

The Things You Need to Know Before and After Forming a Legal Entity - From the Company Secretarial Perspective

成立公司你要知

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Disclaimer

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PART 1

REGISTRATION / INCORPORATION OF DIFFERENT LEGAL ENTITIES

1 REGISTRATION / INCORPORATION OF DIFFERENT LEGAL ENTITIES

1.1 Comparison of different legal entities

1.1.1 Comparison of different legal entities - Society

- a) Legislation
 - ▶ Societies Ordinance (Cap 151)

- b) Government Department for Registration
 - ▶ Commissioner of Police (CP) – Licensing Office of the Hong Kong Police’s Societies Office
 - ▶ Website: <http://www.police.gov.hk/>

- c) Registration Requirement
 - ▶ Constitution / Memorandum & Articles of Association / minutes
 - ▶ Specified application form
 - ▶ Three Office bearers and their ID copies
 - ▶ Society address with proof or letter of consent from address owner

- d) Time Required for Registration
 - ▶ About 3- 4 weeks
 - ▶ Cost
 - ▶ Nil
 - ▶ Legal Identity
 - ▶ No separate legal status

- e) Legal Liability
 - ▶ All members are personally liable if assets are not sufficient to meet the liabilities

- f) Termination
 - Initiated by a resolution of members and need to inform CP in writing

1.1.2 Comparison of different legal entities - Sole Proprietorship

- a) Legislation
 - ▶ Inland Revenue Ordinance

- b) Government Department for Registration
 - ▶ Inland Revenue Department – Business Registration Office

- c) Registration Requirement
 - ▶ Form 1(a)
 - ▶ A business address
 - ▶ A person to register

- d) Time Required for Registration
 - ▶ One week

- e) Cost
 - ▶ HKD450 per year (current rate)

- f) Legal Identity
 - ▶ No separate legal status

- g) Legal Liability
 - ▶ The sole proprietor is personally liable if assets are not sufficient to meet the liabilities

- h) Termination
 - ▶ Inform the Business Registration Office by Form IRC 3113
 - ▶ Death of the sole proprietor

1.1.3 Comparison of different legal entities - Limited by Guarantee

a) Legislation

- ▶ Companies Ordinance

b) Government Department for Registration

- ▶ Companies Registry

c) Registration Requirement

- ▶ Memorandum & Articles of Association
- ▶ Business Registration
- ▶ A registered office
- ▶ One director (minimum)
- ▶ One member (minimum) (maximum is subject to M&A)
- ▶ One secretary (must be HK resident)

Note: The sole director cannot be the secretary, i.e. a Limited Company by Guarantee needs at least 2 persons for registration – 1 director, who is also a member, and 1 secretary

d) Effect of Registration

- ▶ Formation of a company limited for non-profit making purpose

e) Time Required for Registration

- ▶ About 1 week (after submission of documents)

f) Cost

- ▶ Registration fee
 - HKD170 for 25 members or less
 - HKD340 for more than 25 members but not exceeding 100
 - HK\$20 for every 50 members or less after the first 100 (subject to a maximum fee of HK\$1,025)
- ▶ HKD450 Business Registration Fee (current rate)

g) Legal Identity

- ▶ Separate legal entity

h) Legal Liability

- ▶ Limited, every member is liable up to his contribution stated in the M&A (e.g. HKD100)

i) Termination

- ▶ Liquidation
- ▶ Deregistration (with Company Registries, a lower cost option for termination)

1.1.4 Comparison of different legal entities – Limited by Shares

a) Legislation

- ▶ Companies Ordinance

b) Government Department for Registration

- ▶ Companies Registry

c) Registration Requirement

- ▶ Memorandum & Articles of Association
- ▶ Business Registration
- ▶ A registered office
- ▶ One director (minimum)
- ▶ One shareholder (minimum) (maximum 50)
- ▶ One secretary (must be HK resident)
Note: The sole director cannot be the secretary
- ▶ Share Capital (minimum HKD1.00)

d) Effect of Registration

- ▶ Formation of a company limited

e) Time Required for Registration

- ▶ About 1 week (after submission of documents)

f) Cost

- ▶ HKD1,730
HKD1,720 Incorporation fee
HKD10 Capital Duty
- ▶ HKD450 Business Registration Fee (current rate)

g) Legal Identity

- ▶ Separate legal entity

h) Legal Liability

- ▶ Limited, the shareholders are liable up to the shares they contributed

i) Termination

- ▶ Liquidation
- ▶ Deregistration

1.2 Registration Procedures

1.2.1 Registration Procedures – Society

Submit the following documents by any one of the registered office-bearers to the Societies Office within one month from the date of establishment of the society:

- a) Completed Application Form;
- b) A constitution/ articles of association/ minutes of a meeting, if any, to establish the society or any document purporting to show the objects and purposes of the society;
- c) Copies of HKID Cards or other valid identity documents of each registered office-bearer;
- d) Document to prove the place of business of the society (e.g. utility bill, bank statement, etc); and
- e) A letter of permission from the owner of the premises in case where the society is using an address belonging to another body, which must contain the full name of the owner, dated and signed before submitting.

1.2.2 Registration Procedures – Sole Proprietorship

Submit an application (Form 1(a)) for business registration to the Business Registration Office within 1 month from the commencement of business together with a Business Registration Fee (current rate: HK\$450).

1.2.3 Registration Procedures – Limited by Guarantee

- a) Prepare and submit to the Charitable Donations & Retirement Scheme Section of the Inland Revenue Department a draft memorandum & articles of association and an activities plan for the coming one year in order to apply for the tax exemption under Section 88 of the Inland Revenue Ordinance.
- b) Submit the Form NC1G, M&A and Form IRBR1 to the Companies Registry together with registration fee (HK\$170 for 25 members or less; HK\$340 for more than 25 members but not exceeding 100; HK\$20 for every 50 members or less after the first 100 (subject to a maximum fee of HK\$1,025)) and business registration fee (current rate: HK\$450)

1.2.4 Registration Procedures – Limited by Guarantee

- a) If applying for charity status, prepare and submit to the Charitable Donations & Retirement Scheme Section of the Inland Revenue Department a draft memorandum & articles of association and an activities plan for the coming one year in order to apply for the tax exemption under Section 88 of the Inland Revenue Ordinance.
- b) Submit the Form NC1G, M&A and Form IRBR1 to the Companies Registry together with registration fee (HK\$170 for 25 members or less; HK\$340 for more than 25 members but

not exceeding 100; HK\$20 for every 50 members or less after the first 100 (subject to a maximum fee of HK\$1,025)) and business registration fee (current rate: HK\$450)

1.2.5 Registration Procedures – Limited by Shares

Submit Form NC1, Memorandum & Articles of Association and Form IRBR1 to the Companies Registry together with registration fee (HK\$1,720), capital fee (HK\$1 for every or part of HK\$1,000 of the nominal share capital (subject to a maximum fee of HK\$30,000 per case)) and business registration fee (current rate: HK\$450)

1.3 Annual Compliance of different legal entities

1.3.1 Annual Compliance of different legal entities – Society

- ▶ No annual compliance requirement
- ▶ Society is required to apply to the Societies Office for any of the following changes of particulars:
 - a. name of society
 - b. address of society
 - c. office-bearer(s)
 - d. objects of society
 - e. dissolving the society

1.3.2 Annual Compliance of different legal entities – Sole Proprietorship

- ▶ Renewal of Business Registration Certificate
- ▶ Filing Profits Tax Return together with management accounts

1.3.3 Annual Compliance of different legal entities – Limited by Guarantee

- ▶ Hold an Annual General Meeting (“AGM”) in accordance with the provisions of the Articles of Association.
- ▶ Submit to the Companies Registry an Annual Return within 42 days from the date of the AGM or the date of written resolution passed in lieu of AGM together a filing fee of HK\$105.
- ▶ Renew Business Registration Certificate (current rate: HK\$450).
- ▶ Arrange for the Company’s accounts to be audited.
- ▶ Maintain Minutes Book and Registers

1.3.4 Annual Compliance of different legal entities – Limited by Shares

- ▶ Hold an Annual General Meeting (“AGM”) in accordance with the provision of Articles of Association.
- ▶ Submit to the Companies Registry an Annual Return within 42 days from the anniversary date of incorporation together with a filing fee of HK\$105.
- ▶ Renew Business Registration Certificate (current rate: HK\$450).
- ▶ Arrange for the Company’s accounts to be audited and submit the same together with Profits Tax Return to the Inland Revenue Department.
- ▶ Maintain Minutes Book and Registers

PART 2

APPLICATION OF TAX EXEMPTION

2 APPLICATION OF TAX EXEMPTION

2.1 General Information about application of tax exemption of a charity under section 88 of the Inland Revenue Ordinance

- ▶ Charity must be established exclusively for charitable purposes
- ▶ Generally speaking, for an institution or a trust to be a charity, it must be established for purposes which are exclusively charitable according to law
- ▶ The law defining the legal attributes of a charity is based upon case law developed through court decisions
- ▶ Charitable purposes are classified into four heads according to an authoritative case of I T Special Commissioners v Pemsel (3 TC 95)
- ▶ Summary of the purposes that may be accepted as charitable are:-
 - a) relief of poverty;
 - b) advancement of education;
 - c) advancement of religion; and
 - d) the purposes of a charitable nature beneficial to the community not falling under any of the preceding heads.
- ▶ (a) to (c) can be carried on in any part of the world but (d) must be of benefit to the Hong Kong community
- ▶ Charity must be established for public benefit
- ▶ A purpose is not charitable unless it is directed to the public or a sufficient section of it
- ▶ An institution cannot generally be charitable if it is in principle established for the benefit of specific individuals
- ▶ No precise definition of what constitutes a sufficient section of the public
- ▶ Each case must be considered on its own merit.

2.2 Examples of Purposes which the Court had held to be Charitable Purposes.

- ▶ Relief of poor people;
- ▶ Relief of victims of a particular disaster;
- ▶ Relief of sickness;
- ▶ Relief of physically and mentally disabled;
- ▶ Establishment or maintenance of non profit making schools;
- ▶ Provision of scholarships;
- ▶ Diffusion of knowledge of particular academic subjects;
- ▶ Establishment or maintenance of a church;
- ▶ Establishment of religious institutions of a public character;
- ▶ Prevention of cruelty to animals;
- ▶ Protection and safeguarding of the environment or countryside.

2.3 **Examples of Purposes which the Courts had held to be Non-Charitable Purposes**

- ▶ Attainment of a political object;
- ▶ Promotion of the benefits of the founders or subscribers;
- ▶ Provision of a playing field, recreation ground or scholarship fund for employees of a particular company or industry;
- ▶ Encouragement of a particular sport such as angling or cricket.

2.4 **Application Procedures (if an organisation has been established)** – usually in a form of Limited by Guarantee/ Society:

- ▶ Prepare an application letter;
- ▶ Submit the following documents with the letter
 - a) a copy of the relevant certificate of registration (i.e. Certificate of Incorporation / Registration of a Society);
 - b) certified true copy of the Memorandum and Articles of Association in the case of a corporation, or the Constitution in the case of a society;
 - c) a list of any activities which have been carried out in the past 12 months (or less, if appropriate), and a list of activities planned for the next 12 months;
 - d) a copy of its accounts for the last financial year (if the organisation has been established for 18 months or more)

2.5 **Application Procedures (if an organisation has not yet been established):**

- ▶ Prepare an application letter;
- ▶ Submit the following documents with the letter
 - a) draft of the Memorandum and Articles of Association or the Constitution;
 - b) a list of the activities planned for the next 12 months from the date of establishment or date of application, where appropriate.

PART 3

ANNUAL MAINTENANCE

3 ANNUAL MAINTENANCE

3.1 Annual General Meeting (“AGM”)

Every company shall:

- ▶ hold an AGM not more than 18 months of incorporation from the date of incorporation and within 9 months of the date from which the first accounts were made up (s.122)
- ▶ hold an AGM in each calendar year at an interval of not more than 15 months from the date of the previous AGM and within 9 months of the date from which the latest accounts were made up.
- ▶ Provided that, so long as the company holds its first annual general meeting within 18 months of its incorporation, it need not hold it in the year of its incorporation or in the following year.

3.1.1 Preparing board resolutions / minutes

- a) Obtain audited financial statements and the directors’ and auditors’ reports
- b) Prepare a board resolutions / minutes to:
 - ▶ approve the audited financial statements and the directors’ and auditors’ reports for presentation to the members
 - ▶ approve the convening of an annual general meeting

3.1.2 Written resolutions of all the members in lieu of annual general meeting

Prepare members’ resolutions to:

- a) approve and adopt the audited financial statements;
- b) re-elect the directors who retire by rotation, if required, and fix their remuneration;
- c) appoint / re-appoint auditors and fix their remuneration
- d) note that the notice to auditors has been sent before the AGM

3.2 Annual return

- ▶ A company shall file a duly completed and signed annual return once in every year with the Companies Registry
- ▶ For limited by guarantee, within 42 days after the date of the AGM or written resolution passed in lieu of the AGM for the year
- ▶ Sample of a completed annual return:
http://www.cr.gov.hk/en/forms/docs/ar1b_sample-e.pdf
- ▶ Documents to be submitted with the annual return:
 - Certified true copies of the company’s balance sheet, reports of the auditors and directors
 - Filing fee (HK\$105)

3.3 Others

If subsidy is granted by the HKADC:

- ▶ Maintain a board of directors of 5 persons;
- ▶ Convene at least one physical meeting of the directors in every 6 months;
- ▶ Notify the HKADC of the meeting at least 7 days before the meeting;
- ▶ Send the board minutes to the HKADC within 3 months after the meeting;
- ▶ Directors declare their conflict of interest when necessary

PART 4

CHANGES AFTER INCORPORATION

4 CHANGES AFTER INCORPORATION

4.1 Amendment of M&A

Procedures

- ▶ Pass a members' special resolution for amending the M&A;
- ▶ Prepare and file the special resolution with the Companies Registry within 15 days from the date of passing the resolution;
- ▶ Arrange reprinting of the M&A;
- ▶ File the reprinted M&A with the Companies Registry.

4.2 Change of financial year end Procedures

- ▶ Submit a letter to the Inland Revenue Department obtaining its approval for the change of financial year end date.
- ▶ Pass a directors' resolution approving the change of financial year end date.
- ▶ Inform the auditors.

5.3 Change of company name

4.3.1 General guidance

- a) A company name can be either in English language or in Chinese language (Traditional) or in both languages;
- b) Limited company must end its name with the word “Limited” (with its equivalent in Traditional Chinese if the company adopts a Chinese name) unless exempted by the Registrar pursuant to section 21 of the Hong Kong Companies Ordinance

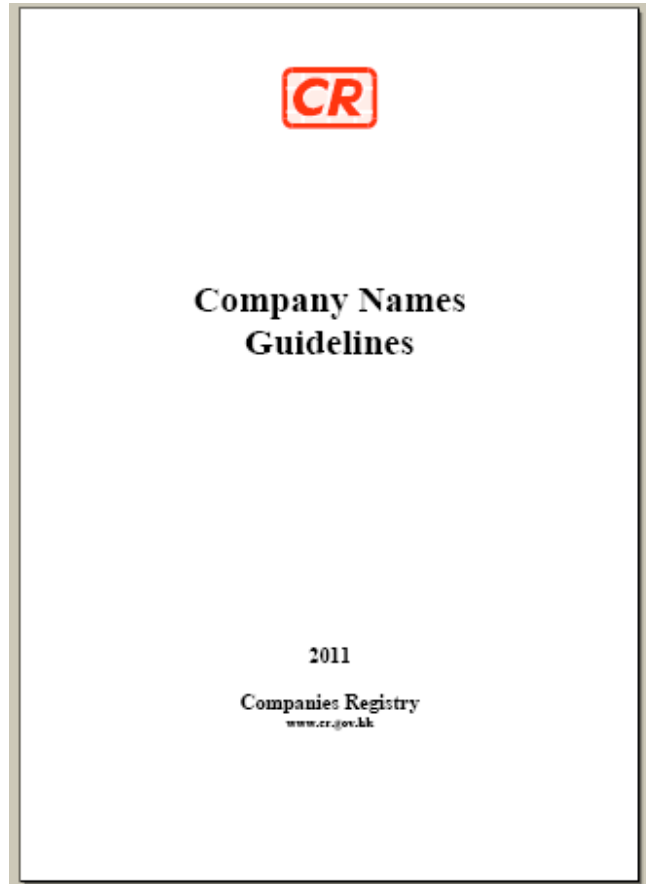
4.3.2 Restrictions

A company shall not be registered with a name :-

- a) Which is the same as or too similar to a name already appearing in the Registrar’s index of company names;
- b) Which is the same as or too similar to that of a body corporate incorporated or established under an Ordinance e.g. The Hongkong and Shanghai Banking Corporation Limited Ordinance;
- c) In the opinion of the Chief Executive its use would constitute a criminal offence e.g. under the Banking Ordinance, it is an offence to use the word “Bank” in a company name without the consent of the Hong Kong Monetary Authority;
- d) In the opinion of the Chief Executive it is offensive or otherwise contrary to the public interest;
- e) Which would be likely to give the impression that the company is connected in any way with the Central People’s Government or the Government of Hong Kong or any department of either Government.
- f) The approval of the Chief Executive is required for a name which contains the words or expression “Building Society”, “Chamber of Commerce”, “Cooperative”, “Kaifong”, “Mass Transit”, “Municipal”, “Savings”, “Tourist Association”, “Trust”, “Trustee” and “Underground Railway”. Such power of approval has been delegated to the Registrar of Companies. (Section 22B of the Hong Kong Companies Ordinance)

The Registrar of Companies may direct a company to change its name within 12 months of its registration if in his opinion, the name is same as or too like to that of a registered company.

For details: Refer to the Company Name Guidelines



<http://www.cr.gov.hk/en/publications/docs/name-e.pdf>

4.3.3 Change of company name – Procedures

- ▶ Conducting name search at the Companies Registry to ascertain whether the proposed name is available for registration;
<http://www.icris.cr.gov.hk>
- ▶ Passing a special resolution to approve the name change;
- ▶ Prepare a Form NC2 and file the Form with the Companies Registry together with the prescribed filing fee within 15 days after passing of the special resolution.
- ▶ The change of name will be effective and the new company name can be used only when the Registrar of Companies issues to a company a Certificate on Change of Name. The Certificate of Change of Name will normally be issued within 4-6 working days after filing of Form NC2.

4.3.4 Actions to be taken AFTER name change

- ▶ Order a new common seal and rubber chop
- ▶ Pass a board resolution to adopt the new common seal
- ▶ Insert copies of the special resolution and Certificate of Change of Name in every copy of the company's memorandum and articles of association
- ▶ Amend the company name on all the statutory records on which it appears

4.4 Appointment and Resignation of Directors

4.4.1 Appointment of Directors- Procedures

- ▶ Check Articles of Association and see whether there is maximum number of directors, any share qualification and procedures;
- ▶ Check whether the new director will also be the shareholder or secretary of the company;
- ▶ Prepare board resolutions;
- ▶ Prepare Form D2A and file the signed Form with the Companies Registry within 14 days from the change;
- ▶ Update Registers of Directors and Minute book;

4.4.2 Resignation of directors

- ▶ A director may resign at any time unless otherwise provided in articles or in the appointment contract.
- ▶ Notification to the Companies Registry for any change of director.
- ▶ If notice of resignation is required by articles or by contract, written notice must be given to the Registered Office of the company and a copy to the Registrar.

Procedures

- ▶ Check Articles of Association and see whether there is minimum number of directors
- ▶ Prepare board resolutions and letter of resignation;
- ▶ Prepare Form D2A and file the signed Form with the Companies Registry within 14 days from the change;
- ▶ Update Registers of Directors and Minute book;

4.5 Appointment of Auditors

Procedures

- ▶ Pass an ordinary resolution to approve the appointment of auditor;
- ▶ Give a special notice to the directors 28 days before the next AGM.

OTHER REFERENCE

- A Guide on Directors' Duty
- http://www.cr.gov.hk/en/publications/docs/director_guide-e.pdf
- A Company's Obligations after Registration
- <http://www.cr.gov.hk/en/publications/docs/19-e.pdf>
- Filing Requirements of a Local Limited Company after Incorporation
- <http://www.cr.gov.hk/en/publications/docs/5-e.pdf>