

## Public Companies

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### 1. Introduction

Under the Companies Ordinance (Cap 622) (the “**Companies Ordinance**”), the following five types of companies can be formed:

- (a) public company limited by shares;
- (b) private company limited by shares;
- (c) public unlimited company with a share capital;
- (d) private unlimited company with a share capital; and
- (e) company limited by guarantee without share capital.<sup>1</sup>

Companies Ordinance defines a public company as a company which is not a private company or a company limited by guarantee.<sup>2</sup> A private company is a company limited by shares which by its articles: (a) restricts the right to transfer its shares; (b) limits the number of its members to 50; and (c) prohibits any invitation to the public to subscribe for any shares or debentures of the company.<sup>3</sup> In other words, a public company is a company limited by shares or an unlimited company with a share capital, which does not restrict the right to transfer its shares and has no limit on its number of members or ability to invite the public to subscribe for its shares or debentures.

As of August 2022, the total number of companies that has remained registered on the Companies Register is 1,388,772, among which 1,371,647 (98.77%) are private companies, 16,207 (1.16%) are companies limited by guarantee and 918 (0.07%) are public companies.<sup>4</sup> While not all public companies are listed companies, only public

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<sup>1</sup> Companies Ordinance, (2021), Cap. 622, §66 (H.K.).

<sup>2</sup> Companies Ordinance, (2021), Cap. 622, §12 (H.K.).

<sup>3</sup> Companies Ordinance, (2021), Cap. 622, §11(1) (H.K.).

<sup>4</sup> Companies Registry, “Statistics: Local Companies that have remained Registered on the Companies Register”,

<https://www.cr.gov.hk/en/publication/fact-stat/statistics/local-companies-registered/since-2014.htm>

(accessed October 14, 2022).

companies can be listed on the stock exchange to invite public members to subscribe for its shares.<sup>5</sup> Listed companies are required to comply with listing rules of the stock exchange. This article limits its scope to rules applicable to public companies in general under the Companies Ordinance and does not intend to cover the listing rules applicable to listed companies.

## 2. Incorporation

Like private companies, any one or more persons may form a public company for a lawful purpose by signing the articles of the company intended to be formed and delivering to the Registrar for registration a specified incorporation form and a copy of the articles.<sup>6</sup> A sample article for public company is included in Schedule 1 of the Companies (Model Articles) Notice (Cap.622H).<sup>7</sup> On registering the incorporation form and articles, the Registrar must issue a certificate of incorporation certifying that a public company is incorporated under the Companies Ordinance.<sup>8</sup> The certificate of incorporation is conclusive evidence that all the requirements of the Companies Ordinance in respect of registration have been complied with and a public company is registered under the Ordinance.<sup>9</sup>

The name of a public company limited by shares must include “Limited” as the last word or “有限公司” as the last 4 characters of the name.<sup>10</sup> The company’s name must not be the same as existing company’s name or a name, in the Registrar’s opinion, constitute a criminal offence, offensive or contrary to public interest.<sup>11</sup>

## 3. Director; Company Secretary; Member

**Director.** Public company must have at least 2 directors.<sup>12</sup> The first directors are the persons named as directors in the incorporation form delivered to the Registrar. For public companies, a director must be a natural person.<sup>13</sup> Appointment of a body corporate as director of public companies will void.<sup>14</sup> As generally required for other types of companies, a director must be at least 18 years age.<sup>15</sup> For public companies, a motion to appoint 2 or more directors by a single resolution cannot be made at a general meeting unless a member resolution that resolves a single resolution at a general meeting can

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<sup>5</sup> Stefan HC Lo & Charles Z Qu, Law of Companies in Hong Kong (2013).

<sup>6</sup> Companies Ordinance, (2021), Cap. 622, §67(H.K.).

<sup>7</sup> Companies (Model Articles) Notice, (2014) Cap. 622H, Sch.1 (H.K.).

<sup>8</sup> Companies Ordinance, (2021), Cap. 622, § 71 (H.K.).

<sup>9</sup> Companies Ordinance, (2021), Cap. 622, § 72 (H.K.).

<sup>10</sup> Companies Ordinance, (2021), Cap. 622, §102(H.K.).

<sup>11</sup> Companies Ordinance, (2021), Cap. 622, §100(H.K.).

<sup>12</sup> Companies Ordinance, (2021), Cap. 622, §453(H.K.).

<sup>13</sup> Companies Ordinance, (2021), Cap. 622, §456(2)(H.K.).

<sup>14</sup> Companies Ordinance, (2021), Cap. 622, §456(3)(H.K.).

<sup>15</sup> Companies Ordinance, (2021), Cap. 622, §459(H.K.).

appoint 2 or more directors has first been passed without vote against it.<sup>16</sup> This is to preserve member's ability to refuse the appointment of a director without having to reject others.<sup>17</sup>

**Company Secretary.** A company must have a company secretary. The first company secretary is the person named as the company secretary in the incorporation form delivered to the Registrar. If the company secretary is a natural person, he/she must ordinarily reside in Hong Kong; if it is a body corporate, it must have a registered office or a place of business in Hong Kong.<sup>18</sup>

**Member.** The founder member of the company is entered as a member on the company's register of members upon registration of the company. Any other person who agrees to become a member and whose name is entered in the company's register of members is a member of the company.<sup>19</sup> One major difference between public company and private company is that unlike private company, there is no limit on the maximum number of members for a public company.

#### 4. Corporate Governance

**Annual General Meeting.** A public company must hold an annual general meeting (i) within 6 months after the end of its accounting reference period by reference to which the financial year is to be determined, or (ii) if such accounting reference period is the first accounting reference period of the public company and is longer than 12 months, within 6 months after the first anniversary of the public company's incorporation<sup>20</sup>.

As many companies may find the obligation to hold annual general meetings redundant and burdensome, based on the Company Ordinance, a company (including a public company) is not required to hold an annual general meeting if:

- (a) the company has done everything that is required or intended to be done at the annual general meeting by a written resolution<sup>21</sup>;
- (b) the company has only one member<sup>22</sup>; or
- (c) the company has dispensed with the holding of annual general meetings indefinitely by passing a resolution to that effect with the unanimous consent of all members entitled to vote<sup>23</sup>.

The resolution to dispense annual general meeting indefinitely can be revoked by an

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<sup>16</sup> Companies Ordinance, (2021), Cap. 622, §460(2)(H.K.).

<sup>17</sup> Stefan HC Lo & Charles Z Qu, Law of Companies in Hong Kong (2013).

<sup>18</sup> Companies Ordinance, (2021), Cap. 622, §474(H.K.).

<sup>19</sup> Companies Ordinance, (2021), Cap. 622, §112(H.K.).

<sup>20</sup> Companies Ordinance, (2021) Cap. 622, 12-76, §610 (H.K.).

<sup>21</sup> Companies Ordinance, (2021) Cap. 622, 12-82, §612 (H.K.).

<sup>22</sup> Companies Ordinance, (2021) Cap. 622, 12-82, §612 (H.K.).

<sup>23</sup> Companies Ordinance, (2021) Cap. 622, 12-84, §613 (H.K.).

ordinary resolution.<sup>24</sup>

***Financial Statements and Reports.*** At least 21 days before the date of an annual general meeting, a public company must send financial statements and other reporting documents (such as director’s report and auditor’s report) to its members before the annual general meeting<sup>25</sup>.

**Annual Return.** A public company must deliver to the Company Registrar for registration an annual return within 42 days after such public company’s return date<sup>26</sup>, which is the date that is 6 months after the end of its accounting reference period<sup>27</sup>. The annual return to be delivered to the Company Registrar must be accompanied by copies of the documents required to be sent to every member of the company under section 430 of the Companies Ordinance (i.e. financial statements and other reporting documents), certified by a director or company secretary of the company to be true copies<sup>28</sup>.

## **5. Shares and Fund-raising by Public Issue**

Unlike private companies, public companies’ articles do not restrict a member’s right to transfer its shares. Public companies can also invite the public to subscribe for its shares or debentures. While it is common for the public companies to be listed on the stock exchange to raise funds, it is also possible for public companies to offer shares or debentures to the public without listing on the stock exchange. Such public offerings are regulated by Part II of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) (the “**Winding Up Ordinance**”).

**Offer to the Public Must be Issued with a Prospectus.** When a public company offers its shares and debentures to the public without listing on the stock exchange, it must comply with certain requirements. One of such requirements is that any form of application for shares in or debentures of a company must be issued with a prospectus that complies with the content and registration requirements (briefly discussed below) in the Winding Up Ordinance.<sup>29</sup> Prospectus means any notice, circular or other document offers shares in or debentures of a company to the public for subscription or purchase for cash or other considerations or calculated to invite offers by the public to subscribe for or purchase for cash or other considerations any shares in or debentures of a company.<sup>30</sup>

**Offer not Considered Public.** An offer or an invitation is not required to be treated as being made to the public (and having to meet the prospectus requirement) if “it can properly be regarded, in all the circumstances, as not being calculated to result, directly

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<sup>24</sup> Companies Ordinance, (2021) Cap. 622, 12-86, §614 (H.K.).

<sup>25</sup> Companies Ordinance, (2021) Cap. 622, 9-172, §430 (H.K.).

<sup>26</sup> Companies Ordinance, (2021) Cap. 622, 12-216, §662(3) (H.K.).

<sup>27</sup> Companies Ordinance, (2021) Cap. 622, 12-216, §662(4) (H.K.).

<sup>28</sup> Companies Ordinance, (2021) Cap. 622, S6-8, §7 (H.K.).

<sup>29</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §38(3) (H.K.).

<sup>30</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §2 (H.K.).

or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation, or otherwise as being a domestic concern of the persons making and receiving it”.<sup>31</sup> A few exemptions in the Winding Up Ordinance provide more color as to what offer is not considered an offer made to public. These exemptions include but are not limited to:

- (a) an offer to not more than 50 persons;<sup>32</sup>
- (b) bona fide invitation to a person to enter into an underwriting agreement;<sup>33</sup>
- (c) rights issue (issuance to existing members or debenture holders of a company);<sup>34</sup>  
and
- (d) offers to professional investors (as defined under the Securities and Futures Ordinance (Cap.571)).<sup>35</sup>

**Content and Registration Requirement of Prospectus.** To the extent an offer or invitation is indeed considered a public offering and no exemptions or safe harbors are applicable, a prospectus must be issued in connection with such offering. The prospectus needs to include information about the company’s business, the share capital of the company, directors’ statement as to the gross trading income or sales turnover for the previous three financial years, and so on.<sup>36</sup> No prospectus can be issued unless its registration has been authorized and a copy registered by the Companies Registrar.<sup>37</sup> Misstatement in the prospectus will give rise to civil liabilities under the Winding Up Ordinance, as well as the Securities and Futures Ordinance (Cap.571) and common law. There can also be criminal liability for misstatement in a prospectus for the person authorizing the issue of prospectus except he or she can prove that the statement was immaterial or that he or she had reasonable grounds to believe and did up to the time of issue believe that the statement was true.<sup>38</sup>

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<sup>31</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §48A (H.K.).

<sup>32</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, Sch.17, Pt.1, §2 (H.K.).

<sup>33</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §38(3)(a) (H.K.).

<sup>34</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §38(5)(a) (H.K.).

<sup>35</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, Sch.17, Pt.1, §1 (H.K.).

<sup>36</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, Sch.3 (H.K.).

<sup>37</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §38D(1) (H.K.).

<sup>38</sup> Companies (Winding Up and Miscellaneous Provisions) Ordinance, (2020) Cap.32, §40A (H.K.).

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