

## Major changes under the New Companies Ordinance, Chapter 622 effected on 3 March 2014 that are applicable to Hong Kong companies limited by guarantee without a share capital

*The New Companies Ordinance has grouped the 2 types of companies limited by guarantee without a share capital available under the original Companies Ordinance, ie, private and non-private, as one category called companies limited by guarantee without a share capital and standardised the requirements.*

*For easy reference, the original Companies Ordinance, Chapter 32 is referred below as Cap 32 and the New Companies Ordinance as the New CO.*

### 1. Constitutional documents and common seal

#### 1.1 Abolition of Memorandum of Association

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- Under Cap 32, the constitutional documents of a Hong Kong company includes the Memorandum of Association (MOA) and Articles of Association (AOA).</li> <li>- The New CO abolishes the MOA and the current provisions in the MOA of existing companies, except those being abandoned or abolished under the New CO, will be deemed as provisions in the AOA.</li> <li>- So, the AOA is the only constitutional document of all Hong Kong companies.</li> <li>- Table C under Cap 32 will be repealed and new Model Articles are introduced under the New CO.</li> <li>- The provisions in Table C as adopted in the AOA of the existing companies will remain valid in so far as they are not modified by the provisions of the New CO.</li> <li>- The current provisions in the AOA of existing companies will remain valid so far as they are not modified by the provisions of the New CO.</li> </ul>	<ul style="list-style-type: none"> <li>- Although the AOA of existing companies can continue to be used without the need to change on commencement of the New CO, it is recommended that existing companies to review their current constitutional documents to take advantage of the new initiatives set out in the New CO and remove those provisions that are not in line with the provisions in the New CO to avoid confusion and misunderstanding.</li> </ul>

## 1.2 Common seal becomes optional

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO provides that it is optional for a company to have a common seal.</li> <li>- The New CO has introduced provisions on execution of documents other than under the common seal which has the effect as if the document has been executed under common seal.</li> </ul>	<ul style="list-style-type: none"> <li>- Existing companies may simply continue to keep and use the common seal in accordance with the provisions of its AOA.</li> <li>- If existing companies would like to abandon the common seal, they may need to amend their AOA.</li> </ul>

## 2 Directors

### 2.1 Basic requirement of Directors is standardised for all guarantee companies

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The minimum number of directors specified under the New CO is 2 and corporate directors are not allowed.</li> <li>- The no residency or nationality requirement and the 18 years of age requirement for individual directors have not been changed.</li> <li>- The reporting requirements of directors have not been changed, ie individual directors are required to report their usual residential address, their Hong Kong Identity Card number and if not available, the passport number and issuing country as well as any subsequent changes to the Registrar of Companies.</li> </ul>	<ul style="list-style-type: none"> <li>- The directors who have not complied with the reporting requirements should rectify the information and situation as soon as possible.</li> </ul>

### 2.2 Indemnity provided by the Company to Directors has been clarified

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO clarifies the indemnity permitted by the Company to a director against liability incurred by the director to a third party. The provisions on indemnity permitted by the Company on liability of a director to the Company have remained unchanged.</li> <li>- Companies are required to keep a copy of such indemnity provision or a written memorandum setting out the terms of the provisions in their registered office or other place in Hong Kong as reported to the Registrar of Companies.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should review the existing indemnity arrangement available to directors to see if it is in line with the provisions in the New CO.</li> <li>- Companies are recommended to review and amend the indemnity clause in their AOA if it is not in line with the provisions in the New CO.</li> <li>- Companies should comply with this documentation keeping requirement if they have provided indemnity to the directors.</li> <li>- Please seek legal or professional advice if in doubt of the extent of the indemnity available to directors.</li> </ul>

### 2.3 Long term service contract of Directors need members' prescribed approval

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- Members' prescribed approval is required for an employment contract of a director with a guarantee term of employment exceeding 3 years.</li> <li>- If members' prescribed approval is not obtained, the contract will be void and may be terminated at any time by the company by giving reasonable notice.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should review employment contracts of directors to see if any of them has an unexpired guarantee term of employment exceeding 3 years and if so, it is advisable for companies to pass members' resolutions to approve it as soon as possible.</li> <li>- Please seek legal advice if in doubt about the terms of the employment of directors.</li> </ul>

### 2.4 Directors' written resolution and Directors' meeting held by way of conference telephone or other technology has not been provided for under the New CO

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO has not introduced provisions to allow written resolutions of directors nor directors' meeting held via telephone conference or other technology means.</li> <li>- Companies may only be able to pass directors' written resolutions or have directors' meeting held via telephone conference if their AOA specifies.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies may consider to amend their AOA to add these provisions if they are not in the AOA.</li> </ul>

## 3 Secretary

### 3.1 The reporting requirements of Secretary has been changed

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- Despite the residency requirement of secretary, ie an individual secretary must be a resident in Hong Kong or the corporate secretary must have registered office or principal place of business in Hong Kong, it is no longer required by the individual secretary to report his or her usual residential address to the Registrar of Companies.</li> <li>- The New CO contains provisions that deem the registered office address of the Hong Kong company the existing individual secretary is serving as his initial correspondence address upon commencement of the New CO and the Companies Register maintained with the Registrar of Companies would be updated automatically on this basis. Any future change of registered office address of that company reported to the Registrar of Companies would also automatically trigger a change of correspondence address of the individual secretary to the new registered office address.</li> </ul>	<ul style="list-style-type: none"> <li>- Existing individual secretary of the existing companies need not do any reporting on the change of residential address to the correspondence address if he agrees to use the registered office address of the company he serves as his correspondence address.</li> </ul>

#### 4 Disclosure of company name and liability status

##### 4.1 Requirement to display company name at office premises is revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The requirement under Cap 32 to have the name painted and affixed outside every office premises is replaced and revised.</li> <li>- The New CO requires all companies to display continuously the company's registered name in legible characters at the registered office and every business venue which are open to public such that the company name can be easily seen by any visitor to the premises.</li> <li>- It is not necessary to display the company's name at the registered office if the company has had no accounting transactions at any time since its incorporation (ie shelf companies).</li> <li>- If the location is the registered office or business venue of more than 6 companies, this requirement is complied if the registered name is displayed through an electronic device continuously for at least 15 continuous seconds once every 4 minutes.</li> <li>- Registered name is the company name in full, ie both English and Chinese names if both are registered with the Registrar of Companies.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should review if the company name is correctly displayed in accordance with the new requirement.</li> </ul>

##### 4.2 Requirement to state company name and liability status on documents is revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO requires all companies to disclose their registered name and liability status (ie whether they are incorporated with limited liability or not) on all websites relating to the company which the company has caused or authorised to appear, all communication documents (including business letters, notices or other official publications of the company) and transaction instruments (including contracts or deeds, bills of exchange, promissory notes or endorsement to be signed by or on behalf of the company) in both hard copy and electronic form.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should review their documents and websites to ensure this new requirement is complied.</li> </ul>

## 5 Registration of charges and their discharge

### 5.1 List of charges that are subject to registration has been revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The list of registrable charges has been updated under the New CO and in particular, a charge on an aircraft or any share in an aircraft is specifically included as a registrable charge while a charge on deposits of a company is not registrable as a charge on book debt.</li> <li>- Companies continue to be required to maintain a register of charges on those charges registered with the Registrar of Companies and keep copies of those instruments evidencing the creation and subsequent release of the charge at the registered office or other place in Hong Kong as reported to the Registrar of Companies.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies with charge over deposits already registered with the Registrar of Companies need not take any action. They simply disregard the amount outstanding under the related banking facility when completing the outstanding amount due under mortgages and charges to be completed in the Annual Return to be filed with the Registrar of Companies.</li> <li>- Companies should review and rectify the situation if the record keeping requirements have not been complied.</li> </ul>

### 5.2 List of documents on registration of charges and discharge have been revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- For new charges created and registrable with the Registrar of Companies, a certified copy of the instrument creating or evidencing the charge has to be delivered to the Registrar of Companies together with the prescribed form for registration. Both the certified copy of the instrument and the statutory form will be placed on the public register for public inspection.</li> <li>- For subsequent payment or satisfaction of debt or release from the charge, a certified copy of any instrument evidencing the discharge together with the specified form have to be delivered to the Registrar of Companies for registration. Both documents will be available for public inspection.</li> </ul>	<ul style="list-style-type: none"> <li>- It may be necessary to consider if any special provisions relating to the transaction has to be contained in a document separate from the instrument as the entire instrument would be available for public inspection. Please seek legal advice if necessary.</li> </ul>

## 6 Accounts, Audit and Annual General Meeting

The below changes are applicable to financial year beginning on or after commencement of the New CO ie 3 March 2014. Financial year beginning before 3 March 2014 and ending after 3 March 2014 should follow the provisions of Cap 32 on the preparation and contents of the audited financial statements as well as their circulation and adoption in Annual General Meeting. Appointment of Auditors and procedures for Annual General Meeting in relation to the financial statements for those financial years should also follow the provisions of Cap 32.

Let's take an example of a company with financial year end of 31 March. Its financial statements for the financial year ending 31 March 2014 should follow the rules under Cap 32 for the preparation etc and so is the corresponding appointment of auditor and Annual General Meeting for adoption of those financial statements. Financial statements for the year ending 31 March 2015 will follow the provisions of the New CO.

6.1 Simplified financial reporting is now available for guarantee companies

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO allows guarantee companies to enjoy simplified financial reporting.</li> <li>- A small guarantee company / holding company of a group of small guarantee companies with total revenue / aggregate total revenue not exceeding HK\$25 million in a financial year will satisfy the qualifying criteria for simplified financial reporting.</li> </ul>	<ul style="list-style-type: none"> <li>- Please consult your auditor as for eligibility of your company and detail conditions for simplified financial reporting.</li> </ul>

6.2 Inclusion of business review in Directors' report

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO requires all companies to include an analytical and forward-looking Business Review in the Directors' Report except companies falling within the simplified financial reporting condition.</li> </ul>	<ul style="list-style-type: none"> <li>- Please consult your auditor as for detail conditions of this exemption.</li> </ul>

6.3 Requirement on Annual General Meeting to be held in respect of each financial year instead of each calendar year

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO requires every guarantee company to hold its annual general meeting in respect of each financial year within 9 months after the end of its accounting reference period (ie end of the financial period) and have its audited financial statements in respect of that accounting reference period laid before the members in that annual general meeting.</li> </ul>	<ul style="list-style-type: none"> <li>- Most AOA's of existing companies have defined the holding of annual general meeting in each calendar year with an interval of 15 months which is not in line with the provisions of the New CO. Such companies may consider to amend their AOA to avoid confusion.</li> <li>- Please consider if the company will continue the current practice or opt for dispensation of annual general meeting which is only applicable to the audited financial statements that covers a financial year beginning after 3 March, 2014.</li> <li>- If companies opt for dispensation of annual general meeting, it is advised to amend their AOA.</li> </ul>

6.3 Requirement on Annual General Meeting to be held in respect of each financial year instead of each calendar year (cont'd)

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- A company is not required to hold an annual general meeting if:-                             <ul style="list-style-type: none"> <li>- Everything that is required to be done at the meeting is done by a written resolution and copies of documents required to be laid at the meeting are provided to each member on or before the circulation date of the written resolution. (ie pass a written resolution in lieu of annual general meeting, the provision provided under Cap 32.) OR</li> <li>- The company is a single member company OR</li> <li>- The company has dispensed with the holding of annual general meeting by a resolution passed by all members which has not been revoked by ordinary resolution nor a request for convening an annual general meeting for a particular financial year has been made by a member of the company not later than 3 months prior to the deadline for holding an annual general meeting for that financial year. (Such resolution has to be delivered to the Registrar of Companies for registration)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>-</li> </ul>

6.4 Reporting requirement on auditors' resignation has been revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- Under the New CO, guarantee companies are also required to deliver a form for registration with the Registrar of Companies on resignation of auditors as well as removal of auditors.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should be aware of the new requirements and attend to the reporting with the Registrar of Companies.</li> </ul>

7 General Meetings, Proxies, etc

7.1 General Meetings can now be held at more than one location

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO provides that a general meeting can be held at more than one location by using any technology subject to provisions of the company's AOA.</li> </ul>	<ul style="list-style-type: none"> <li>- It is not necessary to amend AOA unless the company restricts the meeting to be held at one location only.</li> <li>- The company may elaborate on the rules and procedures in its AOA for meeting held at more than one location as the provision in the ordinance is general.</li> </ul>

## 7.2 Detail procedure for passing written resolutions of Members has been introduced

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- New rules are introduced under the New CO for proposing and passing written resolutions which defines the eligible members entitled to agree to the written resolution, the period of time given to eligible members to give consent, the mode and validity of the agreement to be given by the eligible members as well as the subsequent notification required when the written resolutions is duly passed.</li> <li>- Existing companies with provisions in their AOA that disallow the passing of written resolutions instead of holding a general meeting is void.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies may set out alternative procedures for passing written resolutions provided that the resolution has to be agreed by all eligible members entitled to vote.</li> <li>- AOA of existing companies that do not contain provisions on written resolutions need not be amended in order to enjoy this new initiative.</li> </ul>

## 7.3 Notice period for general meeting has been revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO has revised the notice period for general meeting other than annual general meeting to at least 14 days, irrespective of the type of resolutions (ie ordinary or special resolution) to be passed in the general meeting, unless the AOA of the company requires a longer period of notice.</li> <li>- Companies that intend to pass a special resolution is only required to give 14 day's notice rather than 21 day's notice for the related extraordinary general meeting under the New CO as long as their AOA do not specify a longer period of notice.</li> </ul>	<ul style="list-style-type: none"> <li>- Most AOAs of existing companies have fixed the notice period for general meeting for passing a special resolution at 21 days. So, unless those companies amend their AOA to enjoy this shorter notice period, the companies are still required to give 21 day's notice for passing a special resolution.</li> </ul>

## 7.4 Widened the proxy's power

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- Under Cap 32, members may only appoint proxies if it is authorised in the company's AOA.</li> <li>- Under the New CO, members of a guarantee company may appoint proxies and its AOA may confine the proxy to be a member of the guarantee company.</li> <li>- Under the New CO, the proxies are given all the rights of the members to attend and speak and vote at general meetings subject to the provisions of the AOA.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies may review their AOA to revise the powers of proxies.</li> </ul>



## 7.5 Lowered threshold for right to demand a poll

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO reduces the threshold for members to demand a poll from holding 10% of the total voting rights to 5% of the total voting rights.</li> <li>- Provisions in AOA of existing companies that have the effect of disallowing a demand for a poll made by members holding 5% of the voting rights are void.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies may review their AOA to revise the threshold to demand a poll to avoid confusion.</li> </ul>

## 8 Annual Return

### 8.1 The number of forms of Annual Return available is reduced

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The number of forms of Annual Return available for filing has been reduced under the New CO. There is only one form of Annual Return available and the Certificate of No Change has become obsolete on commencement of the New CO.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies must report full details of corporate structure in each Annual Return even though there is no change of structure since last Annual Return date.</li> </ul>

### 8.2 The filing requirement of Annual Return is revised

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO sets a new arrangement for guarantee companies to file Annual Return which is by reference to the accounting reference date.</li> <li>- Guarantee companies are required to file with the Registrar of Companies an Annual Return within 42 days after the return date which is 9 months after the end of the company's accounting reference period for that financial year.</li> <li>- This new requirement is only applicable to financial years beginning after the commencement date of the New CO.</li> <li>- Those financial years begin before the commencement date of the New CO and end on or after the commencement date of the New CO should continue to follow the rules under Cap 32, ie to file an Annual Return with the Registrar of Companies within 42 days after the annual general meeting that adopts the financial statements.</li> <li>- Guarantee companies are required to notify the Registrar of Companies on any change of accounting reference date.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should be careful in calculating the return date of the Annual Return under the New CO and prepare Annual Return accordingly.</li> </ul>

### 8.3 An Escalating Scale of filing fee for Annual Return is introduced

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO introduces an escalating scale of filing fee which is the same as the scale for private companies.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies should file the Annual Return together with the audited financial statements promptly and before the deadline to avoid the escalating scale of filing fee.</li> <li>- Companies should be careful in completing the Annual Return and check for consistencies and completeness and attach the audited financial statements before delivering it for registration with the Registrar of Companies to avoid rejection as an unsatisfactory document which would result in a re-calculation of filing fee according to the re-submission date.</li> </ul>

## 9 Record Keeping

### 9.1 The period of keeping various records has been clarified

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO has clarified the period for keeping various records of companies:-                             <ul style="list-style-type: none"> <li>- Records of Resolutions and Minutes of Directors and Members: <b>at least 10 years</b></li> <li>- Accounting Records: <b>7 years after the end of the financial year to which the last entry of the matter relates is made</b></li> <li>- Entries of Former Members in the Register of Members: <b>10 years</b></li> <li>- Registers including Registers of Directors, Secretaries, Members, Charges, etc: <b>Not defined</b></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- As the period of keeping the Registers is not defined, it is recommended that those records should be kept for life.</li> <li>- Companies are recommended to keep all minutes and resolutions even after the minimum 10 years requirement for reference purpose.</li> </ul>

## 10 Registrar's power and enforcement

### 10.1 Concept of responsible person is introduced

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The concept of prosecuting "an officer who is in default" when the company fails to comply is relatively difficult under Cap 32 due to the required high level of proof of "willfully and knowingly" authorises or permits the default.</li> </ul>	<ul style="list-style-type: none"> <li>- Companies' officers should be well aware of the statutory requirements as well as reporting deadlines and comply with the requirements to avoid any possible prosecution both against the companies and themselves.</li> </ul>

10.1 Concept of responsible person is introduced (cont'd)

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The New CO replaces “officer in default” by “responsible person”. A responsible person includes an officer or a shadow director of a company who authorises or permits or participates in the contravention or failure which includes omission or reckless acts. An officer includes director, manager or company secretary and if the responsible person is a corporation, the liability would extend to its officers and shadow director.</li> <li>- It is expected that the Registrar of Companies will likely issue more prosecution actions in the future against director, manager or company secretary for not complying with the regulation of the Companies Ordinance after the “willful” element under Cap 32 is removed.</li> </ul>	

10.2 Compound offence is introduced

Explanation	Recommendation
<ul style="list-style-type: none"> <li>- The Registrar of Companies has been given a new discretionary power under the New CO to compound an offence which is usually straightforward and minor regulatory offence that can be easily detectable by the Registrar from objective reliable evidence.</li> <li>- This power is very similar to the power given to the Commissioner of Inland Revenue on compound offence under the Inland Revenue Ordinance.</li> <li>- The company is required to pay the compounding fee and to remedy the breach constituting the offence within the specified time. If the company accepts and complies with the compound offence notice, no prosecution will be initiated against it for that offence.</li> <li>- The regulatory offences that are subject to compounding are laid down in the subsidiary legislation which can be amended from time to time, and the initial compounding offences include failure to deliver the consent to act by the directors upon incorporation of a company within the prescribed time, failure to file Annual Return within the prescribed time, failure to produce common seal in metallic form with the full company name engraved thereon, improper use of common seal, failure to file financial statements within the prescribed time.</li> </ul>	<ul style="list-style-type: none"> <li>- Company officers should be well aware of the statutory requirements and reporting deadlines and comply with the requirements to avoid any possible compounding offence notice.</li> </ul>

### 10.3 Power to reject unsatisfactory document is introduced

Explanation	Recommendation
<ul style="list-style-type: none"><li>- Under the New CO, the Registrar of Companies has been given the power to refuse to accept document or refuse to register document and return it to the person who delivered it for registration if she is of the opinion that the document delivered for registration is unsatisfactory. A document is said to be unsatisfactory for registration if the document is not accompanied by the fee payable, or the document or the signature on the document is incomplete or inconsistent, or is altered without proper authority, or the information contained in the document is internally inconsistent or inconsistent with other information on the Companies Register.</li><li>- Such returned document is regarded as not having been delivered to the Registrar of Companies. Any registration fee to be paid will be recalculated by reference to the date when the document is subsequently received by the Registrar of Companies.</li></ul>	<ul style="list-style-type: none"><li>- Companies should be careful in completing the document and check for consistencies and completeness before delivering it for registration with the Registrar of Companies to avoid rejection as an unsatisfactory document which may result in a re-calculation of registration fee according to the re-submission date if the document should be accompanied by a fee.</li></ul>

*The above explanations and illustrations are not intended to be comprehensive and include all changes in the New CO. We will be pleased to provide detailed advice by reference to your own company situation upon request.*

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