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## PHILIPPINES JURISDICTION UPDATES 2019



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PHILIPPINES



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## A peek into the revised Corporation Code of the Philippines

On February 20, 2019, President Rodrigo Duterte signed into law Republic Act No. 11232, otherwise known as the Revised Corporation Code of the Philippines (the New Code), which may be considered as a landmark legislation updating the 38-year-old Corporation Code of the Philippines (the Old Code) to adjust to modern times.

Some notable amendments under the Code are: (1) One-person corporation; (2) perpetual existence; (3) minimum capital stock; (4) incorporators, directors, trustees and officers; and (5) remote communication and in-absentia voting.

### One-person corporation

The Old Code required at least five stockholders to form a corporation.

Under the New Code, a one-person corporation (OPC) may now be formed by a single stockholder, who may be a natural person, trust or an estate. However, banks and quasi-banks, pre-need, trust, insurance, public and publicly-listed companies, and non-chartered government-owned and controlled corporations may not incorporate as OPCs. Further, as defined, it appears that a juridical entity, such as a corporation, may not be the stockholder in an OPC.

Similar to all other corporations, an OPC is not required to have a minimum capital stock. It does not need to adopt corporate by-laws unlike an ordinary corporation. In lieu of the meetings, an OPC may simply prepare written resolutions, signed and dated by the single stockholder.

The single stockholder will act as the president and sole director of the OPC. He may also act as its treasurer, upon submission of a bond to the Securities and Exchange Commission (SEC) and a written undertaking to faithfully administer its funds, disburse and invest the same according to its registration. However, he may not act as its corporate secretary.

### Perpetual existence

Under the Old Code, a corporation has a term limit of 50 years, unless extended. Its existence is deemed dissolved upon expiration of the term.

Under the New Code, the default rule is that a corporation shall have perpetual existence, unless otherwise specified in the Articles of Incorporation. As transition, corporations existing prior to the effectivity of the New Code shall have a perpetual term unless the corporation, upon the required vote of its stockholders, notifies the SEC that it elects to retain its specified term. The New Code also allows the revival of corporation whose term has expired by filing an application with the SEC.

### Minimum capital stock

The New Code removed the 25 percent subscription, payment and minimum paid-up capital requirements provided under the Old Code. The New Code states that "stock corporations shall not be required to have a minimum capital stock, except as otherwise specifically provided by special law".

### Incorporators, directors, trustees and officers

The New Code removed the minimum number of incorporators, directors and trustees, which stood as five under the Old Code.

Section 10 of the New Code states that "any person, partnership, association or corporation, singly or jointly with others but not more than 15 in number, may organise a corporation for any lawful purpose or purposes". It appears that the New Code allows juridical persons to act as incorporators unlike the Old Code which limits incorporators to natural persons.

Moreover, the New Code reiterated the requirement to elect independent directors in corporations vested with public interest as may be determined by the SEC. The independent directors shall constitute at least 20 percent of the

entire board membership.

The New Code also allows the creation of "emergency board" when the vacancy in the board prevents the remaining directors from constituting a quorum and emergency action is required to prevent grave, substantial, and irreparable loss or damage to the corporation.

With respect to corporate officers, Section 24 of the New Code now requires the treasurer to be a resident of the Philippines, and corporations vested with public interest to appoint a compliance officer.

### Remote communication and in absentia voting

Following the concept of allowing board meetings by way of videoconferencing, teleconferencing, or other alternative modes of communication which have been made explicit under the New Code, the New Code took a step further by allowing stockholders or members to exercise their right to vote through a remote communication or in absentia when authorised under the by-laws, subject to the rules and regulations to be issued by the SEC. With this amendment, it appears that the stockholders and members need not be physically present or represented by proxies in meetings which is required in the past.

Existing corporations affected by certain provisions of the New Code are given a period of two years from its effectivity within which to comply with the requirements thereon.

With the aforementioned significant changes introduced under the New Code, we anticipate that the SEC will issue supplemental regulation specifying the requirements and detailed procedure to comply with its provisions.

*The views and opinions expressed in this article are those of the author. This article is for general informational and educational purposes, and not offered as, and does not constitute, legal advice or legal opinion.*

(Note: This article first appeared in Business World, a newspaper of general circulation in the Philippines.)

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## The 11th Foreign Investment Negative List and its impact on online businesses

For many, this author included, what comes to mind when hearing the term internet businesses, are online selling websites. Ever since e-commerce has evolved to make products easier to discover and purchase through online retailers and marketplaces, the Philippines has cashed in on the trend with emerging websites like Lazada, Zalora and Food Panda.

The 11th Foreign Investment Negative List (FINL) was promulgated last October 29, 2018. Among the notable changes from the 10th FINL is the liberalisation on foreign ownership for internet businesses, which now allows 100 percent foreign ownership. The FINL adopted the definition found in DOJ Opinion 40 (s.1998), which says internet businesses refer to internet access providers (PLDT, Sky Broadband, etc) that merely serve as carriers for transmitting messages, rather than being the creator of messages/information. The same opinion held that internet access providers are no longer considered mass media. This is significant, as mass media is not allowed to have any foreign equity.

By way of background, prior to the 11th FINL, the 1987 Constitution under Article XVI Section 11(1) restricted foreign ownership over mass media saying that it should be 100 percent Filipino owned. Moreover, Republic Act (RA) No 7042, otherwise known as the Foreign Investments Act of 1991, and the 10th Regular Foreign Investment Negative List provide that except for recording, no foreign equity is allowed in mass media. When the 1987 Constitution was passed, the internet was not in existence and traditional mass media was limited to print and

“If these businesses can be completely foreign owned, e-commerce companies like Amazon, Alibaba or eBay could expand their business in the Philippines and bring in more investment”

broadcasting. However, subsequent legislations and opinions of the Securities and Exchange Commission (SEC), considered the internet and mobile technology as platforms for mass media.

RA No 7934, otherwise known as The Consumer Act of the Philippines, defines “mass media” as any means or methods used to convey advertising messages to the public such as television, radio, magazines, cinema, billboards, posters, streamers, hand bills, leaflets, mails and the like. Likewise, under RA No 9211, otherwise known as the Tobacco Regulation Act of 2003, “mass media” is defined as any medium of communication designed to reach a mass of people. For this purpose, mass media includes print media such as newspapers and magazines, broadcast media such as radio and television; and electronic media such as the internet. These descriptions of

mass media covering internet businesses were reiterated by the Department of Justice in a 1986 opinion.

The 11th FINL, however, is not explicit as to whether the same liberalisation applies to internet-based platforms for selling, such as the above-mentioned online retailers. Several SEC opinions has since provided guidelines and held that internet-based platforms used for selling products are forms of mass media since the internet is used as a digital platform to broadcast information to the public.

In light of the current administration’s movement towards easing restrictions on foreign ownership, a more liberalised foreign participation may change the internet-based business landscape in the Philippines. Online-based businesses would be ideal in the Philippines as nearly 60 million netizens have access to the internet. Many Filipinos spend a lot of their time doing online shopping. There are also more than 50 million Facebook users in the country. If these businesses can be completely foreign owned, e-commerce companies like Amazon, Alibaba or eBay could expand their business in the Philippines and bring in more investment. Conversely, Filipinos will also have more options on what website or online businesses to avail of to suit their needs. Whether this is good or bad through nationalistic eyes is a whole other topic and as I ponder on this question, I will order a burger from Food Panda.

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