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Financial Services Regulatory Update 金融服务监管资讯

2023.03.24

Implications of the New Mainland Rules for Overseas Listings to Hong Kong Takeover Transactions

On February 17, 2023, the State Council of China issued the "Decision of the State Council on the Abolition of Some Administrative Regulations and Documents" and the China Securities Regulatory Commission issued the "Administrative Measures for Overseas Offering and Listing of Domestic Enterprises" and relevant guidelines (collectively referred to as the New PRC Regulations) on February 17, 2023. The New PRC Regulations apply to the overseas listing of domestic enterprises. On March 31, 2023, the New PRC Regulations will take effect and will replace the "Special Provisions of the State Council on the Overseas Issuance of Shares and Listing by Joint Stock Limited Companies" issued by the State Council in 1994 (Special Provisions) and the "Essential Clauses for the Articles of Association of Overseas Listed Companies" issued by the State Council Securities Committee and the State Economic and Trade Commission in 1994 (Essential Clauses).

On March 17, 2023, the Securities and Futures Commission of Hong Kong (SFC) issued guidelines to reflect the new regulations on overseas listing of mainland China. The SFC issued Frequently Asked Questions (FAQs) on Disclosure of Equity Interests of PRC Issuers under Part XV of the Securities and Futures Ordinance, and also issued Practice Note 25 to provide guidance to market participants on the application of the Code on Takeovers and Mergers (Takeovers Code) and the Code on Share Buy-backs (collectively, the Codes) under the new rules.

FAQs

The Essential Clauses will be repealed on March 31, 2023. After the repeal, H shares and domestic shares will no longer be treated as different classes of shares. However, as H shares and domestic shares are traded on different exchanges and cannot be directly exchanged between exchanges, issuers' equity interests in H shares should continue to be calculated based on the proportion of issued H shares and reported separately from issued domestic shares.

According to Part XV of the Securities and Futures Ordinance, issuers should calculate and report the issued H shares and domestic shares separately for the calculation of equity interests. All notices and reports required under Part XV should continue to be submitted to Hong Kong Exchanges and Clearing Limited (HKEX) in electronic form for publication on the HKEX website.

The FAQs do not clarify whether, after the change in PRC rules, unlisted domestic shares and A shares should be treated as separate classes of shares when filing notifications. It would however appear that the current way of filing notifications, treating them as different classes, should continue. In any event, it would be safer and clearer to give more information than less.

Practice Note 25 on the application of the Codes under the New PRC Regulations

Class (6) associates under the Takeovers Code include persons who hold or control 5% or more of any class of securities of the offeror or possible offeror or offeree company, including those who hold or control 5% or more as a result of any transaction. To ensure that transactions involving substantial equity interests held by H-share holders are appropriately covered and disclosed in accordance with rule 22 of the Takeovers Code, H shares will continue to be treated as a separate class of shares distinct from A shares and unlisted domestic shares. For A shares and unlisted domestic shares, given that the underlying position under PRC law is that they constitute the same class of shares, the Corporate Finance Executive of the SFC (Executive) will treat A shares and unlisted domestic shares as the same class for the purpose of determining class (6) associates.

Rule 2.2 and 2.10 of the Takeovers Code originally require, subject to waivers by the Executive, shareholder approval by independent shareholders of the offeree company for cancellation of listing status or privatization transactions. Given that any proposal to privatize or delist a PRC H-share issuer's H shares would have a significant impact on the interests of H-share holders, whose interests differ from those of domestic shareholders, prior to the changes in PRC rules, the Executive required separate approval by H-share holders of such transactions to protect their interests.

After the changes in PRC rules, the Executive will maintain this approach, being of the view that H-share holders should continue to enjoy the same protection. Therefore, any such approval should be made solely by H-share holders.

In addition, Rule 14 of the Takeovers Code originally requires that, where a company has more than one class of equity capital, an offer must be made on the same terms for each class of shares, except where a class of shares does not carry voting rights. Prior to the changes in PRC rules, offers for PRC H-share issuers' H shares generally needed to be made on the same terms for A shares under Rule 14, unless waived by PRC regulators; and vice versa. However, as PRC H-share issuers' A shares and H shares inherently differ, and are not directly interchangeable in practice, the approach of treating the two classes of shares, and other equity securities, separately will be maintained after the changes in PRC rules. Therefore, the requirement under Rule 14 to make offers on the same terms for different securities will be maintained after the changes in PRC rules.

Before the change in PRC rules, A shares, H shares, and unlisted domestic shares were treated as three independent share classes. Rule 23 only became applicable when the offeror and its concert parties acquired a substantial holding (10% or more of the voting rights) in a particular class of shares. After the change in PRC rules, although domestic shares (whether unlisted or A shares) and H shares are treated as the same class, the Executive will continue to treat domestic shares and H shares as different classes when applying Rule 23. The Executive will consider the significant differences between domestic shares and H shares and their impact on the application of General Principle 1 before deciding whether Rule 23 needs to be invoked for offers for domestic shares and H shares.

Specifically, Rules 23.1(a), (b), and 23.2 only become applicable when the offeror and its concert parties acquire a substantial holding (10% or more of the voting rights) in a particular class of shares. Even if domestic shares (whether unlisted or A shares) and H shares are treated as the same class, Rules 23.1(a), (b), or 23.2 would not be triggered unless the offeror and its concert parties hold 10% or more of the voting rights in H shares. Similarly, while Rule 23.1(b) would be triggered if the offeror and its concert parties acquire a substantial amount of H shares during an offer period, Rule 23.1(a) would not since H shares would not be treated as domestic shares. The Executive would only invoke Rule 23.1(c) in special circumstances to require cash offers for domestic shares and H shares to implement General Principle 1.

The Executive confirms that the existing practices and waivers under Rule 25 and Practice Note 17 for

associated transactions and the cleansing transaction waivers under Note 1 to Rule 26 and Table VI will remain unchanged after the change in PRC rules. Therefore, shareholder approval for specific transactions under Rule 25 and Practice Note 17 does not require class shareholder approval by H shareholders. Similarly, when an exemption for a cleansing transaction is approved by shareholders voting "independently", class shareholder approval by H shareholders is not required.

Finally, if parties are in any doubt about the interpretation and application of any provisions under the Codes following the changes in PRC rules, early consultation with the Executive is strongly recommended so that any issues may be identified and resolved as soon as possible.

Remarks

It should be noted that, under the Codes, certain issues are applicable to all shareholders alike while some other issues require different treatments for separate classes of securities. After the New PRC Regulations are implemented, for the purposes of the Codes, the Executive will generally continue to treat domestic shares and H shares as different classes in respect of class-specific issues, provided that the Executive will consider the similarities and differences between the share classes involved in a transaction governed by the Codes (including without limitation any general offer, partial offer, whitewash, securities exchange offers, privatization, share scheme, buy-back, or cancellation of listing status transaction) in determining the situation to ensure that the interests of all parties are properly considered, especially where a different or otherwise treatment would be warranted by the application of General Principle 1 that all shareholders are to be treated even-handedly while all shareholders of the same class are to be treated similarly.

Please also refer to the article at the end of this update.

中国内地新境外上市规例对香港收购交易的影响

于 2023 年 2 月 17 日，中国国务院于 2023 年 2 月 17 日发出了《国务院关于废止部分行政法规和文件的决定》及中国证监会于 2023 年 2 月 17 日所发出了《境内企业境外发行证券和上市管理试行办法》及相关的指引（合称为新的中国规例）；对内地企业的境外上市实施新的中国规例。并于 2023 年 3 月 31 日实施的新的中国规例将取代由中国国务院于 1994 年所发出的《国务院关于股份有限公司境外募集股份及上市的特别规定》（《特别规定》）及由国务院证券委员会及国家经济体制改革委员会于 1994 年发出的《到境外上市公司章程必备条款》（《必备条款》）。

于 2023 年 3 月 17 日, 香港证券及期货事务监察委员会(证监会)发出指引, 以反映内地有关境外上市的新规例。证监会就根据《证券及期货条例》第 XV 部对“关于中国发行人权益的披露”发出常见问题, 证监会亦发布了《应用指引 25》, 向市场参与者提供在新的规则下有关《公司收购、合并及股份回购守则》(《收购守则》)的应用指引。

常见问题

《必备条款》于 2023 年 3 月 31 日被废止。《必备条款》将 H 股和内资股视为不同类别股份,但废止后将不再如此。尽管如此,由于 H 股和内资股分别在不同的交易所交易,且无法在交易所之间直接互换,因此发行人的 H 股权益应继续按已发行 H 股股数的比例计算,并与已发行内资股股数分开报告。

根据《证券及期货条例》第 XV 部,发行人应就权益百分比计算,将已发行 H 股和内资股股数分开计算。所有第 XV 部规定的通知和报告应以电子方式提交给香港联合交易所有限公司,以便在香港交易所网站上发布。

常见问题解答并未阐明, 在中国规则发生变化后, 非上市内资股和 A 股在提交通知时是否应被视为不同类别的股份。然而, 目前提交通知的方式似乎应该继续, 将它们视为不同的类别。无论如何, 提供更多信息比提供更少信息更安全、更清晰。

《应用指引 25》在新的中国规例下的应用指引

《收购守则》所界定的第(6)类联系人包括拥有或控制 5% 或以上由要约人或可能要约人或受要约公司所发行的任何类别有关证券的人,包括因任何交易而拥有或控制 5% 或以上的人。为确保由持有 H 股重大股权的人进行的交易所涉及的关键性和有关资料能够根据《收购守则》规则 22 而获得涵盖和披露,H 股将被视为有别于 A 股及非上市内资股的独立股份类别。至于 A 股及非上市内资股,鉴于在中国法律下的基础立场是两者均属同一股份类别,故就厘定任何第(6)类联系人而言,执行人员将视 A 股及非上市内资股为同一类别。

《收购守则》规则 2.2 及 2.10 原要求,除非得到执行人员的豁免,取消上市地位或私有化的交易须先得得到相应公司的无利害关系股东批准。鉴于任何私有化中国 H 股发行人 H 股或取消其上市地位的建议将对 H 股持有人的利益造成重大影响,且 H 股持有人的利益与内资股持有人的利益不同,在中国规则变更前,执行人员规定上述交易须由 H 股持有人批准,以保障其利益。在中国规则变更后,执行人员规定维持此方针,确信 H 股持有人应继续享有相同保障。因此,任何相关批准均应仅由 H 股持有人决定。

此外,《收购守则》规则 14 原要求凡一家公司具有超过一类权益股本,便须就该每一类股本的股份作出同等基础的要约,不论有关股本是否附有投票权。在中国规则变更前,凡就中国 H 股发行人的 H 股作出要约,通常须根据规则 14 就 A 股作出同等基础的要约,除非获得中国监管当局的豁免;反之亦然。然而,由于中国 H 股发行人的 A 股与 H 股存在固有差异,且两者实际上不可直接互换,在中国规则变更后,将上述两者及其他权益证券分开处理的做法将予维持。有鉴于此,规则 14 所要求就不同的证券作出同等基础的要约的做法,将在中国规则变更后予维持。

在中国规则变更前,A 股、H 股及非上市内资股被视为三个独立类别的股份。规则 23 只在要约人及其一致行动人士在特定类别股份(附有 10%或以上投票权)购买大量股份时,才会变得适用。在中国规则变更后,虽然内资股(不论是非上市股份或 A 股)与 H 股均被视为同一类别,但执行人员在应用规则 23 时,会继续将内资股与 H 股视为不同类别。执行人员会考虑内资股与 H 股之间的重大分别,及其对应应用一般原则 1 的影响,才会决定是否需要就内资股及 H 股要约引用规则 23。

具体而言,规则 23.1(a)、(b)及 23.2 只在要约人及其一致行动人士在特定类别股份(附有 10%或以上投票权)购买大量股份时,才会变得适用。即使内资股(不论是非上市股份或 A 股)与 H 股被视为同一类别,只要要约人及其一致行动人士没有在 H 股取得 10%或以上投票权,便不会触发规则 23.1(a)、(b)或 23.2。同样地,若要约人及其一致行动人士在要约期内取得大量 H 股,便会触发规则 23.1(b),但不会触发规则 23.1(a),因为 H 股不会被视为内资股。执行人员只会在特殊情况下,引用规则 23.1(c),要求为落实一般原则 1 的规定,就内资股及 H 股要约均作出现金要约。

执行人员确认,在中国规则变更后,现行规则 25 及《应用指引 17》下与特别交易有关的做法和规则 26 的豁免注释 1 及附表 VI 下的清洗交易的豁免将会维持不变。因此,依据规则 25 及《应用指引 17》就特定交易取得股东批准时,将无须取得 H 股持有人的类别股东批准。同样地,当由股东“独立投票”以批准清洗交易的豁免时,将无须取得 H 股持有人的类别股东批准。

最后, 证监会极力建议, 任何人士如在中国规则变更后, 对收购守则任何条文的诠释及应用有任何疑问, 应尽早咨询执行人员的意见, 以便尽快识别和解决任何问题。

评论

应该注意的是, 根据《收购守则》, 一些问题同样地适用于所有股东, 而其他一些问题需要针对不同类别的证券进行不同的处理。新中国法规实施后, 执行人员一般来说就特定类别相关的问题将继续将内资股和 H 股视为不

同类别，前提是执行人员将考虑受《收购守则》规管的交易（包括但不限于任何全面要约、部分要约、清洗交易、证券交换要约、私有化、股份计划、回购或取消上市地位的交易）中涉及的股份类别之间的差异及具体情况以确保适当考虑所有各方的利益，特别是在应用一般原则 1（即所有股东均应受到公平对待，同一类别的所有股东得到同样的对待）的情况下，是否需要作出特别的处理。

另请参阅本期金融服务监管资讯末尾的文章。

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The Stock Exchange of Hong Kong Limited Publishes Consultation Paper on Rule Amendments Following Mainland China Regulation Updates and Other Proposed Rule Amendments Relating to PRC Issuers

On February 24, 2023, The Stock Exchange of Hong Kong Limited (the Exchange) published a consultation paper proposing to amend the Listing Rules (the Rules) to reflect updates to regulatory rules in mainland China and proposing other amendments to the Rules concerning Chinese issuers to reflect updates to regulatory rules in mainland China and proposing to amend other unnecessary provisions concerning Chinese issuers. The proposals aim to ensure the Rules Chapter 19A (i.e. the provisions applicable to Chinese issuers) are consistent with Chapter 19 (i.e. the provisions applicable to overseas issuers) and meet the Exchange's long-standing objective of providing equal protection to investors of all issuers (regardless of place of registration).

Amendments to Reflect Changes in Mainland China Regulatory Rules

As these amendments to the Rules reflect changes in mainland China regulations, market consultation is not required. The Exchange will announce the effective date of the corresponding amendments to the Rules in due course upon obtaining the necessary regulatory approvals. The amendments mainly include:

Shareholder Class Meetings

The Exchange will delete the Rules Chapter 19A provisions concerning shareholder class meetings for issuance and repurchase of shares by Chinese issuers to align with the cancellation of Special Provisions and Essential Provisions. Deleting the class meeting provisions will not prejudice the rights of H shareholders as H shares and domestic shares carry the same substantive rights (including voting rights, dividend rights and rights to distribution of assets on a winding up). Class meetings are primarily convened for issuance of new shares or share repurchases and approval from different classes of shareholders is no longer required. The deletion aligns with the current arrangement for dual-listed non-Chinese issuers on the Shanghai and Hong Kong Stock Exchanges. Chinese regulations (and the Rules) do not specify that shares listed on different exchanges should be treated as different classes.

In addition, the Exchange will delete supplementary provisions reflecting the Essential Provisions to align with the provisions for overseas issuers, including:

- Requiring shareholder approval by ordinary resolution (instead of special resolution) for issuance or repurchase of shares;
- Waiving the requirement for shareholder approval for preferential issuance of shares; and
- Deleting the exemption for Chinese issuers to implement a share issuance plan adopted within 15 months of regulatory approval by the China Securities Regulatory Commission (CSRC) (the exemption was specified in the Essential Provisions but not under the new Chinese regulations).

Arbitration Clauses and Related Provisions

The Exchange will delete from the Rules Chapter 19A the provisions reflecting the arbitration provisions in the Essential Provisions following their cancellation. After the deletion, shareholders of Chinese issuers may exercise their rights under the company's articles of association as for shareholders of overseas issuers. In particular, they may, like shareholders of overseas issuers, seek to enforce their rights by commencing legal proceedings in (i) the jurisdiction where the issuer is registered; or (ii) the Hong Kong courts.

Amendments to Reflect New Mainland China Overseas Listing Filing Regulations

The Exchange will, in line with the introduction of a new filing system (replacing the current CSRC approval system) under the new Chinese regulations, delete Rule 19A.22A requiring Chinese new applicants to submit a copy of the CSRC's approval for their listing on the Exchange and add the Rules Chapter 9 paragraph 16 requiring new applicants (whether registered in mainland China or other jurisdictions) to submit a notice issued by the CSRC confirming completion of the

mainland China filing process at least four business days before the expected hearing date. The Exchange will also amend the Rules Chapter 19A.42 paragraphs 54(2) and (4) to reflect the new filing system.

Requirements relating to articles of association

The Exchange suggested deleting Appendix 13D of the Rules. This appendix required H-share companies to comply with the core shareholder protection levels outlined in Appendix 3 of the Rules. The previous requirement in Appendix 13D is no longer mandatory for inclusion in the articles of association. For domestic enterprises that list overseas directly, they should refer to the regulations on corporate governance issued by the CSRC when formulating their company articles of association.

Other Proposed Amendments to the Rules

The Exchange also proposes corresponding amendments to the Rules following the implementation of the new Chinese regulations and cancellation of the Special Provisions and Essential Provisions. The proposals mainly include:

Proposed amendment of Rules provisions concerning the classification of domestic shares and H shares

The Exchange proposes to amend the Rules Chapter 19A.38 to align with the cancellation of the classification of domestic shares and H shares and the corresponding class meetings. Specifically, it is proposed that the overall limits for general mandates and specific mandates will be set at 20% and 10% respectively of the total issued shares of the Chinese issuer. This aligns the mandate limits with the provisions for non-Chinese dual-listed issuers on the Exchange and overseas exchanges and provides greater flexibility for Chinese issuers with both A shares and H shares to determine the number of H shares to be issued, which is consistent with the fact that H shares and domestic shares are shares of the same class.

Proposed removal or amendment of other unnecessary provisions in the Rules Chapter 19A

The Exchange proposes to delete the Rules Chapter 19A provisions concerning undertakings by directors, senior management and supervisors of a Chinese issuer and its shareholders. The Exchange considers these provisions unnecessary as Chinese issuers can require directors, supervisors and senior management to comply with the Company Law of the People's Republic of China and the issuer's articles of association and require them to compensate for non-compliance. Shareholders of Chinese issuers can also require directors, supervisors and senior management to comply with the issuer's articles of association and

remedy non-compliance under the articles of association.

香港联合交易所有限公司刊发建议根据中国内地监管新规修订《上市规则》以及其他有关中国发行人的条文修订的咨询文件

于 2023 年 2 月 24 日, 香港联合交易所有限公司(联交所)刊发咨询文件, 建议因应中国内地监管规则更新而修订《上市规则》, 同时建议《上市规则》作出若干其他有关中国发行人的修订, 以反映中国内地监管规则的更新, 同时建议修订其他不再必要的有关中国发行人的条款。建议旨在使《上市规则》第十九 A 章(即适用于中国发行人的规定)与第十九章(即适用于海外发行人的相关规定)保持一致, 符合联交所长期以来为所有发行人(不论注册地点)的投资者提供同等保障的目标。

根据中国内地监管新规修订《上市规则》

此部份的《上市规则》修订为反映中国法规的相关变动, 故毋须进行市场咨询, 待获得所需的监管机构批准后, 联交所将适时公布《上市规则》相应修订的生效日期, 修订内容主要包括:

类别股东会议规定

联交所将删除《上市规则》第十九 A 章与中国发行人发行及回购股份有关的类别股东会议规定, 以配合《特别条款》及《必要条款》的取消。删除类别股东会议规定不会损害 H 股股东的权益, 因 H 股和内资股所附带的实质权利(包括投票权、收股息权和清盘时资产分配权)是相同的。类别股东会议主要是为发行新股或回购股份而召开, 现时不需要征求不同类别股东的批准。删除此规定符合现时对中国证券交易市场和联交所双重上市的非中国发行人的安排。中国法规(及《上市规则》)并无规定于不同交易所上市的股份须被视为不同类别的股份。

此外, 联交所将删除反映《必备条款》的附加规定, 使上述规定与适用于海外发行人的规定保持一致, 包括:

- 规定发行或回购股份须经股东大会以普通决议案(而非特别决议案)通过;
- 豁免有关优先发行股份须经股东批准的规定;及
- 删除有关中国发行人根据其成立时采纳并于中国证监会批准日期起计 15 个月内实施的计划发行股份可获的豁免(该豁免于《必备条款》中订明, 但中国新法规没有)。

仲裁条款及相关规定

联交所将删除《上市规则》第十九 A 章中反映《必备条

款》仲裁规定的条文,配合《必备条款》的废除。删除后,中国发行人的股东可行使其于公司章程下的权利,一如其他海外发行人的股东。尤其是他们可与海外发行人的股东一样,通过在(i) 发行人注册成立地的法院;或(ii) 香港法院提出法律诉讼来寻求行使其权利。

为反映适用于内地公司境外上市的中国备案新规而作出的《上市规则》相应修订

联交所将配合中国新法规引入的新的备案制度(取代现行的中国证监会核准制),删除《上市规则》第19A.22A条要求中国新申请人提交中国证监会批准其在联交所上市的批文副本的规定,并于《上市规则》第九章增设条文16,要求新申请人(不论是在中国还是其他司法权区注册成立)在预期的聆讯审批日期至少足4个营业日之前提交由中国证监会发出的确认新申请人完成中国备案程序的通知书。联交所亦将修订《上市规则》第19A.42条第54(2)及(4)段,以反映新的备案制度。

有关公司章程的规定

香港联交所建议删除上市规则附录十三D部,要求H股公司的章程符合上市规则附录三的核心股东保障水平,原有的附录十三D部不再是章程必备的强制内容。境内企业直接境外发行上市,应参照中国证监会关于公司治理的规定制定公司章程。

《上市规则》的其他修订建议

联交所亦建议论继中国实施中国新法规而撤销《特别规定》及《必备条款》之后,对《上市规则》作出相应的修订。其中主要包括:

建议修改有关内资股与H股「类别划分」的《上市规则》条文

联交所建议修订《上市规则》第19A.38条,以配合内资股与H股之间「类别划分」及取消相应类别股东会议的规定。具体而言,联交所建议将一般性授权及计划授权的整个限额分别设为中国发行人全部已发行股份的20%及10%。此举将授权限额的设计与适用于在联交所及海外交易所双重上市的非中国发行人的规定保持一致,并提供同时拥有A股及H股的中国发行人更大灵活性,决定其发行H股的数目,这符合H股及内资股属同一类别的股份的事实。

建议删除或修改《上市规则》第十九A章内其他已无必要的规定

联交所建议,删除《上市规则》第19A章有关董事、高级管理人员及监事向中国发行人及其股东作出承诺的规

定。因为联交所认为有关规定已无必要,因为中国发行人可根据《中国公司法》强制要求董事、监事及高级管理人员遵守《中国公司法》及公司章程,并要求其就不合规的情况作出赔偿。中国发行人的股东则可根据中国发行人的公司章程,强制要求董事、监事及高级管理人员遵守公司章程,并要求其就不合规的情况作出补救。

Source 来源:

https://www.hkex.com.hk/News/Regulatory-Announcements/2023/230224news?sc_lang=en
<https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/2016-Present/February-2023-Mainland-China-Regulation/Consultation-Paper/cp202302.pdf>

The Hong Kong Exchanges and Clearing Limited Publishes Enforcement Bulletin to Remind Directors of their Duties to Safeguard the Assets or Interests of Issuers

Hong Kong Exchanges and Clearing Limited (HKEX) issued the Market Misconduct Tribunal Briefing Note in March 2023, summarizing 13 disciplinary cases under the Securities and Futures Ordinance in the second half of 2022, many of which involved directors violating their fiduciary duties by failing to safeguard the assets or interests of the issuers. This included the first batch of 13 directors issued with Unsuitability Statements and 12 directors issued with Statements of Censure for Harming Investor Interests.

Company's duties

Under Rules 13.49(1) and 13.46(2)(a) of the Listing Rules, listed issuers are required to publish preliminary announcements of annual results and annual reports within specific timeframes. Rules 13.48(1) and 13.49(6) specify timeframes for publishing preliminary announcements of interim results and interim reports. Rules 14.34, 14.38A and 14.40 require issuers to issue announcements, circulars and obtain shareholder approval for major transactions. According to Rule 14.04(1)(e), "transactions" include (including) financial assistance provided by issuers. Code Provision A.4.2 of the Corporate Governance Code under Appendix 14 of the Listing Rules stipulates that each director (including directors with a fixed term) should retire by rotation at least once every three years. Under Rule 13.89(3), if an issuer deviates from the Code Provisions of the Corporate Governance Code, it must provide reasons that have been carefully considered in its annual report and/or interim report.

Rules 14.34, 14.38A, 14.40, 14A.35, 14A.36 and 14A.46 stipulate that for transactions that must be announced and/or related party transactions, issuers must comply with the requirements for notices, announcements, circulars and shareholder approval.

Directors' duties

Under Rule 3.08, directors must jointly and severally exercise their duties of utmost good faith and with the skill, care and diligence that a reasonably prudent person would exercise in comparable circumstances. When exercising the above duties, directors must at least meet the standards established under Hong Kong law. These duties include (but are not limited to) acting in the best interests of the issuer as a whole in an honest and faithful manner; being accountable to the issuer for the application or misapplication of its assets; and exercising the degree of skill, care and diligence that a reasonably prudent person would exercise in comparable circumstances, given the knowledge and experience that may reasonably be expected of a person carrying out the same functions in relation to the issuer as those carried out by the directors.

According to the Form B Declaration and Undertaking with regard to Directors under Appendix 5 of the Listing Rules (Undertaking), each director must (i) endeavor to comply with the Listing Rules; (ii) endeavor to procure compliance by the Company with the Listing Rules; and (iii) cooperate with the HKEX in any investigation.

Cases of breach of directors' duties have been reported involving two directors of Ping An Securities Group (Holdings) Limited who exceeded their authority in granting loans and a director of Good Resources Holdings Limited who failed to report pledge agreements and loan agreements entered into by a subsidiary, resulting in significant losses. There are other cases that also reflected that directors failed to adequately safeguard the interests of issuers or exposed issuers to excessive risks. All directors must remember that directors have an extremely important role in safeguarding the assets and interests of issuers. This includes ensuring that transactions have reasonable commercial grounds and are properly discussed by the board of directors, and ensuring that all parties act prudently and properly manage the risks of entering into transactions and conducting subsequent monitoring.

香港联合交易所有限公司发布上市规则执行简报提醒董事保障发行人资产或利益的董事责任

香港联合交易所有限公司（联交所）发布2023年3月的《上市规则执行简报》，重点总结2022年下半年联交所证券上市规则（《上市规则》）对13个执行个案，当中不少均涉及董事因未有保障发行人资产或利益而违反董事责任；这包括首批向13名董事发出董事不适合性声明的个案，及向12名董事发出的损害投资者权益声明。

公司责任

《上市规则》第13.49(1)及13.46(2)(a)条规定上市发行人公布年度业绩及年报的初步公告的时限，而第13.48(1)及13.49(6)条则规定上市发行人公布中期业绩及中期报告的初步公告的时限。第14.34、14.38A及14.40条规定发行人须就主要交易公布公告、发出通函及取得股东批准。根据第14.04(1)(e)条，“交易”包括(其中包括)由发行人提供财务资助。《上市规则》附录14之《企业管治守则》守则条文A.4.2规定每名董事(包括有指定任期的董事)应轮流退任，至少每三年一次。第13.89(3)条规定，若发行人偏离《企业管治守则》的守则条文行事，其须在年报及/或中期报告中提供经过审慎考虑的理由。

《上市规则》第14.34、14.38A、14.40、14A.35、14A.36及14A.46条订明，就须予公布及/或关联交易，发行人须遵守通知、公告、通函及股东批准的规定。

董事责任

《上市规则》第3.08条订明董事须共同与个别地履行诚信责任及以应有技能、谨慎和勤勉行事的责任，而履行上述责任时，至少须符合香港法例所确立的标准。上述责任包括（但不限于）诚实及善意地以公司的整体利益为前提行事；对发行人资产的运用或滥用向发行人负责；及以应有的技能、谨慎和勤勉行事，程度相当于别人合理地预期一名具备相同知识及经验，并担任发行人董事职务的人士所应有的程度。

根据《上市规则》附录五B表格所载表格形式之《董事的声明及承诺》（《承诺》），每名董事均须(i)尽力遵守《上市规则》；(ii)尽力促使该公司遵守《上市规则》；及(iii)配合上市科的任何调查。

过往有董事违反董事责任的案例，包括平安证券集团(控股)有限公司的两名董事越权授出贷款，及天成国际集团控股有限公司的一名董事未有汇报附属公司订立的质押合同及贷款协议，导致重大损失。其他案例亦反映董事未有充分保障发行人利益或让发行人承受过大风险。所有董事均须谨记，董事在保障发行人资产及利益方面有着非常重要的角色，包括确保交易有合理的商业理据及经过董事会适当讨论，并确保各方谨慎行事，妥善管理订立交易的风险及进行后续监察。

Source 来源:

<https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Disciplinary-and-Enforcement/Enforcement-Newsletter/newsletter202303.pdf>

Hong Kong Exchanges and Clearing Limited Publishes an Updated Guide on General Meetings

On February 28, 2023, the Hong Kong Exchanges and Clearing Limited (HKEX) published an updated Guide on General Meetings (the Updated Guide). The Guide comprehensively outlines the procedures for convening and conducting general shareholder meetings, including the annual general meetings (AGM), extraordinary general meetings (EGM), and special general meetings (SGM). It consolidates all relevant regulations stipulated in the Corporate Governance Code and Rules Governing the Listing of Securities on the Stock Exchange (Listing Rules). The key updates mainly include:

Virtual/Hybrid General Meeting

Due to COVID-19, virtual shareholder meetings have increased. According to the Companies (Amendment) Ordinance 2023 effective on April 28, 2023, shareholder meetings may be physical, virtual, or hybrid.

The Updated Guide recommends issuers consider virtual or hybrid meetings to increase shareholder engagement. When holding these meetings, issuers should:

- provide access details and verification in the meeting notice
- use secure authentication like unique logins or one-time PINs
- enable listening, speaking, and real-time questioning
- offer video and audio access if possible
- address technical issues and have contingency plans with support
- enable real-time electronic voting with safeguards and records

Notice of General Meeting

The Updated Guide also stipulate revised requirements and timelines for shareholder meeting notice. Issuers must provide at least 21 days' notice for AGMs and at least 14 days' notice for other meetings. In addition, notices must specify the meeting format as physical, virtual, or hybrid. To the extent permitted under the law of the issuer's place of incorporation and its constitutional documents, in printed form or in electronic form. If a notice of a general meeting is to be sent to shareholders with overseas addresses in printed form, it shall be sent by airmail or an equivalent service that is not slower.

Shareholders' Requisition of Meetings

Shareholders holding a minority stake must be able to convene a general meeting and add resolutions to a meeting agenda. Issuers should set out in their constitutional documents the minimum stake for convening a general meeting having regard to the requirements of the Listing Rules and the laws of their places of incorporation.

Minutes of Meeting

The Updated Guide expressly recommends that issuers formally record and disclose key discussion points raised by shareholders (or proxies) as well as responses from the board and management. Issuers must properly document shareholder questions and comments and management's responses and make these records available to shareholders.

Cumulative voting arrangements

Issuers may adopt cumulative voting for director and supervisor elections at general meetings if permitted by applicable law and constitutional documents. If cumulative voting is adopted, issuers must clearly disclose this in the general meeting notice, proxy form, and poll results announcement to properly inform shareholders.

Poll Results Announcement

According to Updated Guide, the poll results announcement must include: The total number of shares eligible to attend and vote at the general meeting; the number of shares entitled to attend and abstain from voting; and the number of shares required to abstain from voting under the Listing Rules. It must disclose the number of shares voted for and against each resolution as well as shares excluded from the poll results calculation. The announcement must confirm whether parties that disclosed voting intentions in the circular acted accordingly at the meeting. It must also disclose directors' attendance at the general meeting.

香港联合交易所有限公司发布最新《有关股東大會的指引》

2022年2月28日,香港联合交易所有限公司(联交所)发布最新《有关股东大会的指引》(「更新指引」)。指引全面概述召开和举行股东大会的程序,股东大会(包括股东周年大会及股东特别大会)时须作出的安排。它整合《企业管治守则》和《上市规则》中的所有相关规定。主要更新包括:

虚拟/混合式股东大会

由于 COVID-19,虚拟股东大会有所增加。根据 2023 年 4 月 28 日生效的《公司(修订)条例》,股东大会可以是以实体会议、虚拟会议或混合形式举行。

更新指引建议发行人考虑举行虚拟或混合式股东大会以增加股东参与。举行这些大会时,发行人应:

- 在会议通告中提供会议详情和验证程序
- 使用独特登入 ID/密码或一次性 PIN 等安全认证方法

- 启用实时发言、提问和聆听功能
- 如果可行,提供视频和音频接入
- 处理技术问题并制定应急计划以提供支持
- 实施实时电子投票并设有保障措施和记录

股东大会通告

更新指引还规定股东大会通告的要求和时间表。发行人须就举行股东大会给予股东合理书面通知（通常指分别于股东周年大会及其他股东大会的至少 21 天及至少 14 天前发出）。此外，股东大会通告应注明股东大会将以何种形式举行（即实体、虚拟或混合式会议）。在发行人注册成立地的法律及其组织章程文件容许的范围内，股东大会通告必须以印刷本或以电子形式发送至所有股东。电子形式送交所有股东。若要向海外股东寄送实体股东大会通告，则须以空邮付寄，或采用其他不致较空邮为慢的服务送交。

股东要求召开会议

持有发行人少数权益的股东须可必须能够召开大会并新增议程项目。发行人应在其宪法文件中规定最低持股率以便召开大会,同时考虑《上市规则》和及其注册成立地法律的要求。

会议记录

更新指引明确建议发行人正式记录和披露股东(或代理人)提出的主要讨论点和董事会及管理层的回应。发行人必须妥善记录股东提问和意见以及管理层的回应,并向股东提供这些记录。

累积投票安排

如适用法律和宪法文件允许,发行人可以在大会上采用累积投票机制选举董事和(对中国内地发行人)监事。如果采用累计投票,发行人必须在机制。若采用累积投票机制,发行人应在相关股东大会通告、机制。若采用累积投票机制,发行人应在相关股东大会通告、代表委任表格及投票表决结果公告中向股东清晰披露此事,以妥善地告知股东。

投票表决结果

根据更新指引,决议结果公告必须包括:出席和有权投票的股份总数;有权出席并免于投票的股数;和《上市规则》规定必须免于投票的股数。公告必须披露每项决议的赞成和反对票数以及决议结果计算中排除的股数。公告还必须确认通函中披露投票意向的相关方是否在大会上作出相应行动。公告也必须披露董事出席大会情况。

Source 来源:

https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listed-Issuers/Practices-and-Procedures-for-Handling-Listing-related-Matters/gm_guide.pdf

Hong Kong Exchanges and Clearing Limited Publishes Frequently Asked Questions on PRC's New Filing Requirements for Overseas Listings and Securities Offerings by Mainland Companies 118-2023

On February 24, 2023, Hong Kong Exchanges and Clearing Limited (The Exchange) published Frequently Asked Question No. 118-2023 regarding the new filing requirements for Mainland companies' overseas listings and issuances of securities under Main Board Listing Rules 2.03 and 8.01 and GEM Listing Rules 2.06 and 11.01. The FAQ clarifies the application of the new filing requirements on Mainland companies that have obtained regulatory approval from mainland regulators or completed the overseas listing or issuance of securities before the implementation of the new filing requirements.

Query	Responses
On 17 February 2023, the China Securities Regulatory Commission ("CSRC") announced the implementation of new regulations for overseas listing of Mainland companies, including the "Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies" 《境内企业境外发行证券和上市管理试行办法》 and related guidelines, with effect from 31 March 2023. A new filing regime is introduced to require all Mainland companies to register their direct or indirect overseas listings and securities offerings with the CSRC by filing materials on key compliance issues ("PRC Filing Requirements"). They apply to both PRC issuers and Hong Kong/overseas-incorporated issuers with	As a general principle, listed issuers must comply with applicable laws and regulations at all times. Accordingly, where an issuer's proposed issuance of securities falls within the PRC new filing regime, its directors should ensure that the issuer has completed the filing with the CSRC in accordance with the PRC Filing Requirements. The Exchange may require listed issuers to confirm compliance with the PRC Filing Requirements or other laws and regulations applicable to their material transactions as part of its vetting process of transaction circulars. It may withhold the listing approval for the proposed issue of securities if the PRC

principal operations in the Mainland.	Filing Requirements are not fulfilled.
Would the implementation of the PRC Filing Requirements have any impact on the issuance of securities by issuers listed on the Exchange?	

While Hong Kong's securities markets are increasingly closely connected with Mainland China's, we can expect to see more regulatory guidelines towards harmonization of market practices on both sides of the border. Market professionals should familiarize themselves with the requirements and practices of both Hong Kong and Mainland China. In view of this trend, JML's principal has recently become a PRC Greater Bay Area lawyer so as to provide services to clients from a more comprehensive perspective.

香港联合交易所有限公司刊发有关内地公司境外上市及证券发行的中国新备案规定的常见问题 118-2023

于2023年2月24日，香港联合交易所有限公司（联交所）就内地公司境外上市及证券发行的新备案规定，就主板上市规则第2.03及8.01条及创业板上市规则第2.06及11.01条发表常见问题118-2023。常见问题解答澄清了新备案规定对已经获得内地监管机构核准或在新备案规定实施前完成境外上市或证券发行的内地公司的适用情况。

有关《中国备案规定》的实施对在联交所上市的发行人发行证券有影响吗？	
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随着香港证券市场与中国内地的联系越来越紧密，我们可以期待看到更多监管指引以协调两地的市场规则及惯例。市场专业人士应掌握和熟悉香港和中国内地分别的要求和惯例。鉴于这一趋势，JML的主任律师最近成为中国粤港澳大湾区律师，以便从更全面的角度为客户提供服务。

Source 来源:

https://en-rules.hkex.com.hk/sites/default/files/net_file_store/FAQ118-2023_e.pdf

https://cn-rules.hkex.com.hk/sites/default/files/net_file_store/FAQ118-2023_c.pdf

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问题	回应
于2023年2月17日，中国证券监督管理委员会（「中国证监会」）宣布自2023年3月31日起实施内地公司境外上市新法规，包括《境内企业境外发行证券和上市管理试行办法》及相关指引；该新法规引入新的备案制度，要求所有内地公司进行直接或间接境外上市及证券发行时，须先就关键合规问题向中国证监会提交相关资料以作注册备案（「中国备案规定」）。它们适用于中国发行人以及主要业务在内地的香港/海外注册发行人。	<p>作为一般原则，上市发行人必须不时遵守适用的法律法规。因此，如发行人的建议证券发行属于中国新备案制度的范围，其董事应确保发行人已按照中国备案规定向中国证监会完成备案。</p> <p>作为审阅交易通函程序的一部份，联交所可能会要求上市发行人确认其已遵守中国备案规定或其他适用于其重大交易的法律法规。如果发行人未能满足中国备案规定，联交所可能会拒绝对建议发行的证券给予上市批准。</p>