

C-19

TO MEET, OR NOT TO MEET - PUBLIC GATHERING BAN AND GENERAL MEETINGS IN HONG KONG

April 2020

In order to attempt to contain the spread of COVID-19, the Hong Kong government has introduced a number of emergency measures. One of the most wide-reaching is the Prevention and Control of Disease (Prohibition on Group Gathering) Regulation (Cap.599G) (**Regulation**), issued on 28 March 2020. Under the Regulation, all gatherings of more than four persons in public places are prohibited for a period of 14 days (**specified period**), subject to certain exemptions. While the ban is currently intended to last until 11 April 2020, the possibility that the specified period will be extended cannot be ruled out. Given that general meetings usually involve a gathering of more than four persons at places which might be regarded as public places, companies must carefully consider the Regulation when planning their general meetings. The Securities and Futures Commission (**SFC**) and The Stock Exchange of Hong Kong Limited (**Exchange**) on 1 April 2020 issued a [joint statement](#)¹ (**Joint Statement**) helpfully clarifying the application of the Regulation in this context.

In one of our [recent COVID-19 briefings](#), we considered what companies should bear in mind when holding their 2020 annual general meetings (**AGM**) in Hong Kong during this

public health crisis. In this briefing, we now consider the impact of the Regulation on AGMs and other general meetings (**EGMs**) in light of the Joint Statement.

AGMs

The Regulation prohibits gatherings of more than four persons in “public places”. “Public place” is defined widely and catches many of the places at which AGMs and EGMs would ordinarily take place. However, the Regulation exempts meetings “*that must be held within a specified period in order to comply with any Ordinance or other regulatory instrument that governs the operations of the body or its business*” (**Exemption**).²

It is clear that the Exemption applies to AGMs of Hong Kong incorporated companies. Section 610 of the Companies Ordinance (**CO**) (which is an “Ordinance”) requires all companies formed and registered under the current and the former CO to hold AGMs within 9 months (for a private company) or 6 months (for any other companies, including listed public companies) after the end of their respective accounting reference periods. As such, AGMs that must be held during the specified period

¹ Although neither the SFC nor the Exchange administers the Regulation, the Joint Statement was issued after consultation with the government which made the Regulation.

² Paragraph 11 of Schedule 1 to the Regulation.

by Hong Kong incorporated companies can go ahead.

Initially, there was some uncertainty as to whether the Exemption applies to AGMs of companies incorporated overseas (noting that most, if not all, of the listed companies fall within this category). As far as these listed companies are concerned, they are required to hold AGMs within 6 months of the financial year end under the Listing Rules³ (apart from the law of the place of incorporation and their own memorandum and articles of association). The Exemption refers to an “Ordinance” and “other regulatory instrument”. The Listing Rules are not an Ordinance. “Regulatory instrument” is not a term that has been defined or used in any other primary or subsidiary legislation in Hong Kong. The Listing Rules undoubtedly serve regulatory purposes. However, it is not certain as to whether they constitute “instrument”, which is defined under the Interpretation and General Clauses Ordinance (Cap. 1) to include “*any publication in the Gazette having legal effect*”.

The uncertainties have been clarified in the Joint Statement, which states that the Exemption will generally apply to AGMs of companies listed on the Exchange as required under the CO and/or the Exchange’s Listing Rules.

EGMs

Prior to the clarification by the SFC and the Exchange, the position in relation to EGMs or special meetings was less clear. Some EGMs may appear to fall within the scope of the

Exemption because they are required to be held within the specified period in order to comply with the CO, for example, a general meeting convened by the directors as requisitioned by shareholders holding at least 5% of the company’s total voting rights.⁴ However, many EGMs of listed companies are required under the Listing Rules or The Codes on Takeovers and Mergers and Share Buy-backs (**Takeovers Code**), rather than under any Ordinance.⁵ As mentioned above, the meaning of “regulatory instrument” is unclear and it was therefore uncertain whether the EGMs that are commonly required to be held under such rules may benefit from the Exemption.

According to the Joint Announcement, an EGM would be exempted if it must be held within the “specified period” (i.e. from midnight on 29 March 2020 until 11 April 2020) in order to comply with: (i) any law or regulation in Hong Kong or overseas; (ii) any Listing Rules or the Takeovers Code; (iii) the issuer’s own memorandum or articles of association; or (iv) other regulatory instrument.

In summary, the Joint Statement is welcome as it makes it clear that the following EGMs are exempted:

1. EGMs which must be held within the specified period under the law, for example meetings held under sections 566 and 567 of the CO;

³ Unless otherwise specified, “Listing Rules” in this briefing refer to both the Main Board Listing Rules and GEM Listing Rules.

⁴ ss.566, 567 of the CO require directors of a company to hold a general meeting within a certain timeframe (which may fall within the specified period) when

requested to do so by shareholders representing at least 5% of the company’s total voting rights.

⁵ For example, under Chapters 14 and 14A of the Main Board Listing Rules, a listed company is required to hold an EGM in connection with certain notifiable and connected transactions.

2. EGMs which must be held within the specified period in compliance with the Listing Rules and the Takeovers Code; and
3. EGMs which must be held within the specified period in accordance with the issuer's own memorandum or articles of association. The Model Articles for Hong Kong public companies require a general meeting to be held pursuant to sections 566 and 567 of the CO.⁶

Conclusion and practical tips

While the precise meaning of “regulatory instrument” remains unclear (as does exactly what meetings must be held within a specified period in order to comply with other regulatory instruments)⁷, the regulators have helpfully clarified that most general meetings which listed companies must hold within the specified period are exempt under the Regulation.

Nevertheless, the message from the Government is clear: group gatherings should be avoided unless they are absolutely necessary during this critical period. Indeed, the SFC and the Exchange urged listed companies to consider adjourning and postponing general meetings notwithstanding the Exemption. Alternative ways of holding meetings and communicating with

shareholders (such as holding a virtual or hybrid meeting)⁸ should be considered.

For those companies which want to proceed with their general meetings at this time, the following practical guidance should be considered:

- **Venue of meetings:** It may currently be difficult for companies to rent rooms at conference centres or hotels because venues may be reluctant to take bookings for such large gatherings due to the Regulation. It is therefore helpful that there is now clarity that AGMs and certain EGMs are exempt under the Regulation. Some practical concerns in selecting venues and arranging the logistics of meetings include:
 - the venue should have sufficient rooms that shareholders can be put in separate rooms each with no more than four people;
 - rooms that are not ordinarily used for conference purposes (such as banqueting halls and party rooms) should not be used given that “party rooms” should be closed pursuant to the Prevention and Control of Disease (Requirements and Directions)

⁶ See footnote 4 above for ss.566,567 of the CO.

⁷ A point to note is that the Joint Statement does not explain what types of meetings ‘must’ be held within the specified period. EGMs required to be held due to a listed company’s voluntary entry into a transaction (e.g. notifiable or connected transactions under the Main Board Listing Rules) may not be a meeting that ‘must’ be held, because a listed company has the option of delaying or even cancelling the transaction. Furthermore, the Listing Rules may not specify a period of time within which EGMs must be held - although a connected transaction must be conditional on shareholders’ approval at a general meeting held by the

issuer, there is no requirement on how soon the meeting must be held.

⁸ A virtual meeting refers to a meeting where all stakeholders participate electronically, whereas a hybrid meeting is one where only a small number of shareholders attend the meeting physically with the rest attending electronically. However, hybrid meetings are rare in Hong Kong and require complex IT and other arrangements to be in place, so as to ensure shareholders can vote electronically. If the systems are not set up properly, the validity of the resolutions passed at the general meeting may be challenged.

- (Business and Premises) Regulation (Cap. 599F);
- rooms that are licensed for the purpose of public entertainment should not be used⁹; and
 - special arrangements should be in place to avoid having the shareholders gathering / queuing outside the meeting rooms (for example in a lobby or waiting area).
- **Limiting the number of physical attendees**: Although the chairman of a company meeting is entitled under the common law to exclude shareholders from a meeting in limited circumstances,¹⁰ this power should not be exercised without very careful thought, as a shareholder has a basic right to attend the company's meeting. If a chairman were to exercise this power improperly, there is a risk that a shareholder could seek to challenge the validity of the meeting and the resolutions passed thereat. In the present environment, there are ways in which companies might encourage shareholders not to attend a meeting in person, for example, by:
 - encouraging shareholders to exercise their rights to vote by proxy and through HKSCC Nominees Limited (by
- giving instructions to their brokers and custodians);
 - facilitating hybrid meetings; and
 - providing other ways for shareholders to raise questions with the board and management, for example, by putting in place arrangements whereby questions can be sent to the company and answers posted on the company's website.
- **Additional precautions**: Listed companies should take necessary precautions to ensure safety of the attendees, including:
 - mandatory screening of attendees' temperature before granting them admission to the meeting venue (and turning away any attendees with high body temperatures);
 - not providing food and beverage service, or handing out corporate gifts at the meeting;
 - ensuring that all attendees are wearing face masks;
 - maintaining sufficient distance between each and every attendee; and
 - providing hand sanitiser at the venues, to ensure the safety of the attendees at the AGMs/EGMs.¹¹

⁹ 'Entertainment' is defined in section 2 of the Places of Public Entertainment Ordinance to include event and activity such as concert, opera or other theatrical entertainment, lecture, exhibition of pictures, photographs or books, and dance party.

¹⁰ E.g. where a shareholder is disrupting and preventing a meeting from continuing.

¹¹ Listed companies can consider adopting the [suggestions](#) made by the Hong Kong Institute of Chartered Secretaries

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- **Shareholder communications:** Listed companies which have called a general meeting during the specified period should, as soon as practicable, publish an announcement to confirm whether the general meeting will proceed as scheduled during the specified period. If the general meeting will proceed, the announcement should further explain:
 - the necessity for holding the meeting during the specified period; and
 - the meeting arrangements and precautionary measures to be adopted for compliance with the Regulation.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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