



Hong Kong

April 2020

SFC AND HKEX JOINT STATEMENT EXPLAINS HOW THE COVID-19 REGULATIONS APPLY TO SHAREHOLDERS MEETINGS OF HKEX LISTED COMPANIES

On 27 March 2020, the Hong Kong Government took further steps to curb the spread of COVID-19. Issued under the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (the “**Prohibition on Group Gathering Regulations**”),¹ these new measures prohibit group gatherings of more than four people in public places, including any place which the public or a section of the public may or are permitted to access from time to time. The measures became effective on 29 March 2020 and will last for a period of 14 days subject to renewal (the “**Specified Period**”).

Schedule 1 sets out the exemptions to the prohibition and Paragraph 11 which includes the following:

“Group gathering at a meeting of a body that must be held within a specified period in order to comply with any Ordinance or other regulatory instrument that governs the operation of the body or its business” (the “**Exemption**”).

1. Prohibition on Group Gathering Regulations and Initial Uncertainties for General Meetings of HKEx Listed Issuers

When the Prohibition on Group Gathering Regulations was first enacted, it was clear that the regulation would apply to annual general meetings (“**AGMs**”) of Hong Kong incorporated companies. However, there were different views in the market as to whether the regulations would apply to AGMs of companies incorporated in offshore jurisdictions whether or not they are registered with the Companies Registry as Part 16 companies (“**Part 16 Companies**”), as there was a

lack of guidance as to whether the phrase “*other regulatory instrument*” (*Paragraph 11*) would extend to offshore laws and regulations or the Rules Governing the Listing of Securities on the Stock Exchange (the “**HKEx Listing Rules**”). This raised particular issues in respect of general meetings of HKEx listed companies.

2. Clarification from Regulators through Joint Statement of the SFC and HKEx

1 April 2020 saw the Securities and Futures Commission of Hong Kong (the “**SFC**”) and The Stock Exchange of Hong Kong Limited (“**HKEx**”) issue a Joint Statement in relation to General Meetings in light of the Prevent and Control of Disease (Prohibition on Group Gathering) Regulation (the “**SFC and HKEx Joint Statement on General Meetings**”)² following consultation with the HKSAR Government which administers the Prohibition on Group Gathering Regulations. In the SFC and HKEx Joint Statement on General Meetings, the SFC and the HKEx noted their understanding following the consultation with the HKSAR Government that:

- a) Hong Kong AGMs as required under the Companies Ordinance (Cap. 622 of the Laws of Hong Kong) (the “**Companies Ordinance**”) and/or the HKEx Listing Rules are generally exempted (i.e. fall within the Exemption);

¹ <https://www.elegislation.gov.hk/hk/cap599G>

² https://www.hkex.com.hk/News/News-Release/2020/200401news?sc_lang=en

- b) extraordinary general meetings and special general meetings of HKEx listed companies fall within the Exemption if the meeting must be held within the Specified Period in order to comply with:
 - i) any law or regulation in Hong Kong or overseas that is applicable to the HKEx listed company or a subsidiary of the HKEx listed company (as part of the HKEx listed company's business);
 - ii) any HKEx Listing Rules or The Codes on Takeovers and Mergers and Share Buy-backs of the SFC;
 - iii) the HKEx listed company's own memorandum or articles of association; or
 - iv) other regulatory instrument.
- c) whether any business to be considered at the meeting is of such urgency and importance that an adjournment or delay would, taking into account all facts and circumstances, materially harm the interests of the HKEx listed company and its shareholders considered as a whole.

In this regard, our reading of the Exemption is that it would only apply if the meeting "*must be*" held within the Specified Period for compliance with an Ordinance or other regulatory instrument. That is, where it is possible to adjourn or postpone a general meeting until a later date outside the Specified Period without any breach of any Ordinance or regulatory instrument, then the Exemption would not apply (i.e. the holding of a general meeting within the Specified Period in such circumstances would mean that relevant persons who organised and participated in the meeting may have committed an offence under the Prohibition on Group Gathering Regulations).

4. Recommendations of the Regulators in the Joint Statement to Adjourn or Delay Physical Meetings and to Take Necessary Precautions if Physical Meetings are to be Held

Under the SFC and HKEx Joint Statement on General Meetings, HKEx listed companies are encouraged to consider a longer adjournment or delay to allow themselves more time:

- a) to monitor how the current situation develops in order to better decide how to manage the potential health risks of a physical meeting (if one is needed); and
- b) to explore and assess measures permissible under the laws of their jurisdictions of incorporation and their constitutional documents to reduce the need for physical attendance, including:
 - i) the use of technology (e.g. webcast, video conference, virtual meetings) to enable non-physical attendance and voting;
 - ii) to encourage more shareholders to vote either by proxy or through HKSCC Nominees Limited by giving instructions to their brokers and custodians; and
 - iii) to encourage shareholders to submit their questions to management in writing in advance of the meeting.

Notwithstanding the Exemption, which enables some general meetings to be held during the Specified Period, the SFC and HKEx have determined that it is appropriate for HKEx listed companies to consider certain guidelines listed therein (which relate to legitimate COVID-19 safety concerns and the public policy measures taken to combat the pandemic) when deciding on the timing of their general meetings and the manner in which such meetings are to be held.

3. Does the Exemption Apply where the Relevant Meeting may be Adjourned to a Later Date?

The SFC and HKEx Joint Statement on General Meetings noted that, notwithstanding the Exemption, HKEx listed companies should consider whether it is possible to adjourn or delay their general meetings for a reasonable period until after the Specified Period has ended. In particular, HKEx listed companies should consider:

- a) whether the general meeting is subject to any mandatory legal or regulatory requirement on timing;
- b) whether any such requirement is capable of extension, waiver or other variation by way of application or otherwise; and

HKEx listed companies who decide to proceed with a physical general meeting during the Specified Period should:

- a) take all practicable precautions to ensure the safety of attendees, including mandatory screening of body temperatures and use of face masks, physical distancing, no food and beverage service, no handing out of corporate gifts at the meeting; and
- b) where possible, adopt other appropriate measures to manage the number of physical attendees, including the use of multiple meeting rooms or venues linked by telecommunication facilities to reduce the headcount at a single venue; and restricting the number of non-shareholder attendees.

To keep investors and other stakeholders informed, HKEx listed companies that have called a general meeting during the Specified Period should, as soon as practicable, publish an announcement to:

- a) confirm whether their general meeting will proceed as scheduled during the Specified Period;
- b) if applicable, explain the necessity for holding the meeting during the Specified Period; and
- c) where applicable, outline the meeting arrangements and precautionary measures to be adopted to ensure compliance with the Prohibition on Group Gathering Regulations. HKEx listed companies should also communicate their plans to share registrars and HKEx as soon as practicable. The SFC and HKEx will continue to monitor the situation as it evolves and will issue further guidance if appropriate.

5. Professional Meetings and Board Meetings of HKEx Listed Companies and Other Hong Kong Companies

Separately, the Prohibition on Group Gathering Regulations contains an exemption for a group gathering at a place of work for the purposes of work. This means that a company may continue holding its regular work meetings in Hong Kong during the course of its business without contravening the Prohibition on Group Gathering Regulations. Similarly, it is expected that meetings of boards of directors of companies can take place at the relevant company's place of work in Hong

Kong. However, the board of a company should consider the issue carefully and may determine that is safer to arrange such meetings by video conference.

6. Analysis of HKEx Listed Companies Approach to Shareholder Meetings in the Age of COVID-19

The Prohibition on Group Gathering Regulations have prompted many HKEx listed companies and other Hong Kong companies to rethink the use of technology in convening general meetings, such as use of virtual meetings. At present, there appears to be very limited practice of HKEx listed companies adopting the use of virtual meetings, and what we have observed is the use of "hybrid meetings" whereby participants in different physical locations participate in general meetings together through video conferencing (although the physical meetings in Hong Kong would be subject to the Prohibition on Group Gathering Regulations). The use of virtual meetings without the social gathering of more than four persons would require the addressing of logistical questions and issues which we understand are largely untested in Hong Kong. Relevant matters to consider may include considerations relating to: (i) the setting up of facilities; (ii) enabling and ensuring access and shareholders' participation; (iii) carrying out verification of shareholders' identities; and (iv) contingencies and scrutineering arrangements to mitigate security risks and fraud etc.

While there is yet to be a Hong Kong market practice for the use of virtual meetings, HKEx listed companies (and directors in the exercise of their fiduciary duties to act in the interest of its shareholders as a whole) must take into account that good corporate governance may indicate the taking of necessary precautions or measures to assist in the fight against the spread of the COVID-19 virus if a decision is made to proceed with convening a physical general meeting, irrespective as to whether the Exemption applies, including those set out in the SFC and HKEx Joint Statement on General Meetings.

Venues for hire to hold general meetings will also be a factor to consider. The Centre for Health Protection issued guidance for the hotel industry on the prevention of COVID-19³ (the "Hotel Industry Guidelines"). As part of the preventative measures, the Hotel Industry Guidelines set out that hotel management is advised to suspend any mass gathering or social activities in the hotel. With this in mind, hotels in Hong Kong may not be willing to hire out their conference venues for use by HKEx listed companies to hold their general meetings.

³ https://www.chp.gov.hk/files/pdf/nid_guideline_hotel_serving_guests_eng.pdf

Many HKEx listed companies are not incorporated in Hong Kong and in any event there is no requirement for their shareholders' meetings to be held in Hong Kong (whether meetings of a Hong Kong incorporated company or company incorporated elsewhere). However, the boards of HKEx listed companies and of other Hong Kong incorporated companies should be mindful of the corporate governance issues arising if shareholders cannot in practice attend or participate in the relevant company's shareholders' meeting due to travel or quarantine restrictions.

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Hong Kong Office

Dominion Centre

12th Floor

43-59 Queen's Road East

Hong Kong

Tel: + (852) 2905 7888

Fax: + (852) 2854 9596

www.charltonslaw.com