

Public Governance Guidance Note

Introduction

In previous guidance notes in this series, we looked at the different legal structures available to an organisation dedicated to the public good, identifying a Hong Kong limited liability company – either limited by shares or guarantee – as the most flexible form for incorporating a charity and/or to carry out a social enterprise. Such a company would need to comply, as a minimum, with the statutory requirements under the Hong Kong Companies Ordinance (Cap 622) (CO). We have dealt with the CO compliance-related issues for establishing a company in an earlier guidance note. In this guidance note we will focus on compliance with continuing CO obligations. As compliance is a technical subject, we can only provide an overview of some of the major issues to help you to build your team (in particular your company secretarial and accounting staff) and/or seek professional assistance (for example from a registered trust or company service provider), as appropriate.

Overall concept

The overall concept is that a company is run by its directors, with oversight by members/shareholders (as members are commonly called for a company limited by shares) at member/shareholder meetings. There is a need to present the financial and director reports to shareholders before the annual member/shareholder meeting (known as the annual general meeting). The company secretary should be there

to support company administrative compliance, including on many day-to-day matters. A properly run company will also have three lines of defence, namely appropriate business practices (under codes of conduct); policies and procedures (in particular relating to purchases, delegations of authorities); and audit functions (audit by auditors). When it grows to a certain size, it may even adopt enterprise risk management. We shall discuss some of these further in future guidance notes. The current guidance note will focus on mandatory statutory compliance under the CO.

Special topic: Companies Ordinance fine levels

When you read the CO, you will notice that there are many statutory provisions where non-compliance could amount to an offence that carries with it fines from Level 1 to 6 (in addition to any daily default fines, and at times, imprisonment). You will not find the fine levels in the CO, they are set out in the Criminal Procedure Ordinance (Cap 221), Schedule 8. The court has the discretion to impose a fine of up to the following amounts: Level 1 HK\$2,000; Level 2 HK\$5,000; Level 3 HK\$10,000; Level 4 HK\$25,000; Level 5 HK\$50,000 and; Level 6 \$100,000 under the CO.

Constitutional documents

The CO requires a company to have a set of Articles of Association (AA). A standard form of the AA can be found at the Companies Registry (CR) website¹. The AA constitutes a

1 The model AA for companies limited by share and guarantee respectively: https://www.cr.gov.hk/sc/companies_ordinance/docs/ZAA_Sample_D.pdf; and https://www.cr.gov.hk/tc/companies_ordinance/docs/ZAA_Sample_B.pdf

contract between the company, its members/shareholders and among themselves. The AA sets out the rules and regulations applicable to the company, including relating to member/shareholder meetings, director appointments, and authorisations to deal with day-to-day business of the company. As part of your compliance journey, you must read the AA and prepare a list of technical requirements thereunder. For example, your AA may have specific rules as to how to deal with a director who is interested in a transaction with the company.

Overview of CO compliance

In addition to complying with the AA, a company needs to comply with the other statutory requirements under the CO. A regulatory source for an overview of the CO compliance requirements is the 21 sets of briefing notes found on the CR website:
https://www.cr.gov.hk/en/companies_ordinance/briefingnotes_index.htm.

1. Preliminary
2. Registrar of companies and companies registrar
3. Company formation and related matters, and re-registration of Company
4. Share capital
5. Transactions in relation to share capital
6. Distribution of profits and assets
7. Debentures
8. Registration of charges
9. Account and audit
10. Directors and company secretaries
11. Fair dealing by directors
12. Company administration and procedure
13. Arrangements, amalgamation, and compulsory share acquisition in takeover and share buy-back
14. Remedies for protection of companies' or members' interests
15. Dissolution by striking off or deregistration
16. Non-Hong Kong companies
17. Companies not formed, but registrable, under this ordinance
18. Communications to and by companies
19. Investigations and enquiries
20. Miscellaneous
21. Consequential amendments, and transitional and saving provision

We suggest that you initially read at least the highlighted briefing notes. We summarise below a number of major points under the CO which relate to day-to-day compliance matters. We would remind you that all directors and officers are responsible for ensuring compliance with the CO, and there are many offences, fines, and recurring daily fines for any non-compliance. Therefore, you need to seek to understand and commit resources to compliance-related matters in your company.

Director's duties and related matters

- A company limited by shares must have at least one director and a company limited by guarantee two directors. These persons must be natural persons over 18 years of age and not undischarged bankrupts (Sections 453-459 and 480).
- A director has to exercise reasonable care, skill and diligence, to the standard that would be exercised by a reasonably diligent person having the general knowledge, skill and experience of a director, or a higher standard where he or she has a higher skill set. These are in addition to common law fiduciary obligations of a director to act in good faith in carrying out the business of the company.

A major aspect is that the director must not allow his or her own personal interest to conflict with those of the company in resolving and/or carrying out the business of the company without appropriate disclosures.

There are very limited indemnities and ratification rights under the CO for director's wrongdoings (Sections 465-473). Directors therefore need to consider procuring directors and officers (D&O) insurance to cover certain exposures to liabilities.

- The directors have the assistance of a company secretary, as all companies must have a company secretary. This can be a natural person or a company (but not held only by a sole director). The company secretary will be a responsible person as with the director and can be liable for the company not complying with the CO compliance obligations (Sections 3(2) and 474-475).
- All director meetings must be minuted and the minutes kept for 10 years. The minutes, signed by the chairperson, serve as evidence of the matters therein

unless proven to the contrary. The written records of the sole director (only possible for a company limited by shares) should be provided to the company within seven days and have similar effects as with minutes of meetings. There are significant up-front and recurring daily fines for non-compliance with these requirements (Sections 481–483).

- Subject to additional requirements under the AA, where a director is directly or indirectly interested in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, that is significant in relation to the company's business, and the director's interest is material, the director must declare the nature and extent of the director's interest to the other directors in accordance with certain requisite procedures (Sections 536–542).
- There are additional compliance requirements for 'fair dealing' by directors. They relate to loans, quasi loans, credit-transactions, payment for loss of office and lengthy directors' service contracts. Some of these extend to the company conferring a benefit to a child, cohabitee or shadow directors of the director (Sections 484–535).

Annual general meetings

- A company must, in respect of each financial year of the company, hold a general meeting as its annual general meeting (AGM) within nine months after the end of its accounting reference period, but in any event not more than 18 months from incorporation or 15 months from the last meeting (Sections 369 and 431).
- A company's directors must, in respect of each financial year, lay before the company in annual general meeting, or in any other general meeting directed by the court, a copy of certain reporting documents, and the director's failure could lead to a HK\$300,000 fine and 12 months' imprisonment (Section 429).

The reporting documents which should be sent 21 days before the annual general meeting are: the financial statements for the financial year, the directors' report for the financial year and the auditor's report on those financial statements. Your accounting staff and/or external auditor will assist

you to prepare and circulate these with the assistance of the company secretary (Sections 357(2), 429–430, 571 and 576).

- Alternatively, you can comply with the statutory requirements by a written resolution with all the reporting documents circulated on or before the date of the written resolutions to all members. It is important to remember to notify every member and the auditor within 15 days of the written resolution (Sections 559, 610–612). We have seen many companies failing to meet this compliance requirement.
- In fact, a company could dispense with the requirement for holding of annual general meetings altogether by passing a written resolution or a resolution at a general meeting by all members. The company is required to deliver a copy of the resolution to the CR for registration within 15 days after the resolution is passed (Section 613 and 622).

To protect shareholders, the financial statements and reports originally required to be laid before an annual general meeting will still need to be sent to members. Any member may request the company to convene an annual general meeting for a particular year (Section 613(5)).

Keeping of registers


- A company must keep its records of resolutions and meetings of members and directors, available for inspection at the company's registered office or a prescribed place (Sections 618–620, and 641–648).
- Information as to trusts are not to be entered in the members register, but companies are now required to keep a significant controllers register identifying beneficial owners holding more than 25% interest in the company, which is subject to narrow exceptions. This applies to all companies within the chain of title from the company to its beneficial owners (Sections 634 and 653H).

CR filings

The above is a brief summary of key compliance issues, but a related topic is the need to file returns to the CR. There are 92 forms and the more common forms (samples are available on the CR website: <https://www.cr.gov.hk/en/forms/specified.htm>) are as set out on next page.

Common forms for CR filings		
Form no.	Section (CO)	Form name
NAR1	662	Annual return (Specimen) (For private company) (Specimen) (For public company) (Specimen) (For company limited by guarantee)
ND2A	645(1), 645(4), 652(1), 652(2)	Notice of change of Company Secretary and Director (Appointment/Cessation) (Specimen)
ND2B	645(4), 652(2)	Notice of change in particulars of Company Secretary and Director (Specimen)
ND4	464(3), 477(3)	Notice of resignation of Company Secretary and Director (Specimen)
NNC1	67(1)(b)	Incorporation Form (Company limited by shares) (Specimen) (This Form must be delivered with IRBR1)
IRBR1		Notice to Business Registration Office (Notice specified by the Commissioner of Inland Revenue) (This Notice must be delivered with Form NNC1) Note 1: Please refer to the electronic service at e-Registry section of the website for the sample articles of association. Note 2: Please refer to the website of the Inland Revenue Department for details of renewal of business registration. Note 3: Please refer to the website of the Trade and Industry Department for information on other licences, permits, certificates and approvals relevant to import and export operations and other business operations in Hong Kong.
NNC1G	67(1)(b)	Incorporation Form (Company not limited by shares) (Specimen) (This Form must be delivered with IRBR1)
IRBR1		Notice to Business Registration Office (Notice specified by the Commissioner of Inland Revenue) (This Notice must be delivered with Form NNC1G) Note 1: Please refer to the electronic service at e-Registry section of the website for the sample articles of association. Note 2: Please refer to the website of the Inland Revenue Department for details of renewal of business registration. Note 3: Please refer to the website of the Trade and Industry Department for information on other licences, permits, certificates and approvals relevant to import and export operations and other business operations in Hong Kong.
NNC3	74	Consent to act as first director
NSC1	142(1)	Return of allotment

The above are some of the major filing obligations. For a good reference to the filing and non-filing obligations for a company limited by guarantee, please refer to The Hong Kong Council of Social Service respective website links: <https://governance.hkcss.org.hk/index.php/node/299>; and

<https://governance.hkcss.org.hk/index.php/node/300>. The matters in this guidance note and the publications are only intended to assist you in your compliance journey, and there is no substitution for reading the Companies Ordinance and related subsidiary rules highlighted in this guidance note. 

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