

## The Government Consults on Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase Two

### Quick Read

As explained in our previous Legal Update “[New Companies Ordinance Expected to Take Effect in 2014](#)”, the new Companies Ordinance (CO) was gazetted on 10 August 2012 and is expected to take effect in 2014. For the purpose of facilitating the implementation of the new CO, 12 pieces of subsidiary legislation are required to be legislated to provide for administrative, technical and procedural matters.

The consultation on the 12 pieces of subsidiary legislation is conducted in two phases. The Government launched the Phase One consultation on seven pieces of subsidiary legislation on 28 September 2012 and the consultation ended on 9 November 2012. Please refer to our previous Legal Update “[The Government Consults on Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase One](#)” for details of the Phase One consultation.

Closely following the Phase One consultation, the Phase Two consultation was launched on 2 November 2012 on the following five pieces of subsidiary legislation:

- Companies (Trading Disclosures) Regulation
- Companies (Revision of Financial Statements and Reports) Regulation
- Companies (Disclosure of Information about Benefits of Directors) Regulation
- Companies (Residential Addresses and Identification Numbers) Regulation
- Companies (Unfair Prejudice Proceedings) Rules

All comments in response to the “*Subsidiary Legislation for Implementation of the new Companies Ordinance – Phase Two Consultation Document*” (**Consultation Paper**) should be submitted on or before **14 December 2012**.

## An Overview of The Subsidiary Legislation

Please see below a brief comparison of the existing CO regime and the new CO regime in relation to the matters contained in the five pieces of subsidiary legislation under the Phase Two consultation:

THE EXISTING CO REGIME	THE NEW CO REGIME		
	REQUIREMENTS UNDER THE NEW CO	THE RELEVANT SUBSIDIARY LEGISLATION	PROPOSED MAJOR PROVISIONS IN THE RELEVANT SUBSIDIARY LEGISLATION
<p>Requiring a company:</p> <ul style="list-style-type: none"> <li>to display its registered name outside every office and place of business (a list of permitted abbreviations e.g., “HK”, “Co.” and “Ltd.” is provided for such display) (Displaying Requirement)</li> <li>to state its registered name in communication documents such as letters and notices and transaction documents such as contracts, deeds and invoices (Documents Requirement)</li> <li>to disclose its limited liability status by appending the word(s) “Limited” or “有限公司” expressly if required (Company Status Requirement)</li> </ul> <p>Both the company and its officers will be liable for violating the Displaying Requirement. However, only the company (and NOT its officers) will be liable for violating the Document Requirement and Company Status Requirement</p>	<p>The Displaying Requirement, Documents Requirement and Company Status Requirement will not be reproduced in the new CO. Instead, such matters will be prescribed in the subsidiary legislation</p>	<p><b><i>Companies (Trading Disclosures) Regulation</i></b></p>	<p><i>Displaying Requirement</i> – retaining the existing CO regime requirement and including additional requirements for display of name by electronic means. Subject to exemptions, if more than six companies are sharing an office or a place of business, specific requirements will be imposed if an electronic device for display of company names is used</p> <p><i>Document Requirement</i> – retaining the existing CO regime requirement and expanding the scope to include company’s website and documents in electronic form</p> <p><i>Company Status Requirement</i> – retaining the existing CO regime requirement</p> <p><i>Liability</i> - both the company and every responsible person of the company will be liable for violating the Displaying Requirement, Document Requirement and Company Status Requirement</p>

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<p>After the company accounts have been sent to the shareholders, the directors may still revise the accounts, summary financial report and directors' report subject to the following:</p> <ul style="list-style-type: none"> <li>• revision can be made by either replacement or supplementary notes</li> <li>• the revised documents should be approved by the board</li> <li>• the relevant CO provisions regarding the original documents apply equally to the revised documents (as from the date of revision)</li> <li>• an audit report must be prepared on the revised accounts</li> <li>• the revised documents and audit report (Financial Documents) should be sent to the shareholders and the Registrar of Companies (Registrar)</li> <li>• the Financial Documents should be tabled before the first general meeting</li> </ul>	<p>Restating the provision contained in the existing CO regime to allow a company to voluntarily revise its financial statements in the new CO although details will be prescribed by the subsidiary legislation</p>	<p><b><i>Companies (Revision of Financial Statements and Reports) Regulation</i></b></p>	<p>The same general principle that the relevant requirements under the new CO regarding the original documents should equally apply to the revised documents</p> <p>The provisions largely mirror the existing CO regime requirements with necessary modifications to align with the relevant provisions under the new CO:</p> <ul style="list-style-type: none"> <li>• alignment of terms e.g., replacing “accounts” by “financial statements”</li> <li>• alignment of signing and distribution requirements e.g., additional provisions on publishing revised financial statements via a website</li> <li>• alignment of requirements regarding audit report on revised financial statements</li> <li>• alignment of offences and penalties regarding the original documents</li> </ul>

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<p>The following benefits of directors should be disclosed:</p> <ul style="list-style-type: none"> <li>• emoluments</li> <li>• pensions</li> <li>• compensation in respect of loss of office</li> <li>• any dealings entered into by the company in favour of its directors and other relevant persons which involve loans, quasi-loans or credit transactions and any related guarantees and security provided by the company (Dealings)</li> <li>• any contract which is significant to the company's business and in which a director has any material interest</li> </ul>	<p>Very similar disclosure requirements as the existing CO regime (with modifications) as follows:</p> <ul style="list-style-type: none"> <li>• emoluments</li> <li>• retirement benefits</li> <li>• payments or benefits for loss of office</li> <li>• Dealings entered into in favour of directors, their controlled or connected entities</li> <li>• material interests of directors in transactions, arrangements or contracts entered into by group company</li> <li>• payment to third parties for making available the director's services to group company (New Requirement)</li> </ul>	<p><b><i>Companies (Disclosure of Benefits of Directors) Regulation</i></b></p>	<p>Largely restating the existing CO regime requirements with modifications to clarify the law and align changes made under the new CO as follows:</p> <ul style="list-style-type: none"> <li>• additional interpretive provisions covering payment to a director and payment by a person</li> <li>• emoluments explicitly covering bonuses and payments for accepting office</li> <li>• "pensions" will be replaced by "retirement benefits" and expressly include cash and non-cash benefits</li> <li>• two specified types of payment are expressly included for "payments for loss of office"</li> <li>• in relation to the New Requirement, information to be disclosed will be the aggregate amount of any such payment in respect of all directors</li> <li>• only requiring disclosure of Dealings in favour of directors, their controlled or connected entities and NOT officers and refining the relevant disclosure requirements</li> </ul>

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			<ul style="list-style-type: none"> <li>the scope of disclosure in relation to “any contract that is significant to the company’s business and in which a director has any material interest” is expanded to also cover transactions and arrangements and those involving connected entities of directors (for public companies)</li> <li>providing a reporting exemption to private companies which prepare simplified reports</li> </ul>
<p>Directors and company secretaries who are natural persons are required to disclose the following personal information (PI) in documents (PI Documents) delivered to the Registrar for registration:</p> <ul style="list-style-type: none"> <li>usual residential addresses</li> <li>full identification numbers (ID No.)</li> </ul> <p>PI Documents are available for public inspection</p>	<p>To introduce a regime which strikes a balance between protecting the PI and the need for public access to the PI as follows:</p> <ul style="list-style-type: none"> <li>for documents submitted for registration after implementation of the new CO, the PI will not be made available for public inspection generally (Protected PI)</li> <li>for documents already registered, applications can be made to withhold the PI in such documents from public inspection (Withheld PI)</li> </ul>	<p><b><i>Companies (Residential Addresses and Identification Numbers) Regulation</i></b></p>	<p>Prescribing details and procedural requirements relating to applications for withholding PI and disclosure of any Protected PI or Withheld PI</p> <p>Withholding PI applications – the following information should be provided by the applicants:</p> <ul style="list-style-type: none"> <li>the subject address and ID No. to be protected</li> <li>a corresponding address in lieu of the residential address for public inspection</li> </ul> <p>Disclosure applications – specifying the persons who can make an application for disclosure of Protected PI or Withheld PI:</p>

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	<p>For both cases:</p> <ul style="list-style-type: none"> <li>if the residential address is the subject of protection, the correspondence address will be made available for public inspection instead</li> <li>for ID No., part of it will remain available for public inspection</li> <li>allowing legitimate disclosure of Protected PI and Withheld PI via applications by specified groups of persons</li> </ul>		<ul style="list-style-type: none"> <li>the data subject</li> <li>a person authorised by the data subject</li> <li>a shareholder of the relevant company</li> <li>public officers and other specified persons for legitimate reasons</li> <li>a liquidator or trustee of a property of a bankrupt if required in their work</li> </ul>
<p>Empowering the making of a court petition if a company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of the shareholders. The court can make orders to provide relief for the purpose of ending the subject matter</p>	<p>Mainly restating the arrangements under the existing CO regime with the following modifications:</p> <ul style="list-style-type: none"> <li>clarifying the scope of application by providing that a petition may also be made in respect of a proposed act or omission of the company that would be unfairly prejudicial</li> <li>expanding the scope of remedies by allowing the court to make an order requiring the doing of an act which the company has omitted to do</li> </ul>	<p><b><i>Companies (Unfair Prejudice Proceedings) Rules</i></b></p>	<p>Regulating the conduct of unfair prejudice proceedings by providing details on the following:</p> <ul style="list-style-type: none"> <li>the form of the petition</li> <li>the arrangements for presentation of the petition</li> <li>the fixing of the return day on which the court gives directions</li> <li>the requirements on the service of the petition</li> <li>the matters on which the court may give directions on the return day</li> <li>the drawing up of an order and service of the order</li> <li>the court's power to give directions on advertising of the order</li> </ul>

## Way Forward

The Government aims to complete the entire legislative process by July 2013. Upon completion of the necessary procedures, the new CO together with the subsidiary legislation will be brought into operation, tentatively in 2014.

We will closely monitor the latest developments of the new CO and its subsidiary legislation from time to time and will issue updates as and when appropriate. In the meantime, please do not hesitate to contact us if you require any advice or further information.

You may download copies of the Consultation Paper via the link below:

<http://www.cr.gov.hk/en/publications/consultation20121102.htm>

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