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# Amendments To The Companies Ordinance Relating To Non-Hong Kong Companies To Take Effect On 14 December, 2007

## Introduction

The amendments made by the Companies (Amendment) Ordinance 2004 to the provisions of the Companies Ordinance relating to overseas companies will come into effect on 14 December, 2007. The principal changes include:

* the renaming of "oversea companies" as "non-Hong Kong companies";
* the modernisation of the registration regime for overseas companies;
* a requirement for all non-Hong Kong companies to file a full annual return within a new statutory deadline;
* new provisions relating to the filing of accounts; and
* clarification as to the circumstances in which non-Hong Kong companies are required to file charges over Hong Kong property.

The new provisions affect all overseas companies with an established place of business in Hong Kong. The Companies Ordinance (Amendment of Eighth Schedule) Order 2007 (the **Fees Order**), which restructures the filing fees payable by non-Hong Kong companies, will also take effect on 14 December, 2007.

The purpose of this note is to provide a summary of the principal changes.

## 1. New Term: "Non-Hong Kong Company"

The term "non-Hong Kong company" will replace the existing term, "oversea company" in the Companies Ordinance.

## 2. Modernisation Of The Registration Regime For Non-Hong Kong Companies

### 2.1 New Form N1

A new specified form (Form N1) will be introduced for non-Hong Kong companies applying for registration under Section 333 CO. This will require the inclusion of the following additional information:

1. the date of establishment of the company's place of business in Hong Kong;
2. the dates of appointment of its directors and secretary; and
3. the identification details of its authorised representative in Hong Kong and the date of such person's authorisation.

### 2.2 Requirement to Deliver Accounts

Under the amended law, a non-Hong Kong company applying for registration under Part XI CO will not have to deliver its accounts in the following circumstances:

1. if it is not required 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 by (a) the law of the company's place of incorporation, (b) the laws of any other jurisdictions where the company is registered as a company, or (c) the rules of any stock exchange or similar regulatory bodies in such jurisdictions; or
2. if it has been incorporated for less than 18 months and the accounts that it is required to publish have not yet been made up.
* If either of the above circumstances (the **Specified Circumstances**) applies, the company should include a statement to that effect in the Form N1 (new Sections 333(3)(e) and 333(8) CO). It will no longer be necessary for a non-Hong Kong company to establish its status as a private company in order to be exempt from the requirement to deliver its accounts.

## 3. Reporting Changes In Respect Of Non-Hong Kong Companies

Section 335 has been amended to require delivery of returns within 1 month of alterations in:

1. the constitutive documents of the company (Form N5);
2. the company's directors, secretary or authorised representative (Form N6) or their particulars (Forms N7 and N8);
3. the address of the company's principal place of business in Hong Kong or its registered office, or the address of its principal place of business in its place of incorporation (Form N9); and
4. the company's corporate name (Form N10). A certified copy of the instrument effecting the change of name, together with a certified translation in English or Chinese (if applicable) is required to be submitted with Form N10.

## 4. Filing Of Annual Returns And Accounts

### 4.1 Existing Position

The CO currently requires overseas companies to file an annual return confirming that there has been no alteration in the documents and particulars delivered under Section 333 (other than alterations notified under Section 335) together with certified copies of their accounts. An overseas company can however claim an exemption from the requirement to file annual returns and accounts if it can establish that it has substantially the same characteristics as a private company.

### 4.2 New Mandatory Requirement for Filing Annual Returns

Under the amended law, it will no longer be possible for non-Hong Kong companies to apply for an exemption from the requirement to file an annual return. Accordingly all non-Hong Kong companies will be required to deliver an annual return within the new statutory deadline, which is within **42 days** after each anniversary of the date of the company's registration under Part XI (new Section 334 CO).

A new form of annual return (Form N3) has been introduced which requires fuller disclosure than the existing form. The first annual return filed by a non-Hong Kong company after 14 December, 2007 must be presented in the new Form N3. Thereafter, if there has been no change in the particulars required to be filed since the date of the last annual return, companies will be able to make a return by filing a certificate in the specified form (Form N4) stating that fact.

### 4.3 Accounts

A non-Hong Kong company will be required to submit a certified copy of its latest published accounts (or a certified translation in English or Chinese where such accounts are in another language), together with its annual return within **42 days** after each anniversary of the date of the company's registration under Part XI (new Section 336(1) CO).

A company will not however be required to submit its accounts if either of the Specified Circumstances referred to in paragraph 2.2 above applies. In that case, the company should state that fact in the annual return. It will no longer be necessary to apply for an exemption from the requirement to file accounts or to submit explanatory letters for not submitting accounts where the reason is that the company has been incorporated for less than 18 months and the accounts have not yet been prepared.

### 4.4 Escalating Fees for Late Filing

Under amendments introduced by the new Fees Order, non-Hong Kong companies will have to pay an annual registration fee on delivery of the annual return. The Fees Order introduces an escalating fee scale which is determined by the time of delivery of the annual return.

### 4.5 Transitional Provisions for Filing Annual Returns and Accounts

According to Companies Registry External Circular No. 4/2007, the new requirements in relation to the filing of annual returns and accounts for 2007 will apply only to non-Hong Kong companies with anniversary dates of registration falling on or after 14 December.

New Section 334(6) further provides that non-Hong Kong companies which are required to file a return in 2007 under the amended law will not have to do so if they have filed a return within the 3 months immediately preceding 14 December, 2007. Similarly, if they have filed documents in accordance with the pre-amended Section 336 CO within the 3 months immediately preceding 14 December, they will not be required to deliver their latest published accounts after 14 December if those latest published accounts relate to the same year.

## 5. Registration Of Charges

### 5.1 The Current Position

The new Section 91 CO clarifies the circumstances in which non-Hong Kong companies are required to register charges on their property. The current Section 91(1) requires that charges on property in Hong Kong which are created or acquired by an oversea company which has a place of business in Hong Kong must be registered under Section 80 CO. The charge must be registered within 5 weeks of the date of creation otherwise it becomes void as against a liquidator and other creditors of the oversea company.

The difficulty with this situation is that the requirement to register a charge under Section 91 applies even if the company has failed to register as an oversea company under Part XI. This is compounded by the uncertainty regarding the definition of "place of business" which applies for the purposes of Part XI under Section 341 CO. Accordingly, it has become common practice to effect a so-called "Slavenburg registration" in the case of overseas companies that are not registered under Part XI. This means that particulars of the charge are delivered to the Registrar of Companies (the **Registrar**) even though the company is not registered under Part XI.

### 5.2 The new requirements

Under the new Section 91, only charges on Hong Kong property created or acquired by non-Hong Kong companies which are registered under Part XI will be required to be registered with the Registrar of Companies under Section 80. Accordingly, charges created by non-Hong Kong companies which are not registered under Part XI will not need to be registered.

New Section 91(2) further clarifies that charges of a Part XI registered non-Hong Kong company are not required to be registered if the relevant property was not in Hong Kong at the time the charge was created by the company or at the time the property was acquired by the company subsequent to the creation of the charge. New Section 91(7) specifies that ships and aircraft that are registered in Hong Kong will be treated as property in Hong Kong irrespective of their physical location. Likewise, ships and aircraft registered outside Hong Kong will be treated as property outside Hong Kong.

## 6. Notification Of Liquidation/Dissolution/Cessation Of Place Of Business

### 6.1 Commencement of Liquidation and Appointment of Liquidator

Section 337A CO has been amended to require non-Hong Kong companies to notify the Registrar of the commencement of liquidation proceedings, regardless of whether the proceedings are commenced in their places of incorporation or otherwise. New Form N11 containing detailed information in relation to the liquidation and the appointment of a liquidator must be delivered within **14 days** after the later of: (i) the date of commencement of liquidation proceedings, and (ii) 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. Any change in the particulars given in Form N11 must also be notified to the Registrar within 14 days.

### 6.2 Cessation of Place of Business

A non-Hong Kong company must notify the Registrar on Form N13 within **7 days** after ceasing to have a place of business in Hong Kong (Section 339 CO).

### 6.3 Dissolution

A new Section 339AA requires a non-Hong Kong company to file notice of its dissolution (Form N14) together with a certified copy or certified translation of the instrument effecting the dissolution within **14 days** of the date of dissolution.

## 7. Authorised Representatives

### 7.1 Definition

The term "authorised representative" has been defined in Section 341(1) as a person authorised by a non-Hong Kong company to accept service of process and notices on its behalf.

### 7.2 On Cessation of Place of Business

Under the amended Section 333A, non-Hong Kong companies will be required to keep an authorised representative for **1 year** (instead of 3 years) after it ceases to have a place of business in Hong Kong.

### 7.3 Termination of Registration

Section 333B has been amended to allow a non-Hong Kong company to terminate the appointment of its authorised representative by sending him a written notice. A copy or a certified translation of a notice of termination, whether given by the authorised representative or by the non-Hong Kong company, must be filed with the Registrar, together with Form N2 within **1 month** after the date of the notice of termination. The termination will take effect on the later of: (i) the date of termination of the authorisation as stated in the notice and (ii) 21 days after the notice of the termination is filed with the Registrar.

### 7.4 Service of Documents

Currently, any process or notice required to be served on an overseas company is sufficiently served if addressed to any person whose name has been given to the Registrar under Part XI CO. This means that the process or notice may be sent to the directors or secretary of the company.

Under the amended law, any process or notice is required to be served on the company's authorised representative (Section 338(1) CO).

Section 338(2)(b)(ii) has also been amended to provide that, if a non-Hong Kong company no longer has a place of business in Hong Kong and the addresses of its registered office and principal place of business have not been registered, a document may be served on the company 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 (rather than 3 years under the current CO).

## 8. OTHER AMENDMENTS

### 8.1 Definition of "Place of Business"

The definition of "place of business" in Section 341 has been simplified. It now includes a share transfer office or share registration office but does not include an office specified in the Twenty-fourth Schedule to the CO (i.e. a local representative office established or maintained with the approval of the Monetary Authority by a bank).

### 8.2 Regulation of Use of Corporate Names

The Registrar (rather than the Financial Secretary) will approve the use by a non-Hong Kong company of a name other than its corporate name (Section 337B(3)). New Form N12 should be used in this respect.

### 8.3 Inspection, Production and Evidence of Documents kept by the Registrar

Under new Sections 305(1)(b)(iia) and (iib), it will be possible to obtain a certificate certifying that a non-Hong Kong company is registered under Part XI and, where a non-Hong Kong company has changed its name, a new certificate certifying that the company is registered under Part XI with the new name, on payment of the prescribed fees.

### 8.4 Partnerships: No Maximum Number of Partners

The cap on the maximum number of partners in a partnership (currently 20) will be removed.

## 9. Amendments To The Eighth Schedule To The Companies Ordinance

Filing fees for non-Hong Kong companies will be restructured under the Companies Ordinance (Amendment of Eighth Schedule) Order 2007. The principal changes which will take effect from 14 December, 2007 are:

1. A single filing fee will replace the current requirement for a HK$20 registration fee to be paid on the filing of each document other than the annual return.
2. An annual registration fee will be payable on delivery by a non-Hong Kong company of its annual return. The amount of the fee is determined by reference to the time of delivery of the annual return. The escalating fee scale is aimed at encouraging compliance with the requirement to file within 42 days of the anniversary of the company's registration under Part XI.
3. A new fee will be payable for the issue of certificates of registration for non-Hong Kong companies.

The purpose of this note is to provide a summary only of the amendments relating to overseas companies to be made by the Companies (Amendment) Ordinance 2004. Specific advice should be sought in relation to any particular situation.

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