

Hong Kong Stock Exchange and SFC Release New Joint Policy Statement on Listing of Overseas Companies in Hong Kong

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Introduction

In March 2007, The Stock Exchange of Hong Kong Limited (the **HKEx**) and the Securities and Futures Commission of Hong Kong (the **SFC**) issued a joint policy statement on the listing of overseas companies in Hong Kong (the **2007 JPS**) with a view to facilitating and encouraging the listing on the HKEx of companies incorporated outside the four “recognized” jurisdictions of Hong Kong, China, the Cayman Islands and Bermuda. Although 30 companies incorporated outside the recognized jurisdictions are now listed on the HKEx, the majority of those listings occurred in 2010 and 2011 and the number of such new listings has fallen significantly since then. Most notably, no secondary listing has taken place since December 2011.¹ With the aim of further clarifying and streamlining for the listing of overseas companies on the HKEx, and to reflect some of the practical experiences since the adoption of the 2007 JPS, the HKEx and SFC issued on September 27, 2013 a new joint policy statement on the listing of overseas companies (the **2013 JPS**).

The major changes brought in by the 2013 JPS are as follows:

Refinement of applicable shareholder protection standards that must be met. In order for a company incorporated outside the recognized jurisdictions to be eligible to list on the HKEx, Rules 19.05 and 19.30 of the Rules Governing the Listing of Securities on the Stock Exchange of Hong Kong Limited (the **Listing Rules**) provide, among other things, that the HKEx must be satisfied that the company is incorporated or established in a jurisdiction where the standards of shareholder protection are at least equivalent to those provided in Hong Kong. The 2007 JPS included a four-page table of shareholder protections with cross references to applicable provisions of the Companies Ordinance that a listing applicant and its advisers were expected to address in order to enable the HKEx and SFC to determine whether an overseas company was able to offer a level of shareholder protection commensurate with that in Hong Kong, resulting in submissions that often ran to more than 50 pages. Pursuant to the 2007 JPS, once an initial “test case” had been approved for a new jurisdiction, the HKEx would publish a listing decision setting out the grounds for the approval confirming that the new jurisdiction was considered an “Acceptable Jurisdiction.”² The four-page table has been replaced by a significantly more streamlined list of 11 items relating to (i) matters requiring a super-majority vote, (ii) individual members’ approval to increase member’s liability, (iii) appointment of auditors by majority votes, and (iv) proceedings at general meetings.

1 A secondary listing is the listing of a company that is already listed on a foreign stock exchange, or will be listed on a foreign stock exchange simultaneous with its listing on the HKEx, and that intends to remain primarily governed by the laws, regulations and rules of that foreign stock exchange and foreign jurisdiction.

2 The “Acceptable Jurisdictions” now include Australia, Brazil, the British Virgin Islands, Canada (Alberta, British Columbia and Ontario), Cyprus, France, Germany, Guernsey, the Isle of Man, Italy, Japan, Jersey, Labuan, Luxembourg, Singapore, South Korea, the United Kingdom and the United States (California and Delaware).

Introduction of “Country Guides” to replace listing decisions. The HKEx has indicated that it will publish “Country Guides” for all Acceptable Jurisdictions before the end of 2013 setting out how companies incorporated in those jurisdictions can meet the shareholder protection standards required by the HKEx. The 2013 JPS codifies an obligation on overseas companies incorporated in Acceptable Jurisdictions to inform the HKEx “at the earliest opportunity” of any material changes to the laws relating to shareholder protection matters in their jurisdictions of incorporation as set out in the applicable Country Guide, which raises the question as to what steps the HKEx might take in the event that there is a regulatory change in an Acceptable Jurisdiction that cannot be remedied by amendments to a company’s constitutional documents that otherwise would have rendered the jurisdiction unsuitable. Overseas companies also are required to disclose (i) information regarding the waivers that they have obtained, (ii) a summary of the provisions in the laws and regulations in their home jurisdiction and primary market that are different than those required by Hong Kong law, (iii) details of withholding tax on dividends and other distributable entitlements or any other tax that is payable and whether Hong Kong investors have any tax reporting obligations, and (iv) where a company is listing depositary receipts (**HDRs**), a summary of the terms and conditions in the depositary agreement and deed poll on a “Company Information Sheet” that must be updated and revised on an ongoing basis.

Codification of “automatic” and “common” waivers. As practitioners involved in secondary listing applications are aware, one of the most time-consuming aspects of preparing a secondary listing has been the identification, preparation and negotiation of waivers of the relevant requirements under the Listing Rules in order to enable the company to properly meet otherwise conflicting ongoing compliance obligations in both its “home” jurisdiction and Hong Kong. Listing applicants that meet the criteria set out in the 2013 JPS are now eligible to receive automatic waivers from various Listing Rules, including, among others, waivers from numerous corporate governance requirements and Chapters 14 (with regard to notifiable transactions), 14A (with regard to connected transactions) and 17 (with regard to share option schemes) of the Listing Rules.

Clarification of entities suitable for a secondary listing and corresponding “automatic” waivers. The HKEx also has formally acknowledged its previously informal policy of not allowing companies with a “center of gravity” in Greater China to apply for secondary listings. The criteria that must be met by a secondary listing applicant in order to enjoy the various “automatic” waivers include (i) a market capitalization in excess of USD\$400 million, (ii) listed status on one of the recognized stock exchanges³ for at least five years before application for listing, and (iii) a good track record of legal and regulatory compliance. Companies listed on an exchange other than those listed in the 2013 JPS may still apply for a secondary listing, but will need to first satisfy the HKEx that its primary listing is or will be on an exchange where the standards of shareholder protection are at least equivalent to those provided in Hong Kong in accordance with Listing Rule 19.30.

Greater emphasis on regulatory cooperation. Under the 2007 JPS, whether or not the securities regulator in a jurisdiction was a signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (the **IOSCO MMOU**) or a bilateral agreement with the SFC was not necessarily determinative of the acceptability of that jurisdiction. The 2013 JPS makes it clear that the securities regulator in both the jurisdiction of incorporation and place of central management and control of a company (if different) must be signatories to either the IOSCO MMOU or a bilateral agreement with the SFC.

3 The recognized stock exchanges are the Amsterdam Stock Exchange, the Australian Securities Exchange, the Brazilian Securities, Commodities and Futures Exchange, the Frankfurt Stock Exchange, the Italian Stock Exchange, the London Stock Exchange, the Madrid Stock Exchange, the NASDAQ, the New York Stock Exchange, the Paris Stock Exchange, the Singapore Exchange, the Stockholm Stock Exchange, the Swiss Exchange, the Tokyo Stock Exchange and the Toronto Stock Exchange.

Clarification on accounting- and audit-related matters. The HKEx and SFC clarified the approach with respect to approving the use of financial statements not prepared in accordance with Hong Kong Financial Reporting Standards (**HKFRS**) or International Financial Reporting Standards issued by the International Accounting Standards Board (**IFRS**) (the two reporting standards required under the Listing Rules) by non-Hong Kong qualified auditors, setting out a list of alternative reporting standards that they have accepted in the past and the disclosure they expect where those reporting standards differ in a material way from HKFRS or IFRS.⁴ For the HKEx to accept the use of non-Hong Kong qualified auditors, those auditors must (i) have an international name and reputation, (ii) be a member of a recognized body of accountants, and (iii) be subject to independent oversight by a regulatory body of a jurisdiction that is a signatory to the IOSCO MMOU.

Acknowledgement of potentially different standard of diligence for secondary listings. Although only appearing as a note to the table of “automatic” and “common” waivers in the 2013 JPS, the HKEx and SFC have formally acknowledged that the scope and extent of appropriate due diligence by a sponsor regarding a secondary listing applicant under Practice Note 21 to the Listing Rules may potentially differ from those for an issuer that is not already listed elsewhere. In the past, sponsors and their legal counsel often have struggled to come to grips with fulfilling their diligence requirements for secondary listing applicants under Practice Note 21 as, on their face, the requirements do not differentiate between different types of listing applicants — and companies with large market capitalizations that have been listed on a foreign stock exchange for many years have had concerns about subjecting themselves to a full-blown diligence process that may divert significant management attention. Nevertheless, in light of the increasing regulatory scrutiny of the SFC, we believe it remains prudent for sponsors to continue to adopt an approach to diligence that is characterized by a high degree of professional skepticism and to ensure a close degree of cooperation with regulators, particularly where the proposed level of diligence may diverge from market practice for primary listings.

Conclusions

Whether the 2013 JPS helps to revive the fortunes of overseas listings on the HKEx remains to be seen. The 2013 JPS contains a number of welcome new developments, in particular the codification of “automatic” and “common” waivers, an acknowledgement that sponsors may consider a different level of diligence with respect to secondary listing applicants, and a clearer, more streamlined set of requirements that overseas companies must meet in order to list in Hong Kong. However, it also comes at a time when market practitioners are still coming to grips with the revisions to the sponsor regime implemented pursuant to the Consultation Conclusions on the regulation of IPO sponsors issued by the SFC on December 12, 2012, the corresponding revisions to the Listing Rules, and a slew of new guidance letters, forms and checklists issued by the HKEx in July 2013, all of which came into effect on 1 October 2013 — and is set against a backdrop of increasing regulatory scrutiny, the impending April 1, 2014 introduction of public filings of draft listing documents submitted at the time of listing applications, and a new Hong Kong Companies Ordinance that will come into effect during 2014.

⁴ The HKEx has previously accepted generally accepted accounting principles of Australia, Canada, the European Union, Japan, Singapore, the United Kingdom and the United States.