration of defunct companies;
  3. introducing a new procedure of “administrative restoration” of a dissolved company by the Registrar; and
  4. streamlining the procedures for restoration of dissolved companies by court order.

Major Initiative  
2c(i)

Major Initiative  
3a(vi)

Major Initiative  
3a(vii)

## Part 15 – Striking Off or Deregistration

### Extending the Voluntary Deregistration Procedure to Guarantee Companies (Section 750)

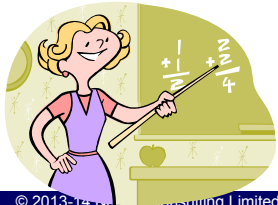
- In the new Co
  - The deregistration procedure is extended to guarantee companies.
  - Public companies and certain categories of businesses (say banks, insurers and etc.) will continue to be excluded (Section 749).
  - The conditions for applying for voluntary deregistration (Section 750(2)), particularly the requirement of agreement by all members would prevent any possible abuse of the procedure.



## Part 15 – Striking Off or Deregistration

### Imposing Additional Conditions for Voluntary Deregistration of Defunct Companies (Sections 750 to 751)

- In the new CO
  - Additional conditions have been imposed on companies applying for deregistration so as to prevent any potential abuse of the deregistration procedure, such as where a company applying for deregistration is a party to legal proceedings or is in possession of immovable property in Hong Kong.
  - Sections 750 to 751 mainly restate the existing deregistration provisions under Cap. 32 with three additional conditions for deregistration.



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## Part 15 – Striking Off or Deregistration

### Imposing Additional Conditions for Voluntary Deregistration of Defunct Companies (Sections 750 to 751)

- ❖ Section 750(2) requires a deregistration that:
  - An application must not be made unless, at the time of the application—
    - (a) all the members agree to the deregistration;
    - (b) the company has not commenced operation or business, or has not been in operation or carried on business during the 3 months immediately before the application;
    - (c) the company has no outstanding liabilities;
    - (d) the company is not a party to any legal proceedings;
    - (e) the company's assets do not consist of any immovable property situate in Hong Kong; and
    - (f) if the company is a holding company, none of its subsidiary's assets consist of any immovable property situate in Hong Kong (s. 750(2)).

Newly added

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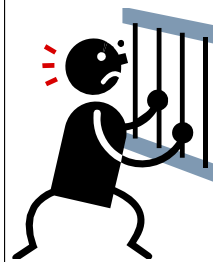
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## Part 15 – Striking Off or Deregistration

### Imposing Additional Conditions for Voluntary Deregistration of Defunct Companies (Sections 750 to 751)

❖ Section 750(6) states that:

- A person who, in connection with an application, knowingly or recklessly gives any information to the Registrar that is false or misleading in a material particular commits an offence and is liable—
  - (a) on conviction on indictment to a fine of \$300,000 and to imprisonment for 2 years; or
  - (b) on summary conviction to a fine at level 6 and to imprisonment for 6 months (s. 750(6)).



## Today's Agenda

### III. Major Initiatives (as Summary)



# Major Initiatives

## (Measures for 4 Main Objectives)

### 1. Enhancing Corporate Governance

- a. Strengthening the accountability of directors
- b. Enhancing shareholder engagement in the decision-making process
- c. Improving the disclosure of company information
- d. Fostering shareholder protection
- e. Strengthening auditors' rights

### 2. Ensuring Better Regulation

- a. Ensuring the accuracy of information on the public register
- b. Improving the registration of charges
- c. Refining the scheme for deregistration of companies
- d. Improving the enforcement regime, incl. The original S. 399

### 3. Facilitating Business

- a. Streamlining procedures
- b. Facilitating simplified reporting
- c. Facilitating business operations

### 4. Modernising the Law

- a. Abolishing par value for shares
- b. Removing the power to issue share warrants
- c. Clarifying the rules on indemnification of directors against liabilities to third parties

# Major Initiatives

## (Measures for 4 Main Objectives)

### 1. Enhancing Corporate Governance

#### a. Strengthening the Accountability of Directors

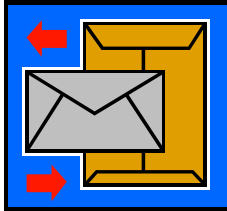
- i. Restricting the appointment of corporate directors
  - by requiring every private company to have at least one natural person to act as director, to enhance transparency and accountability. **New CO Part 10 S. 457**
- ii. Clarifying in the statute the directors' duty of care, skill and diligence with a view to providing clear guidance to directors. **New CO Part 10 S. 465 & 466**



# Major Initiatives

(Measures for 4 Main Objectives)

## 1. Enhancing Corporate Governance



### b. Enhancing Shareholder Engagement in the Decision-Making Process

i. Introducing a comprehensive set of rules for proposing and passing a written resolution. **New CO Part 12 S. 548 to 561**

ii. Requiring a company to bear the expenses of circulating members' statements relating to the business of, and proposed resolutions for, Annual General Meetings, if they are received in time to be sent with the notice of the meeting. **New CO Part 12 S. 580 & etc.**

iii. Reducing the threshold requirement for members to demand a poll from 10% to 5% of the total voting rights. **New CO Part 12 S. 591**

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# Major Initiatives

(Measures for 4 Main Objectives)

## 1. Enhancing Corporate Governance



### c. Improving the Disclosure of Company Information

i. Requiring public companies and the larger (i.e., companies that do not qualify for simplified reporting) private companies and guarantee companies to prepare a more comprehensive directors' report **New CO Part 9 S.388 & Sch.5**

- which includes an analytical and forward-looking "business review",
  - whilst allowing private companies to opt out by special resolution.
- The business review will provide useful information for shareholders.
- In particular, the requirement to include information relating to environmental and employee matters that have a significant effect on the company is in line with international trends to promote corporate social responsibility.

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# Major Initiatives

(Measures for 4 Main Objectives)

## 1. Enhancing Corporate Governance



### d. Fostering Shareholder Protection

- i. Introducing more effective rules to deal with directors' conflicts of interests,
  - including expanding the requirement for seeking shareholders' approval to cover directors' employment contracts which exceed three years. **New CO Part 11 S. 530 to 535**
- ii. Requiring disinterested shareholders' approval in cases where shareholders' approval is required for transactions of public companies and their subsidiaries. **New CO Part 11 S. 496 & etc.**
- iii. Requiring the conduct of directors to be ratified by disinterested shareholders' approval to prevent conflicts of interest and possible abuse of power by interested majority shareholders in ratifying the unauthorised conduct of directors. **New CO Part 10 S. 473**

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# Major Initiatives

(Measures for 4 Main Objectives)

## 1. Enhancing Corporate Governance



### d. Fostering Shareholder Protection

- iv. Replacing the "headcount test" with a not more than 10% disinterested voting requirement for privatisations and specified schemes of arrangement, while giving the court a new discretion to dispense with the test (in cases where it is retained) for members' schemes. **New CO Part 13 S.673 & etc.**
- v. Extending the scope of the unfair prejudice remedy to cover "proposed acts and omissions",
  - so that a member may bring an action for unfair prejudice even if the act or omission that would be prejudicial to the interests of members is not yet effected. **New CO Part 14 S. 724**

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# Major Initiatives

(Measures for 4 Main Objectives)

## 1. Enhancing Corporate Governance

### e. Strengthening Auditors' Rights

- i. Empowering an auditor to require a wider range of persons, including
  - the officers of a company's Hong Kong subsidiary undertakings and
  - any person holding or accountable for the company or its subsidiary undertakings' accounting records, to provide information or explanation reasonably required for the performance of the auditor's duties.
  - The offence for failure to provide the information or explanation is extended to cover officers of the company and the wider range of persons.

New CO Part 9 S. 412



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# Major Initiatives

(Measures for 4 Main Objectives)

## 2. Ensuring Better Regulation

### a. Ensuring the Accuracy of Information on the Public Register

- i. Clarifying the Registrar's powers in relation to the registration of documents, such as
  - specifying the requirements for the authentication of documents to be delivered to the Companies Registry and the manner of delivery, and
  - withholding the registration of unsatisfactory documents pending further particulars.
- ii. Clarifying the Registrar's powers in relation to the keeping of the register, such as
  - rectifying typographical or clerical errors,
  - making annotations and
  - requiring a company to resolve any inconsistency or provide updated information.

New CO Part 2 S. 31, 35 to 38



New CO Part 2 S. 39 to 44

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# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation



## a. Ensuring the Accuracy of Information on the Public Register

iii. Providing a statutory basis for applications to court for removing information from the register that is inaccurate, forged or derived from anything invalid, ineffective or done without the authority of the company.

New CO Part 2 S. 42

iv. Requiring a company to deliver to the Registry a return, including a statement of capital, whenever there is a change to its capital structure, to ensure that the public register contains up-to-date information on a company's share capital structure.

New CO Part 4 S. 201

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation



## b. Improving the Registration of Charges

i. Revising the list of registrable charges, such as

- expressly providing that a charge on an aircraft or any share in an aircraft is registrable, and
- removing the requirement to register a charge for the purpose of securing an issue of debentures.

New CO Part 8 S. 334

ii. Replacing the automatic acceleration of the repayment obligation with a choice given to the lender

- as to whether the secured amount is to become immediately payable when a charge is void due to non-compliance with the registration requirements.

New CO Part 8 S. 337(6)

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation



## b. Improving the Registration of Charges

iii. Requiring a certified copy of the charge instrument (in addition to the prescribed particulars of the charge) to be registered and available for public inspection, to provide more detailed info. to those searching the register. **New CO Part 8 S. 335, & etc.**

iv. Shortening the period for delivery to the Registrar of the charge instrument and the prescribed particulars from five weeks to one month, to reduce the period during which the charge is not visible on the register. **New CO Part 8 S. 335 & etc.**

v. Requiring written evidence of satisfaction/release of a charge to accompany a notification to the Registrar for registration of the satisfaction/release, thus making such documents available for public inspection. **New CO Part 8 S. 345.**

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation

## c. Refining the Scheme for Deregistration of Companies

i. Imposing three additional conditions for the deregistration of defunct companies,

- namely that the applicant must confirm that
  - that the company is not a party to any legal proceedings and
  - that neither the company nor its subsidiary has any immovable property in Hong Kong,

to minimise any potential abuse of the deregistration procedure. **New CO Part 15 S. 750 to 751**

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation



## d. Improving the Enforcement Regime

i. Enhancing the investigatory powers of an inspector,

**New CO Part 19 S. 846 to 850**

- for example, by requiring a person under investigation to preserve records or documents and to verify statements made by statutory declaration.

ii. Providing better safeguards to ensure the confidentiality of information obtained in investigations and enquiries and for the better protection of informers.

**New CO Part 19 S. 880 to 885**

iii. Providing new powers for the Registrar to obtain documents or information to ascertain whether any conduct that would constitute an offence in relation to the provision of false or misleading statement to the Registrar has taken place.

**New CO Part 19 S. 873 to 876**

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation



## d. Improving the Enforcement Regime

iv. Strengthening the enforcement regime in relation to the liabilities of officers of companies for the companies' contravention of provisions in the new Ordinance, including

**New CO Part 1 S. 3**

- lowering the threshold for prosecuting a breach or contravention and
- extending it to cover reckless acts through a new definition of "responsible person".

v. Introducing a new offence in relation to inaccurate auditor's reports

**New CO Part 9 S. 408**

- so-called 399 regime, now S. 408
- the offence would be committed if the auditors in question knowingly or recklessly caused two important statements to be omitted from the auditor's report.

# Major Initiatives

(Measures for 4 Main Objectives)

2. Ensuring  
Better  
Regulation

## d. Improving the Enforcement Regime

vi. Empowering the Registrar to compound specified offences to optimise the use of judicial resources.

- Compoundable offences are generally confined to straightforward, minor regulatory offences committed by companies that are punishable by a fine.

New CO Part 20 S. 899



# Major Initiatives

(Measures for 4 Main Objectives)

3. Facilitating  
Business

## a. Streamlining Procedures

i. Allowing companies to dispense with Annual General Meetings by unanimous shareholders' consent.

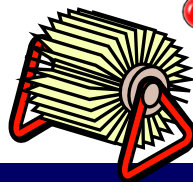
New CO Part 12 S. 612 to 614

ii. Introducing an alternative court-free procedure for reducing capital based on a solvency test.

New CO Part 5 S. 215 to 225

iii. Allowing all types of companies (rather than just private companies, as in the current Companies Ordinance (Cap.32)) to purchase their own shares out of capital, subject to a solvency test.

New CO Part 5 S. 257 to 266



# Major Initiatives

## (Measures for 4 Main Objectives)

### 3. Facilitating Business

#### a. Streamlining Procedures

iv. 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.

- Under the current CO, subject to certain specified exceptions, there is a broad prohibition on the giving of financial assistance to purchase the company's own shares.

New CO Part 5 S. 283 to 289

v. Introducing a new court-free statutory amalgamation procedure for wholly owned intra-group companies.

New CO Part 13 S. 678 to 686

# Major Initiatives

## (Measures for 4 Main Objectives)

### 3. Facilitating Business

#### a. Streamlining Procedures

vi. Streamlining the procedures for the restoration of dissolved companies by court order.

New CO Part 15 S. 765 to 767

vii. Introducing a new administrative restoration procedure for a company dissolved by the Registrar in straightforward cases, without the need for recourse to the court.

New CO Part 15 S. 760 to 762

# Major Initiatives

(Measures for 4 Main Objectives)

## 3. Facilitating Business

### b. Facilitating Simplified Reporting

- i. Facilitating SMEs to prepare simplified financial and directors' reports along the following lines:
  - a private company (with the exception of a bank/deposit-taking company, an insurance company or a stockbroker) will automatically qualify for simplified reporting if it qualifies as a "small private company".
  - the holding company of a group of companies that qualifies as a "group of small private companies" will also qualify for simplified reporting.
  - a private company that is not a member of a corporate group may adopt simplified reporting with the agreement of all the members.

New CO Part 9 S.359-366, S.3

# Major Initiatives

(Measures for 4 Main Objectives)

## 3. Facilitating Business

### b. Facilitating Simplified Reporting

- ii. Allowing small guarantee co. and groups of small guarantee co., which have a total annual revenue of not more than \$25 million, to qualify for simplified reporting.  
New CO Part 9 S.359-366, S.3
- iii. A private co. or a group of private co. which is not qualified as a "small private co." or a "group of small private co." respectively may prepare simplified reports  
New CO Part 9 S.359-366, S.3
  - if it meets a higher size criteria and
  - if the members holding 75% of the voting rights so resolve and no member objects.
- iv. Making the summary financial reporting provisions more user-friendly and extending their application to companies in general (rather than confining them to listed companies)  
New CO Part 9 S. 437 to 446

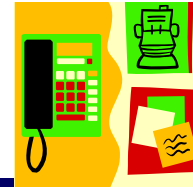
# Major Initiatives

(Measures for 4 Main Objectives)

## c. Facilitating Business Operations

- i. Making the use of a common seal optional and relaxing the requirements for a company to have an official seal for use abroad. **New CO Part 3 S. 124 & etc.**
- ii. Permitting a general meeting to be held at more than one location using electronic technology. **New CO Part 12 S. 584**
- iii. Setting out the rules governing communications to and by companies in electronic form. **New CO Part 18 S. 831 to 837**

3. Facilitating Business



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# Major Initiatives

(Measures for 4 Main Objectives)

## a. Abolishing Par Value for Shares

- i. Adopting a mandatory system of no-par for all companies with a share capital
  - as par value is an antiquated concept that may give rise to practical problems, such as inhibiting the raising of new capital and unnecessarily complicating the accounting regime

**New CO Part 4 S. 135**

4. Modernising the Law



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# Major Initiatives

(Measures for 4 Main Objectives)

## b. Removing the Power to Issue Share Warrants

### i. Removing the power of companies to issue share warrants to bearers.

- Share warrants are rarely issued by companies nowadays and are undesirable from the perspective of anti-money laundering because of the lack of transparency in the recording of their ownership and the manner by which they are transferred.

New CO Part 4 S. 139



4. Modernising  
the Law

# Major Initiatives

(Measures for 4 Main Objectives)

## c. Clarifying the Rules on Indemnification of Directors against Liabilities to Third Parties

### i. Clarifying the rules on the indemnification of directors against liabilities to third parties

- in order to remove the uncertainties at common law.

New CO Part 10 S. 467 & etc.



4. Modernising  
the Law



# The New Companies Ordinance

(From a CPA's Perspective)

23 June 2014



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# The New Companies Ordinance

(From a CPA's Perspective)

23 June 2014



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