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TECH news

A Summary of Amendments to the Companies Ordinance Relating to Oversea Companies

This TechNews provides a summary of the major amendments to the Companies Ordinance ("CO") brought about by the Companies (Amendment) Ordinance 2004 (the "Amendment Ordinance") concerning overseas companies (which will be renamed as "non-Hong Kong companies" in the CO). These amendments will become effective on 14 December 2007. The main purposes of these amendments are to simplify the registration requirements and to enhance the disclosure requirements of non-Hong Kong companies. It also introduces stringent new filing requirements for annual returns for non-Hong Kong companies.



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SUMMARY OF THE MAJOR AMENDMENTS TO THE COMPANIES ORDINANCE ("CO") CONCERNING NON-HONG KONG COMPANIES BROUGHT ABOUT BY THE AMENDMENT ORDINANCE

New Name for "Oversea Company"

1. A company incorporated outside Hong Kong which establishes a place of business in Hong Kong is presently named as an "oversea company" in the CO but has been redesignated as a "non-Hong Kong company" under the Amendment Ordinance.

Definition of "Place of Business"

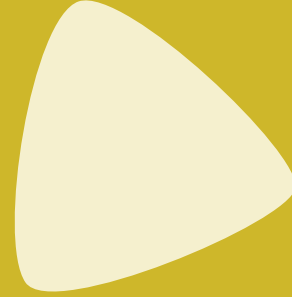
2. The definition of "place of business" in relation to a "non-Hong Kong company" has been simplified to include a share transfer or share registration office but does not include an office specified in Schedule 24 of the CO. Presently, Schedule 24 contains one category of offices, which are local representative offices of banks authorized under the Banking Ordinance by the Monetary Authority. Such a local representative office is not regarded as a "place of business".

Documents, etc., to be Delivered to the Registrar of Companies ("Registrar") by Companies that Establish a Place of Business in Hong Kong

3. Section 333 has been amended to require a non-Hong Kong company applying for registration under Part XI of the CO ("Part XI") to provide the following information in addition to the existing requisite information:
 - (a) date of establishment of place of business in Hong Kong;
 - (b) date of appointment of authorized representative and the number of his/her Hong Kong identity card (if any) or, in the absence of such number, the number and issuing country of any passport held by him/her;
 - (c) where the company is not required by (i) the law of its place of incorporation, or (ii) the laws of any other jurisdiction where the company is registered as a company, or (iii) the rules of any stock exchange or similar regulatory body in any of those jurisdictions, to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of the public, the form to the Registrar shall include a statement stating that fact;
 - (d) where the company has been incorporated for less than 18 months prior to the date of delivery of the form to the Registrar and the accounts that it is required to publish have not been made up, the form shall include a statement stating that fact.

Continuing Obligation in respect of Authorized Representative

4. The period in which a non-Hong Kong company is required to have an authorized representative after it ceases to have a place of business in Hong Kong is shortened from 3 years to 1 year (section 333A(1)).
5. If a non-Hong Kong company has a sole authorized representative who ceases to act as such, the company is required to appoint a new representative and notify the Registrar of such appointment within one month after the outgoing representative ceases to act. At present, the notification period is within 6 weeks (section 333A(2)).



Termination of Registration of Authorized Representative

6. Section 333B has been amended
 - (a) to allow a non-Hong Kong company to terminate the appointment of its authorized representative by sending a notice in writing to him, in addition to allowing the authorized representative to do the same; and
 - (b) to require the company or the authorized representative to send a notice to the Registrar informing him of the date of termination, within one month after the date of the notice of termination, together with a copy of the notice of termination, or a certified translation thereof in English or Chinese if it is in a language other than English or Chinese.
7. The notice to the Registrar as referred to in paragraph 6(b) above shall contain a statement made by the company or the authorized representative stating that the company or the authorized representative has been notified of the termination.
8. The termination shall be effective either (i) on the date of termination as stated in the notice or (ii) 21 days from the date of filing of the notice with the Registrar, whichever is the later.

Annual Return

9. A new section 334 has been added to require every non-Hong Kong company registered under Part XI to file a full annual return every year with the Registrar to set out full details of the company.
10. The annual return shall be filed by a non-Hong Kong company with the Registrar within 42 days after each anniversary of the date of registration of the company under Part XI.
11. The annual return shall contain the following information:
 - (a) the date of the return, which shall be the date of the most recent anniversary of the date of registration of the company under Part XI;
 - (b) the place of incorporation of the company;
 - (c) the name of the company and its registered number in Hong Kong;
 - (d) the date of registration of the company under Part XI;
 - (e) the address of the principal place of business of the company in Hong Kong;
 - (f) the respective addresses of the principal place of business (if any) and the registered office (or its equivalent) of the company in the place of its incorporation;
 - (g) particulars with respect to each person who, at the date of the return, is a director, secretary or authorized representative of the company;
 - (h) in the case of a company having a share capital, particulars relating to the authorized and issued share capital, or their equivalents, of the company; and
 - (i) particulars of the total amount of the indebtedness of the company as at the date of the return in respect of all mortgages and charges that are required to be registered with the Registrar under the CO.

If there has been no alteration in the particulars filed since the date of the last return, the company may file a return of no alteration in lieu of the full return. However, the first annual return filed by a non-Hong Kong company after the commencement of the Amendment Ordinance shall be a full return.



12. With effect from 14 December 2007, upon commencement of the Companies Ordinance (Amendment of Eighth Schedule) Order 2007, the fee payable by a non-Hong Kong company on delivery of an annual return under section 334 of the CO will be as follows:

	HK\$
(i) if delivered within 42 days after the anniversary of registration	180
(ii) if delivered more than 42 days after but within 3 months after the anniversary of registration	1,200
(iii) if delivered more than 3 months after but within 6 months after the anniversary of registration	2,400
(iv) if delivered more than 6 months after but within 9 months after the anniversary of registration	3,600
(v) if delivered more than 9 months after the anniversary of registration	4,800

Therefore, to avoid paying higher filing fees, it is important that a non-Hong Kong company should file its return on time.

13. Where a non-Hong Kong company has, within 3 months immediately before the commencement of the Amendment Ordinance, filed an annual return, the company shall not be obliged to deliver an annual return in the year of that commencement.

Returns to be Delivered to the Registrar where Documents, etc., are Altered

14. Section 335 has been amended

- (a) to specify that a return under that section shall be delivered to the Registrar within 1 month after the date of the relevant change; and
- (b) to require a non-Hong Kong company that changes its name to deliver to the Registrar a certified copy of the instrument effecting the change of name, together with a certified translation of the instrument in English or Chinese if that instrument is in a language other than English or Chinese.

The current requirement is to report any such change within 21 days after the date of change.

Accounts of non-Hong Kong Companies

15. At present, an overseas company may apply for exemption from filing of its accounts if it meets both conditions

(a) and (b) below:

- (a) (i) If the company were incorporated under the CO, it would be a private company within the meaning of section 29; or
 - (ii) In the opinion of the Registrar, the company has substantially the same general characteristics of such a private company.
- and

(b) The company is not required by the law of its place of incorporation to publish accounts or to deliver copies to any person in whose office they may be inspected as of right by members of the public.



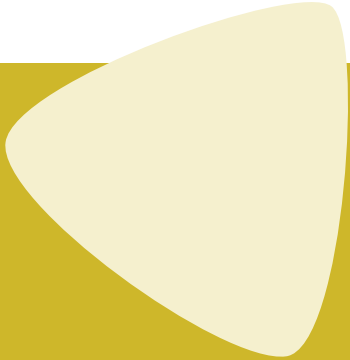
16. Section 336 has been amended to specify circumstances in which a non-Hong Kong company must file accounts. Private company status of a non-Hong Kong company is no longer relevant in determining whether or not a company is required to file accounts under section 336.
17. Under section 336, if a non-Hong Kong company is required by (i) the law of its place of incorporation, or (ii) the laws of any other jurisdiction where the company is registered as a company, or (iii) the rules of any stock exchange or similar regulatory body in any of those jurisdictions, to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of the public, the company shall, within 42 days after each anniversary of its date of registration under Part XI, deliver to the Registrar for registration together with the annual return, a certified copy of its latest published accounts.
18. Where a non-Hong Kong company is neither required by the law of the place of its incorporation nor other relevant jurisdictions or regulatory authorities to publish its accounts or to deliver copies of its accounts to any person in whose office they may be inspected as of right by members of the public, the company shall state that fact in the annual return. Applications for exemption from filing accounts are no longer required.
19. Where a non-Hong Kong company has, within 3 months immediately before the commencement of the Amendment Ordinance, complied with section 336 of the CO that was in force prior to such commencement in delivering documents under that section relating to a financial year, the company shall not be required to file its latest published accounts if those latest published accounts relate to the same financial year.

Obligation to State Place of Incorporation

20. Section 337 has been amended
 - (a) to require a non-Hong Kong company to state in every prospectus inviting subscriptions for its shares or debentures in Hong Kong, to exhibit in every place where it carries on business in Hong Kong, and to state in all bill-heads, letter paper, notices, etc., the "place" of its incorporation instead of the "country" of its incorporation; and
 - (b) to state that a non-Hong Kong company is in liquidation in all documents regardless of where the liquidation proceedings are initiated.

Notice of Commencement of Liquidation and of Appointment of Liquidator

21. Section 337A has been amended
 - (a) to require a non-Hong Kong company to file a notice of commencement of any proceedings for the liquidation of the company, and the appointment of liquidator, regardless of where the liquidation proceedings are initiated;
 - (b) to impose the filing obligation on the non-Hong Kong company only instead of on both the company and its officers; and
 - (c) to provide for a new time limit of 14 days for the delivery of the notice under section 337A.



22. The notice shall be delivered within 14 days after the date of commencement of the liquidation proceedings or within 14 days after the notice of commencement of such proceedings has been served on the company according to the law of the place in which such proceedings are commenced, whichever is the later.

Use of Corporate Name by Non-Hong Kong Companies in Hong Kong

23. Section 337B has been amended

- (a) to provide for the Registrar instead of the Financial Secretary to approve a non-Hong Kong company to use a name other than its corporate name under which it proposes to carry on business in Hong Kong; and
- (b) to allow the Registrar to withdraw a notice served under section 337B(1).

24. When a notice under section 337B(1) is served, a non-Hong Kong company may register with the Registrar a name approved by the Registrar other than the corporate name for carrying on business in Hong Kong. The non-Hong Kong company may also change this name to another new name approved by the Registrar.

Service of Documents on Non-Hong Kong Companies

25. Section 338 has been amended to clarify that any process or notice required to be served on a non-Hong Kong company shall be sufficiently served if it is served on the authorized representative of the company.

26. Where a company has failed to maintain an authorized representative or the authorized representative is unavailable for any reason, or the company no longer has a place of business in Hong Kong, service may be effected by sending by registered post to its registered office, with a copy by registered post to its principal place of business (if any) in its place of incorporation. In cases where no such addresses have been registered, service may be effected by leaving it at or sending it by post to any place in Hong Kong at which the company has had a place of business within the previous 12 months instead of the previous 3 years.

Notices to be Sent when Non-Hong Kong Companies Cease to have a Place of Business in Hong Kong

27. A non-Hong Kong company which ceases to have a place of business in Hong Kong is required to notify the Registrar of such cessation by filing a notice within 7 days after ceasing to have the place of business. Currently, the requirement is to notify the Registrar forthwith.

Notices to be Sent when Non-Hong Kong Companies are Dissolved

28. A new section 339AA has been added to provide that if a non-Hong Kong company is dissolved, an agent of the company shall, within 14 days after the date of dissolution, notify the Registrar of such dissolution, by filing a notice, together with a certified copy of an instrument effecting the dissolution, or a translation thereof in English or Chinese, if the instrument is in a language other than English or Chinese.



Disqualification of Directors

29. Section 168C(1) has been amended to clarify that Part IVA of the CO (relating to disqualification of directors) applies to a non-Hong Kong company.

Application of Part III (relating to Registration of Charges) to Non-Hong Kong Companies

30. Section 91 has been amended to provide that:

- (a) Part III of the CO does not extend to charges on property in Hong Kong of a non-Hong Kong company registered under Part XI if the relevant property was not in Hong Kong at the time the charge was created by the company, or at the time it was acquired by the company subsequent to the creation of the charge.
- (b) Part III also does not apply to a non-Hong Kong company registered under Part XI if:
 - (i) the non-Hong Kong company sends a notice to the Registrar under section 339 of the fact that it has ceased to have a place of business in Hong Kong;
 - (ii) the Registrar enters in the register of non-Hong Kong companies a statement under section 339AA that the company has been dissolved; or
 - (iii) the name of the company is struck off from the register of non-Hong Kong companies under section 339A.
- (c) A ship or aircraft registered in Hong Kong shall be treated as property in Hong Kong regardless of where it is physically located, and a ship or aircraft registered outside Hong Kong shall be treated as property outside Hong Kong.

All businesses with non-Hong Kong companies registered under the CO should urgently review their status and take steps to ensure compliance with these new provisions.

Should you need further information or clarification regarding this TechNews, please do not hesitate to approach your usual Tricor contact.

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