

Hong Kong: Stock Exchange proposes rule amendments following the new PRC regulations on overseas listing of PRC Issuers

In brief

On 24 February 2023, the Stock Exchange of Hong Kong Limited ("**Exchange**") published a **consultation paper** ("**Consultation Paper**") setting out: (1) the consequential amendments to the Rules Governing the Listing of Securities on the Exchange ("**Listing Rules**") to reflect the New PRC Regulations (as defined below); and (2) other proposed rule amendments specific to issuers that are duly incorporated in the People's Republic of China, other than the regions of Hong Kong, Macau and Taiwan ("**PRC**") as joint stock limited companies ("**PRC Issuers**").

The consequential amendments are not open for public responses, and will become effective on a date to be announced, subject to the necessary regulatory approvals. The consultation in relation to other proposed rule amendments will close on 24 March 2023.

Background - New PRC Regulations

On 17 February 2023, the China Securities Regulatory Commission (CSRC) published the Trial Administrative Measures of Overseas Securities Offering and Listing by Domestic Companies and related guidelines ("**New PRC Regulations**"), which will take effect from 31 March 2023.

On the same date as the New PRC Regulations take effect, the longstanding Special Regulations on the Overseas Offering and Listing of Shares by Joint Stock Limited Companies ("**Special Regulations**") and the Mandatory Provisions for Companies Listing Overseas ("**Mandatory Provisions**") will be repealed.

PRC Issuers shall formulate their articles of association in line with the Guidelines for the Articles of Association of Listed Companies issued by the CSRC ("**PRC Guidelines on AoA**") in place of the Mandatory Provisions. Since holders of domestic shares and H shares (which are both ordinary shares) are no longer deemed as different classes of shareholders, the class meeting requirement now applicable to holders of domestic shares and H shares is no longer necessary. The PRC Guidelines on AoA applicable to PRC Issuers will remove the system related to class meetings, which will profoundly affect the compliance procedures related to shareholders' meetings of PRC Issuers.

In addition to the removal of class meetings, other provisions in the articles of association of PRC Issuers that are inconsistent with the current Company Law of the PRC and PRC Guidelines on AoA should also be adjusted accordingly, which includes removing regulations that restrict the change of register of shareholders for a special period; restricting external guarantees of listed companies; allowing the articles of association to authorize the board of directors to carry out share repurchases under specific circumstances; and increasing the profit distribution period requirements, etc. The corresponding provisions in the PRC issuer's articles of association derived from the Mandatory Provisions do not automatically become invalid. The Mandatory Provisions will only cease to apply after the PRC issuer completes the revision of its own articles of association (which includes the deletion of provisions derived from the Mandatory Provisions) in accordance with the current Company Law of the PRC and the PRC Guidelines on AoA.

The New PRC Regulations also introduce a new filing regime that requires PRC companies to register their direct and indirect overseas listings and securities offerings with the CSRC by filing relevant materials ("**PRC Filing Requirements**").

Contents

Background - New PRC Regulations

Listing Rule amendments

- (1) Consequential Listing Rule amendments
- (2) Other proposed Listing Rule amendments
- (3) Practical impact on PRC Issuers' corporate actions
- (4) Retained Listing Rules with specific requirements for H shares with minor modifications

Issues remaining to be addressed

- (1) Impact of the PRC Filing Requirements
- (2) Disclosure of interest under Part XV of the Securities and Futures Ordinance (SFO)
- (3) The Codes on Takeovers and Mergers and Share Buy-backs ("**Takeovers Code**")



Listing Rule amendments

(1) Consequential Listing Rule amendments

In connection with the implementation of the New PRC Regulations, the Exchange will make consequential Listing Rule amendments to remove Listing Rule requirements that reflect requirements under the New PRC Regulations and the repeal of the Special Regulations and the Mandatory Provisions.

As PRC Issuers are no longer required by the Mandatory Provisions to deem holders of their domestic shares and H shares to be different classes of shareholders, the Exchange proposes to modify the Listing Rules that address issues arising from domestic shares and H shares being treated as different classes.

The amendments will include: (i) amendment of Chapter 19A to remove (a) the class meeting and related requirements for issuance and repurchase of shares by PRC Issuers and (b) the requirements for disputes involving H shareholders to be resolved through arbitration; (ii) repeal of Appendix 13D, which requires PRC Issuers' articles of association to include the Mandatory Provisions and other ancillary provisions; and (iii) amendment of the documentary requirements for new listing applications to reflect PRC's new filing requirements for overseas listings of PRC companies.

Transitional arrangements

Under the New PRC Regulations, PRC Issuers shall formulate their articles of association in line with the PRC Guidelines on AoA, and the Mandatory Provisions will cease to apply. PRC Issuers listed on the Exchange are bound by both the Listing Rules and the provisions in their articles of association. In other words, these PRC Issuers must still adhere to their existing articles concerning class meetings for certain resolutions and other provisions required under the Mandatory Provisions where applicable, until they amend their articles of association. They should also comply with the Listing Rules (or the amended Listing Rules after the effective date of the Listing Rule amendments) at all times.

Under the New PRC Regulations, new applicants incorporated in the PRC are expected to follow the PRC Guidelines on AoA in preparing their articles of association. The Exchange will allow these applicants to comply with the Listing Rules, taking into account the consequential amendments if they are listed on the Exchange during the period between the repeal of the Mandatory Provisions and the effective date of the Listing Rule amendments.

New applicants incorporated in the PRC or other jurisdictions with principal business operations in the PRC are required to submit to the Exchange, at least four clear business days before the expected hearing date, a notification issued by the CSRC confirming their completion of PRC's filing procedures, where the new applicant's application for listing on the Exchange is required to be filed with the CSRC under the New PRC Regulations.

(2) Other proposed Listing Rule amendments

The Exchange has also taken this opportunity to review the Listing Rules relating to PRC Issuers, and it proposes changes to certain requirements specific to PRC Issuers that are no longer necessary in light of developments in PRC law and the PRC's financial market. Such amendments are also intended to align those with the requirements currently in place for Hong Kong and overseas issuers.

The key proposed amendments include the following:

- (a) Modifying the Listing Rules to allow the limits on general mandate for issuance of new shares and scheme mandate for share schemes to be calculated with reference to a PRC issuer's total issued shares (instead of referencing to each of domestic shares and H shares)
- (b) Removing the requirements for directors, officers and supervisors of PRC Issuers to provide undertakings to the issuers and their shareholders to comply with the Company Law of the PRC and the articles of association
- (c) Aligning minor requirements on compliance advisers under Chapter 19A (for PRC Issuers) with those in Chapter 3A (for all issuers)
- (d) Removing certain requirements in Chapter 19A relating to: (i) online display or physical inspection of documents; and (ii) disclosure in listing documents of new applicants.

The Exchange also proposed housekeeping Listing Rule amendments to remove provisions in Chapter 19A that duplicate other Listing Rules or are outdated.



(3) Practical impact on PRC Issuers' corporate actions

- (a) The removal of class meeting requirements relating to issuance and repurchase of shares by PRC Issuers mean that these resolutions **only need to be passed at a general meeting**, including shareholders of both domestic shares and H shares, instead of three separate meetings (a general meeting, a domestic share class meeting and an H share class meeting), thereby potentially making it easier for resolutions to be passed. The lower threshold of an **ordinary resolution** (instead of a special resolution) to approve the issuance or repurchase of shares and the exemption of shareholders' approval requirement for preemptive issuance also make it easier for PRC Issuers to implement such corporate actions.
- (b) Under the current Listing Rules, a PRC issuer may seek prior approvals from shareholders to: (i) issue securities of up to 20% of each of its issued domestic shares and H shares ("**general mandate**"); and (ii) issue securities in respect of options and awards granted under Chapter 17 share schemes of up to 10% of each of its issued domestic shares and H shares ("**scheme mandate**"). With the Listing Rule amendments, the general mandate and the scheme mandate would be subject to an overall cap of 20% and 10%, respectively, of a PRC issuer's total issued shares. As such, a PRC issuer has the flexibility to decide the proportion of A shares and H shares to be issued within the 20% and 10% cap under such a mandate.

(4) Retained Listing Rules with specific requirements for H shares with minor modifications

The Exchange retained certain Listing Rules that govern H shares trading on the Exchange only, subject to minor modifications:

- (a) Rule 19A.25(3) governing the repurchase of H shares on the Exchange states that "for a PRC issuer, the reference to "10 per cent. of the existing issued share capital of the issuer" in (i) of rule 10.06(1)(c) is amended to mean "10 per cent. of the total amount of existing issued H shares of the PRC issuer." This means that for the repurchase of H shares, the total number of H shares that the PRC issuer is authorised by its general meeting to repurchase still shall not exceed 10 per cent. of the total amount of existing issued H shares. As compared to the approach taken towards the general mandate and the scheme mandate, it appears that the Exchange is taking a more cautious approach towards repurchase of H shares.
- (b) Rule 19A.17 requiring a PRC issuer to obtain the Exchange's listing approval for the trading of H shares on the Exchange.
- (c) Rule 19A.12 requiring H shareholders' approval for a withdrawal of listing on the Exchange under Listing Rules 6.11, 6.12, 6.15 and 6.16. This means that in order to withdraw listing of PRC Issuers with H shares on the Exchange, approval must be given by at least 75% of the votes attaching to the H shares held by H shareholders voting at the meeting, and that the number of votes cast against the resolution must not be more than 10% of the votes attaching to the H shares held by H shareholders permitted to vote at the meeting.
- (d) Rule 19A.38A allowing an A+H issuer to calculate its market capitalisation for the purpose of the percentage ratios under Chapters 14 and 14A based on the prevailing market prices of A and H shares in issue.

It is expected that the new amendments would not adversely affect the PRC issuer's public float or raise a concern about the availability of an open market for the trading of H shares. There might be a question as to what happens if there is a potential reduction in size of the H share market relative to the A share market. As no amendment has been made to Rule 8.08(1)(b), the requirement that the number of H shares (in the case of a PRC issuer seeking to list H shares on the Exchange) must not be less than 15% of the issuer's total number of issued shares, having an expected market capitalisation at the time of listing of not less than HKD 125 million, is still applicable at the time of listing. As A shares and H shares are traded on separate exchanges and are not fungible, there is a possibility of the H share public float dropping to a low level (as a percentage of the total issued shares) if a PRC issuer chooses to issue new shares in the form of A shares only after listing. However, this should not be a concern to the Exchange as the 15% requirement above no longer needs to be observed after listing. Further, given the fact that the number of H shares will not be affected, there should be sufficient H shares on the Exchange to allow trading in a fair and orderly manner. In any event, a PRC issuer is required to maintain, at all times, an open market in the H shares traded on the Exchange under the Listing Rules.

While the Exchange acknowledges that the issuance of A or H shares is primarily a commercial decision driven by, among other things, public demand and pricing, the Exchange also considers that a reduction in the percentage of H shares (compared to the issuer's total issued shares) may reduce the relative liquidity and investors' interest in the H share market relative to the A share market, and consequently, affect the long-term development of the H share market.



Issues remaining to be addressed

(1) Impact of the PRC Filing Requirements

As stated above, the PRC Filing Requirements are introduced to require all PRC companies to register their direct and indirect overseas listings and securities offerings with the CSRC by filing materials on key compliance issues. They apply to both PRC Issuers and Hong Kong-/overseas-incorporated issuers with principal operations in the PRC.

The Exchange issued a “**Frequently Asked Question**” on this issue on 24 February 2023, discussing whether the implementation of the PRC Filing Requirements has any impact on the issuance of securities by issuers listed on the Exchange.

The Exchange noted that 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’s 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 Filing Requirements are not fulfilled.

Generally, the filing with the CSRC pursuant to the PRC Filing Requirements should only happen after the issuance of securities by issuers. Therefore, an issue may arise if the listed issuers are required to confirm compliance with the PRC Filing Requirements as a prerequisite to obtain the listing approval from the Exchange. It would contravene the original intention of the CSRC if the filing is made before the issuance actually takes place. A potential solution could be a request from the Exchange to obtain the listed issuers’ undertaking to complete the filing with the CSRC after the issuance of securities, and an issuance of a conditional listing approval subject to the compliance with PRC Filing Requirements.

We look forward to seeing relevant guidance on this matter from the Exchange soon.

(2) Disclosure of interest under Part XV of the Securities and Futures Ordinance (SFO)

According to the outline of Part XV of the SFO published by the Securities and Futures Commission (SFC), substantial shareholders (i.e., individuals and corporations who are interested in 5% or more of **any class** of voting shares in a listed corporation who must disclose their interests and short positions in voting shares of the listed corporation) are currently required to disclose their interests to the public by filing the disclosure of interest (DI) forms (“**Existing Requirements**”). This would mean, for example, that in the case of a PRC issuer, the 5% threshold would be triggered if a shareholder is interested in 5% or more of the issued H shares alone as a separate class, even if their shareholding percentage over the total number of issued shares (including domestic shares and H shares) is less than 5%.

As of today, no guidance has been issued on how the New PRC Regulations would impact Part XV of the SFO. It remains to be seen whether PRC Issuers will be (in terms of statutory requirements or in practice) required to adhere to the New PRC Regulations for the purpose of Part XV of the SFO, i.e., the shareholding percentage in PRC Issuers will be re-calculated using the total number of issued shares (including domestic shares and H shares) as the denominator instead of the total number of issued shares in that particular class only.

(3) The Codes on Takeovers and Mergers and Share Buy-backs (“**Takeovers Code**”)

As of today, no guidance has been issued on how the New PRC Regulations would impact the Takeovers Code. It remains to be seen whether PRC Issuers will be (in terms of rule requirements or in practice) required to adhere to the New PRC Regulations for the purpose of the Takeovers Code to align its position with the Exchange, i.e., domestic shares and H shares of PRC Issuers will be considered as one single class of shares in respect of the calculation of various shareholders’ approval thresholds and shareholding percentages of classes of securities under the Takeovers Code.

For further information and to discuss what this development might mean for you, please get in touch with our lawyers set out under “Contact Information” or your usual Baker McKenzie contact.

Contact Us



Christina Lee

Partner

Hong Kong

christina.lee@bakermckenzie.com



Victoria Lloyd

Partner

Hong Kong

victoria.lloyd@bakermckenzie.com



Hang Wang

Partner

Beijing

hang.wang@bakermckenzie.com

© 2023 Baker & McKenzie. **Ownership:** This site (Site) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms, including Baker & McKenzie LLP). Use of this site does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion:** All information on this Site is of general comment and for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulation and practice are subject to change. The information on this Site is not offered as legal or any other advice on any particular matter, whether it be legal, procedural or otherwise. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any information provided in this Site. Baker McKenzie, the editors and the contributing authors do not guarantee the accuracy of the contents and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this Site. **Attorney Advertising:** This Site may qualify as "Attorney Advertising" requiring notice in some jurisdictions. To the extent that this Site may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. All rights reserved. The content of the this Site is protected under international copyright conventions. Reproduction of the content of this Site without express written authorization is strictly prohibited.

