

New Companies Ordinance
Briefing Notes on Part 16
Non-Hong Kong Companies

INTRODUCTION

Part 16 (Non-Hong Kong Companies) of the new Companies Ordinance (“new CO”) contains provisions relating to non-Hong Kong companies, i.e. companies incorporated outside Hong Kong that have established a place of business in Hong Kong.

POLICY OBJECTIVES AND MAJOR CHANGES

2. Part 16 essentially restates Part XI of the Companies Ordinance (Cap. 32) (“Cap. 32”) which had been substantially amended by the Companies (Amendment) Ordinance 2004 mainly with a view to simplifying the filing requirements. In Part 16, there are no substantive changes to the registration regime of non-Hong Kong companies under Cap. 32. However, some clarification and modification of the regime are made, which aim at improving regulation and modernising the law, namely –

- (a) Clarifying provisions on changes of corporate names of non-Hong Kong companies (paragraphs 5 and 6 below);
- (b) Clarifying provisions for striking the name of a non-Hong Kong company off the Companies Register and restoration of the company to the Companies Register (paragraphs 7 to 9 below);
- (c) Moving certain procedural details to subsidiary legislation (paragraphs 10 and 11 below); and
- (d) Modifying the penalty provisions to align with those of Hong Kong incorporated companies (paragraphs 12 to 13 below).

3. Apart from the above changes, Part 16 also provides for a company to appeal to the Administrative Appeals Board, instead of to the court, against a notice issued by the Registrar of Companies (“the Registrar”) concerning the company’s name (paragraphs 14 to 15 below). This change was suggested by Members of the Bills Committee on the Companies (Amendment) Bill 2010.

4. The details of the above major changes are set out in paragraphs 5 to 15 below.

Clarifying provisions on changes of corporate names of non-Hong Kong companies (Sections 778 to 779)

Position under Cap. 32

5. Section 335(2) of Cap. 32 requires a non-Hong Kong company to notify the Registrar of any change of its corporate name. The provision is fairly general. There may be uncertainty as to whether notification is required in certain scenarios, such as where there is a change to the registered name of the company in its place of incorporation without a change in the translation appearing on the register which is being used as the company’s corporate name in Hong Kong.

Position and key provisions in the new CO

6. **Section 778** clarifies the notification requirements in various scenarios relating to the changes of corporate names of non-Hong Kong companies. **Section 779** clarifies the registration procedures for change of corporate name.

Clarifying provisions for striking the name of a non-Hong Kong company off the Companies Register and restoration of the company to the Companies Register (Sections 796 to 801)

Position under Cap. 32

7. Section 339A of Cap. 32 empowers the Registrar to remove the name of a non-Hong Kong company from the register if there is reasonable cause to believe that the company has ceased to have a place of business in Hong Kong, by applying the provisions relating to the striking off of local defunct

companies in Cap. 32, with such adaptations as are necessary. Such a legislative provision by way of reference is considered unsatisfactory and may give rise to uncertainty as to which provisions would apply.

Position and key provisions in the new CO

8. To avoid the uncertainty in the application of a legislative provision by way of reference, express provisions are introduced in Part 16 to clarify the matters.

9. Division 8 of Part 16 comprising **sections 796 to 801** expressly sets out the steps that the Registrar should take before striking the name of a non-Hong Kong company off the Companies Register, the procedures for a director or member of a non-Hong Kong company that has been struck off to apply to the Registrar for its restoration to the Companies Register, and the conditions for granting such an application.

Moving certain procedural details to subsidiary legislation (Section 805)

Position under Cap. 32

10. The procedural and technical details concerning the registration of and returns to be made by non-Hong Kong companies are set out in sections 333, 334 and 335 of Cap. 32. These include the particulars to be contained in the applications or returns and the accompanying documents. Such procedural and technical details are likely to require updating over time.

Position and key provisions in the new CO

11. To facilitate future updating, the requirements for procedural and technical details have been moved from primary into subsidiary legislation. **Section 805** empowers the Financial Secretary to make regulations to prescribe certain procedural and technical details. The details will be set out in the **Companies (Non-Hong Kong Companies) Regulation**. These details include, among others –

- (a) the particulars to be contained in applications for registration of non-Hong Kong companies and the documents to accompany such applications;

- (b) the particulars to be contained in annual returns or returns of change of certain particulars by registered non-Hong Kong companies and the documents to accompany such returns; and
- (c) the documents to accompany a notice of the termination of the authorization of an authorized representative by a registered non-Hong Kong company to the Registrar.

Modifying the penalty provisions to align with those of Hong Kong incorporated companies

Position under Cap. 32

12. Section 340 of Cap. 32 imposes liability with a uniform level of penalty on a non-Hong Kong company that is in default of any provisions under Part XI as well as every officer or agent of that company who authorizes or permits the default. Under the Twelfth Schedule to Cap. 32, a fine of up to \$50,000 (level 5) may be imposed summarily upon any of these persons for any offence under Part XI and a daily default fine of \$700 may also be imposed for any continuing default. The imposition of a uniform level of penalty for different types of offences is considered unsatisfactory. It would also result in an offence of similar nature being subject to different penalty levels, depending on whether the company is a locally incorporated or a non-Hong Kong company.

Position and key provisions in the new CO

13. In the new CO, the offence provisions are set out in individual sections of Part 16. The penalty levels are generally aligned with comparable offence provisions for Hong Kong incorporated companies. Following the offence provisions for Hong Kong incorporated companies, “every officer of the company who authorizes or permits the default” is replaced by “responsible person” which is defined in **section 3** of the new CO to mean an officer of the non-Hong Kong company who authorizes or permits, or participates in the contravention.

Allowing a company to appeal to the Administrative Appeals Board instead of to the court (Section 784)

Position under Cap. 32

14. Under Cap. 32, where the Registrar is satisfied that the name of a non-Hong Kong company gives so misleading an indication of the nature of its activities in Hong Kong as to be likely to do harm to the public, the Registrar may issue a notice to the company pursuant to section 337B(1). The company cannot carry on business under that name two months after the notice is served, unless the company applies to the court to set aside the notice.

Position and key provisions in the new CO

15. At the meeting of the Bills Committee on the Companies (Amendment) Bill 2010, Members suggested that a company should be allowed to appeal to the Administrative Appeals Board, instead of to the court, against a change-of-name direction / notice issued by the Registrar in view of the cost and time involved in court proceedings. The suggestion was agreed and, for non-Hong Kong companies, the relevant changes have been incorporated in **section 784**.

TRANSITIONAL AND SAVING ARRANGEMENTS

16. The transitional provisions are set out in detail in **sections 132 to 140 of Schedule 11** to the new CO. The position relating to pending applications for registration and registration of returns is that they are regarded as applications made under the new CO but fees will be paid by reference to the Eighth Schedule to Cap. 32. In most other cases, the general position is that where the action was commenced under Cap. 32, the provisions of Cap. 32 will continue to apply, for example, service of notice regarding cessation of a place of business, notice of dissolution, striking the name of a non-Hong Kong company off the register and restoration of company to the register.

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