

**For information
on 4 February 2002**

**The Legislative Council
Panel on Financial Affairs**

**Proposed Reform of the
Registration System for Oversea Companies**

PURPOSE

This paper informs Members of the proposed reform of the registration system for overseas companies.

BACKGROUND

2. A company incorporated outside Hong Kong which establishes a place of business in Hong Kong is called an overseas company in the Companies Ordinance (the Ordinance). The registration regime for overseas companies is provided for in Part XI of the Ordinance. The main reasons for requiring such registration are as follows -

- (a) to help the local regulatory authorities to monitor the activities of foreign incorporated companies;
- (b) to protect local creditors and businessmen by making available a minimum amount of information about the companies;
- (c) to give local courts an in personam jurisdiction in order to permit lawsuits in Hong Kong; and
- (d) to provide an incontestable means of serving legal process on the company should the need arise.

3. One of the recommendations in the Consultancy Report on the Review of the Hong Kong Companies Ordinance is that the filing requirements for registration as a foreign company should be simplified. In this regard, the Registrar of Companies (the Registrar), with the blessing of the Standing Committee on Company Law Reform (SCCLR), has chaired a Sub-Committee under the SCCLR to undertake a comprehensive review of Part XI of the Ordinance and all the other provisions of the Ordinance

which apply to oversea companies.

4. In conducting the review and drawing up its recommendations, the Registrar has sought to balance the needs of regulation through enhanced disclosure requirements while making the registration regime for oversea companies as user friendly as possible. The recommendations of the Sub-Committee have been approved by the SCCLR as the basis for drafting legislative amendments to the Ordinance.

PROPOSALS

The term “oversea company”

5. The term “oversea company” used in the Ordinance is considered outmoded and inappropriate in Hong Kong’s present circumstances. We **propose** that the term should be replaced by “non-Hong Kong company”. (For the purpose of this paper, we would continue to refer to the term “oversea company”.) Moreover, the existing definition¹ of the term “a place of business” (the establishment of which in Hong Kong is used as the test to define an oversea company) should be simplified to remove the outmoded elements of share transfer/share registration office and place used for the manufacture or warehousing of goods.

Documents delivered to Registrar

6. An oversea company is required to deliver various documents to the Registrar within one month of the establishment of its place of business in Hong Kong. However, the documents need not contain the date of establishment of the place of business. We **propose** that an oversea company should give such information to make it easier for the Registrar to check whether the company had complied with the requirement of registering under Part XI of the Ordinance within one month of the establishment of the place of business. The information is also useful to the public.

¹ The term “place of business” is at present defined to include a share transfer or share registration office and any place used for the manufacture or warehousing of any goods, but does not include a place not used by the company to transact any business which creates legal obligations. The first two elements i.e. a share transfer or share registration office, and a place used for the manufacture or warehousing of goods are considered outmoded. They need not be retained in the new definition of “place of business”.

7. We also **propose** that the identity card number of an individual authorized representative of an overseas company, or in the absence of such number, the number and issuing country of any passport held by him, should be required as it will facilitate the service of process on the authorized representative. The date of appointment of the authorized representative should also be given.

Changes in Corporate Names of Oversea Companies

8. An overseas company is required to deliver a return to the Registrar on a change in its corporate name. The Registrar shall, upon registration of such return, issue a fresh certificate containing the name of the company as so changed. We **propose** that the company should file with the return a certified copy of the instrument effecting the change and a certified translation thereof in English or Chinese if the instrument is in a language other than English or Chinese. We consider it appropriate for the general public to have access to such document to enhance disclosure.

Electronic Filing of Documents and Use of Digital Signatures

9. To facilitate the electronic filing of documents and the use of digital signatures, we **propose** amendments to certain sections of the Ordinance. For example, the reference to the Registrar certifying under his hand that a company is one registered under Part XI of the Ordinance should be amended to refer to the Registrar issuing a certificate.

Continuing Obligation in respect of Authorized Representative

10. An overseas company is required to register under the Ordinance the name and address of an authorized representative resident in Hong Kong, until the expiration of a period of three years from the date on which it ceases to have a place of business in Hong Kong. The purpose is to provide a useful record of an overseas company for a certain period after the company has ceased to have a place of business in Hong Kong in case a member of the public wishes to issue a writ against or serve notice on the company.

11. Whilst the requirement should be retained, the period of three years for keeping an authorized representative appears to be arbitrary. We **propose** to shorten the period to one year.

Termination of Registration of Authorized Representatives

12. An authorized representative of an overseas company may file with the Registrar a statutory declaration for termination of his registration under the Ordinance. Such termination will come into effect on the expiration of a period of six weeks from the date of the filing of the statutory declaration. We **propose** that the statutory declaration should be replaced by a notice in the specified form so as to facilitate electronic filing. The specified form, in which the effective date of the termination shall be stated, may be filed by either the authorized representative or the company.

13. Where an overseas company has ceased to have a place of business in Hong Kong for a period of not less than 3 years, the Registrar is required under the Ordinance to remove from the register the particulars of the company's authorized representative on the application of the company. We **propose** to delete this requirement as the purpose of the requirement is served by section 339 of the Ordinance, which is to be amended to provide that, if any overseas company ceases to have a place of business in Hong Kong, it shall give notice of the fact to the Registrar within seven days after ceasing to have such a place of business.

Return to be delivered to Registrar where documents, etc. altered

14. An overseas company is currently required to notify the Registrar of any changes to the original information filed by the company within -

- (a) 21 days after the date of making of such alterations; or
- (b) 21 days after the date on which notice thereof could, in due course of post and if dispatched with due diligence, have been received in Hong Kong.

In view of the frequent use of facsimiles and, in future, e-filing, we **propose** to delete (b) above.

Filing of Annual Return

15. An overseas company is currently required to file an annual return confirming that there has been no alteration in the original information filed by the company other than any alteration notified under the Ordinance. This arrangement makes it necessary for members of the public to search many documents relating to an overseas company in order to find out details of changes relating to the company. Moreover, an overseas company may be exempted from the requirement to file either the annual return or accounts. The exemption applies to an overseas company which if incorporated under the Ordinance would constitute a private company or which is considered to have substantially the same general characteristics as a private company, and in either case is not required by the law of its place of incorporation to publish its accounts or to make them available to members of the public as of right.

16. In the interest of making full and more timely disclosure, we **propose** that all overseas companies should be required to file an annual return. The return should state -

- (a) the place of incorporation of the company;
- (b) the company name and its registered number in Hong Kong;
- (c) the date of registration of the company;
- (d) the address of the company's principal place of business in Hong Kong;
- (e) the particulars with respect to the persons who, at the date of the return, are the directors, secretary and authorized representative of the company;
- (f) a statement confirming whether the company's most recently published accounts² have been filed with the Registrar, or will not be filed for the reason that the company was neither required to publish and file accounts in the place of its incorporation or in any other jurisdiction to deliver copies to any person in whose office they might be inspected as of right by members of the public;

² The accounts may be required by the law in the place of the company's incorporation or under the law of any other jurisdiction or under the rules of any stock exchange or regulator.

- (g) particulars relating to the authorized share capital and issued share capital or its equivalent of the company; and
- (h) particulars of the total amount of the indebtedness of the company in respect of all mortgages and charges which are required to be registered with the Registrar under the Ordinance.

The time limit for filing the return should be the same as that for local private companies i.e. 42 days from the anniversary date of the company's registration. An annual return in the form of a "certificate of no change" may be filed where there has been no change in the information on the company contained in the last annual return which was filed in full format, with the exception of the information contained in the accounts.

Accounts of Oversea Companies

17. An overseas company is currently required to provide the Registrar with certified copies of various accounting records of the company unless it fulfils the exemption criteria (see paragraph 15 above).

18. We consider that there should not be any distinction between private and public companies for the purposes of filing of accounts. Hence, we **propose** to delete the existing exemption mentioned in paragraph 17 above, i.e. every overseas company, which is required by the law of the place of its incorporation or origin or any other jurisdiction or the rules of any stock exchange or regulator to publish accounts or to make them available to members of the public as of right, should be required to deliver to the Registrar copies of the accounts. In this regard, only the most recently published accounts should be required. If an overseas company is not required to publish its accounts or make them available to members of the public as of right, a statement to that effect shall be provided to the Registrar. Moreover, if an overseas company has been incorporated within a period of 18 months prior to the date of registration under the Ordinance and no accounts have yet to be published or made available, a written statement to that effect should be provided to the Registrar.

19. The Ordinance presently empowers the Registrar to require an overseas company to submit accounts in such form as he may require if he thinks that the accounts already submitted by the company do not disclose the company's financial position. There is little justification for such power which in fact has never been invoked. We therefore **propose** to remove such power.

20. We also **propose** that the accounts should be filed at the same time as the annual return mentioned in paragraph 16 above, so as to secure more updated information from an overseas company which will be available for public search.

Obligation to state Names of Oversea Companies, whether limited and Countries where incorporated

21. At present, if an overseas company is in liquidation in its place of incorporation, the company needs to state so in certain documents of the company.

22. For better disclosure, we **propose** that the requirement for stating that a company is in liquidation should apply to all overseas companies including those companies which are put into liquidation in a place other than their places of incorporation.

Notice of Commencement of Liquidation and of Appointment of Liquidator

23. Under the present provisions in the Ordinance, an overseas company and its officers in Hong Kong are required to notify the Registrar of the commencement of any proceedings for the liquidation of the company in the country in which it is incorporated and the appointment of a liquidator. Any such notice is required to be delivered within 7 days after the date on which such notice could, in due course of post and if despatched with due diligence from the country in which the company is incorporated, have been received in Hong Kong. For the same reason given in paragraph 22 above, we **propose** that these requirements should apply to all overseas companies regardless of whether the proceedings are initiated in their places of incorporation or otherwise. We also **propose** that it should be sufficient for the obligation to deliver the notice to the Registrar to be imposed on the company alone as opposed to the company and its officers. Moreover, the time limit for delivering the notice to the Registrar should be 7 days after the date of commencement of the liquidation.

24. To improve disclosure for the general public, we **propose** that detailed information regarding the liquidation and the appointment of a liquidator would include the date of commencement of the liquidation proceedings; the country in which such proceedings have been commenced; the mode of liquidation and capacity and status of the liquidator; and the date of appointment, resignation or cessation of appointment of the liquidator.

Regulation of Use of Corporate Names by Oversea Companies in Hong Kong

25. The Ordinance empowers the Registrar to serve notice on an overseas company under certain circumstances requiring the company to change its name. The company may apply to the court for such notice to be set aside, but otherwise it must specify another name, approved by the Financial Secretary. In practice, the power to approve such a name has already been delegated to the Registrar. Prior to the submission of another name to the Registrar, the applicant would have informally checked the name with the Registrar. We **propose** to amend the law so that the power to approve should more appropriately be vested in the Registrar.

26. We also **propose** that the Registrar should be empowered to withdraw the notice mentioned in paragraph 25 above, to cater for cases in which a local company having an identical name has released its name to the overseas company.

Service of Documents on Oversea Companies

27. At present, the Ordinance provides that any process or notice required to be served on an overseas company shall be sufficiently served if addressed to any person whose name has been delivered to the Registrar under Part XI of the Ordinance and left at or sent by post to his address as so delivered. This may mean that the process or notice may be sent to the directors and secretary of the company, which is not what we intend. We **propose** that the law should be made clear that the process or notice should be sent to an authorized representative of the company as notified to the Registrar.

28. If an overseas company no longer has a place of business in Hong Kong and the addresses of its registered office and principal place of business are not known, 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 three years. We **propose** that the period should be shortened to one year, which is more reasonable.

Notices to be given when Oversea Companies cease to have a Place of Business in Hong Kong

29. The Ordinance provides that if any overseas company ceases to have a place of business in Hong Kong, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease. It would be desirable to set a clear time limit for filing the notification. We **propose** that filing should be made within seven days after the company ceases to have a place of business in Hong Kong.

Removal etc of Names of Oversea Companies from Register

30. When the Registrar receives notice from an agent of an overseas company registered under the Ordinance that the company has been dissolved, he must remove the name of the company from the register of overseas companies, and where the Registrar has reasonable cause to believe that an overseas company has ceased to have a place of business in Hong Kong, the Registrar may strike off the company. We **propose** that the notice of dissolution should be accompanied by evidence of dissolution so as to guard against false information. Moreover, as the Registrar does not, in practice, remove the name of a dissolved company from the register but instead makes an entry in the register to reflect the dissolution of the company, we **propose** that the law be amended to reflect the practice. To improve disclosure, we **propose** that there be a time limit of 14 days for the filing of notice of dissolution.

Certification and Translation of Documents delivered to Registrar

31. The Ordinance stipulates that documents constituting the constitution of an overseas company and the company's latest accounts, required to be delivered to the Registrar, shall be deemed to be certified as a true copy if, in the jurisdiction in which the company is incorporated, they are duly certified as a true copy by an official of the Government to whose

custody the original is committed or by a notary public of such jurisdiction. In response to representations to the Registrar about the difficulties of complying with such certification requirements, we **propose** that the certification process may take place in Hong Kong, in addition to the company's place of incorporation; and persons such as solicitors, accountants, officers of the court, consular officers etc may be allowed to certify the documents.

32. The Ordinance requires that where translated versions of documents are delivered by an overseas company to the Registrar, the competency of the person making such translation should be certified by persons such as a notary public (if such translation is made outside Hong Kong), or a notary public or a solicitor in Hong Kong (if it is made in Hong Kong). To broaden the types of persons who could certify the competency, we **propose** to allow other persons such as accountants, officers of the court, consular officers etc. to certify.

Registration of Charges

33. Sections 91(1) and (3) of the Ordinance extend the application of Part III of the Ordinance (on registration of charges) to overseas companies. However, there is no express provision that the companies must be registered under Part XI before a charge is registrable. Such uncertainty about the application of the two sections is not satisfactory. We **propose** that the registration requirement would apply only to charges created by overseas companies registered under Part XI of the Ordinance. In this regard, details of the charges to be registered with the Registrar should be sent to the Registrar within 5 weeks after the date of registration of the company under Part XI of the Ordinance.

34. We also **propose** that a charge which applies to property situated outside Hong Kong at the time of creation or acquisition of the charge but which was subsequently brought into Hong Kong should be required to be registered. However, we do not intend to require every floating charge created by an overseas company to be registered in Hong Kong, as this may discourage overseas companies from doing business here. Property which is the subject of a floating charge need be registered only when such property remains in Hong Kong for a period in excess of five weeks cumulative following the date on which the company has established its place of business in Hong Kong.

35. We also **propose** that the interpretation of “property in Hong Kong” in the two sections should be qualified to the effect that ships and aircraft shall always be deemed to be situated in the jurisdictions in which they are registered. Charges on them need not be registered under the Ordinance unless they are registered in Hong Kong.

Miscellaneous Amendment to the Ordinance

36. Section 155C of the Ordinance, which was introduced in 1984, requires a Hong Kong incorporated company that issues a prospectus or a statement in lieu of prospectus to send a copy to each of its members. This requirement is considered an expensive and burdensome obligation for listed companies having a substantial number of members. As the issue of shares by listed companies will already have been approved by the members in general meeting, we **propose** that listed companies should be exempted from the requirement to send a copy of the corresponding prospectus (or statement in lieu) to each of its members.

Way Forward

37. We are drafting the above proposed amendments to the Ordinance. The intention is to introduce the amendments into the Legislative Council in the current legislative session.

Financial Services Bureau

26 January 2002

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