

Client Alert

Corporate Finance

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H-share issuers' domestic shares and H shares are no longer deemed as different classes of shares – Implications under the Hong Kong Listing Rules, the Codes on Takeovers and Mergers and Share Buy-backs and Part XV of the Securities and Futures Ordinance

Background

On 17 February 2023, the State Council issued “Decision of the State Council to Repeal Certain Administrative Regulations and Documents” (《国务院关于废止部分行政法规和文件的决定》), and the China Securities Regulatory Commission issued 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 (all such new regulations are referred to as **New PRC Regulations** below). Pursuant to the New PRC Regulations which took effect from 31 March 2023, the “Special Regulations on the Overseas Offering and Listing of Shares by Joint Stock Limited Companies” (《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》) (**Special Regulations**) and the “Mandatory Provisions for Companies Listing Overseas” (《到境外上市公司章程必备条款》) (**Mandatory Provisions**) were repealed with effect from 31 March 2023.

Following the repeal of the Special Regulations and the Mandatory Provisions, holders of domestic shares and H shares (both being ordinary shares) of issuers incorporated in Mainland China as joint stock limited companies (**PRC issuers**) are no longer deemed as different classes of shareholders, and the class meeting requirement applicable to holders of domestic and H shares are no longer necessary.

Consequential amendments to the Listing Rules

Against the above background, on 24 February 2023, The Stock Exchange of Hong Kong Limited (**Exchange**) published a [consultation paper](#) on the consequential amendments to the Rules Governing the Listing of Securities on the Exchange (**Listing Rules**) in light of the New PRC Regulations, as well as other proposed Listing Rule amendments relating to PRC issuers. The proposals were summarised in our [earlier client alert](#).

On 21 July 2023, the Exchange published [conclusions](#) to this consultation paper. All the Listing Rule amendments outlined in the consultation paper will be adopted, with minor modifications, with effect from **1 August 2023**.

Among the various Listing Rule amendments, the Listing Rules relating to the “separate classes” of domestic shares and H shares will be amended as follows:

	Current position	Listing Rule amendments
Class meeting requirement	<p>Class meetings are required for change or abrogation of the rights of a class of shareholders.</p> <p>In practice, class meetings are held primarily for issuance of new shares (other than general mandate issue which is approved in general meetings) or repurchase of shares.</p>	<p>To remove the class meeting requirement relating to the issuance and repurchase of shares by PRC issuers.</p> <p><i>Note:</i> <u>PRC issuers must still adhere to their existing articles of association concerning class meetings and other provisions that were originally</u></p>

	Current position	Listing Rule amendments
		<u>formulated based on the Mandatory Provisions until and unless they amend their articles of association to remove such provisions.</u> In general, where PRC issuers propose to amend their articles of association to remove the class meeting requirements, they should obtain approvals of domestic shareholders and H shareholders at separate class meetings based on their existing articles of association.
Shareholders' mandates for issuance of new shares	A PRC issuer may seek prior approvals from shareholders (i) to issue securities of up to 20% of <u>each</u> of its issued domestic shares and H shares (general mandate); and (ii) to issue securities in respect of options and awards granted under Chapter 17 share schemes of up to 10% of <u>each</u> of its issued domestic shares and H shares (scheme mandate).	To set the general mandate limit and the scheme mandate limit at 20% and 10% respectively of a PRC issuer's <u>total</u> issued shares.
Definitions of "domestic shares" and "H shares"	"H shares" are defined as "overseas listed foreign shares which are listed on the Exchange" under the Listing Rules. "Domestic shares", "foreign shares", and "overseas listed foreign shares" are also defined in the Listing Rules.	To amend the definition of "H shares" to refer to shares of a PRC issuer which are listed on the Exchange. To remove the definitions of "domestic shares", "foreign shares", and "overseas listed foreign shares".

It should be noted that some of the Listing Rule provisions which govern H shares trading on the Exchange only will be retained, including, among others:

- the rules requiring that shares issued under a general mandate for cash are limited to a price discount of not more than 20% of the prevailing market price of H shares, and the exercise price of share options must not be lower than the prevailing market price of H shares;
(Note: Where appropriate, the Exchange will consider, on a case by case basis, a request for the issue of A shares under a general mandate to be benchmarked to the market price of A shares.)
- the H shareholders' approval requirement for a withdrawal of listing of H shares from the Exchange;
- the rule allowing an A+H issuer to calculate its market capitalisation for the purpose of the percentage ratios under Chapters 14 and 14A of the Listing Rules based on the prevailing market prices of A and H shares in issue; and
- the rule allowing an A+H issuer to calculate its public float with reference to both A and H shares held by the public.

Implications under the Codes on Takeovers and Mergers and Share Buy-backs (Codes)

On 17 March 2023, the Securities and Futures Commission of Hong Kong (SFC) published [Practice Note 25](#) to provide guidance on the application of the SFC's approach towards a number of relevant Codes provisions in light of the New PRC Regulations with effect from 31 March 2023.

The SFC noted that domestic shares (in particular, A shares) and H shares are traded in separate markets with different regulatory and market environments, and therefore, although H shares and domestic shares are one single class of shares under Mainland Chinese law, the fact that H shares and domestic shares are not directly fungible with each other warrants a different approach when applying certain provisions of the Codes to PRC issuers. As such, the SFC's application of the Codes to PRC issuers remains largely the same as in the past, with certain modifications.

The SFC's approach towards some of the relevant Codes provisions as described in Practice Note 25 is briefly summarised below:

Code on Takeovers and Mergers	
Class (6) associate Rule 22 – Disclosure of dealings during an offer period	For the purpose of determining whether a party is a class (6) associate under the Codes: <ul style="list-style-type: none"> • H shares are treated as a separate class of shares from domestic shares (whether unlisted or A shares). That means, whether a holder of H shares is a class (6) associate should be determined by reference to the issuer's total issued H shares only, and not to its entire issued share capital; and • A shares and unlisted domestic shares are treated as the same class.
Rules 2.2 and 2.10 – Delistings and privatisations	A separate class approval from holders of H shares is still required for transactions that would result in a delisting of H shares.
Rule 14 – Offers for more than one class of equity shares	The SFC's practice of treating A shares, H shares and other equity securities of a PRC issuer separately and requiring comparable offers for such different securities remain unchanged.
Rule 23 – Nature of consideration to be offered	Domestic shares and H shares are treated as separate classes when applying Rule 23.
Special deals and whitewash waivers	The practice remains unchanged – i.e.: <ul style="list-style-type: none"> • approval by shareholders of special deals pursuant to Rule 25 and Practice Note 17 does <u>not</u> require separate class approval of holders of H shares; and • the "independent vote" by shareholders to approve a whitewash waiver under Note 1 on dispensations from Rule 26 and Schedule VI does <u>not</u> require separate class approval of holders of H shares.
Code on Share Buy-backs	
Rule 2 – Off-market share buy-back	The SFC's approach remains unchanged – i.e. no separate class meetings for the approval of off-market share buy-backs by PRC issuers will be required.
Rule 3 – Shareholder approval for share buy-back by general offer or delistings and privatisations	The SFC's approach remains unchanged – i.e.: <ul style="list-style-type: none"> • All shareholders regardless of the type of shares they hold are entitled to attend and vote at the general meeting to approve a share buy-back by general offer; and • for a PRC issuer's proposal to buy-back all of its H shares by way of a general offer resulting in a delisting of its H shares, a separate class approval from holders of H shares is still required.

Implications under Part XV of the Securities and Futures Ordinance (Part XV of the SFO)

On 17 March 2023, the SFC also issued a [frequently asked question](#) providing guidance on the disclosure of interests in a PRC issuer under Part XV of the SFO following implementation of the New PRC Regulations with effect from 31 March 2023.

The SFC explained that since H shares and domestic shares of a PRC issuer trade on separate exchanges and they cannot be transferred between exchanges, interests in H shares of a PRC issuer should continue to be calculated as a proportion of the number of issued H shares separately from the number of issued domestic shares. The practice of reporting H shares and domestic shares separately remains unchanged.

For a further discussion of disclosure of interests in a PRC issuer under Part XV of the SFO, please refer to the [April episode of our "Corporate Finance Updates" video series](#).

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