Expert Corner *(Contributed by Christopher W. Betts, Partner from Skadden)*

Legal and Regulatory Considerations for Japanese Companies Contemplating a HK Listing

Understanding the legal framework of listing destination is usually the first step to a successful overseas listing. Often times, key regulatory differences between the listing destination and home markets should be highlighted to companies upfront for them to make any informed decision. Following our recent marketing trip to Japan, we invite Skadden to provide some insight in the legal aspect of Hong Kong listings. Though the paragraph targets Japanese audience, many of the topics discussed below will also be relevant to potential issuers from other countries/regions. We hope this will help you establish a solid first step towards your listing journey.

About the author: Chris has lived in Hong Kong for approximately 15 years and worked on numerous listings on the HKEx, including secondary listings, spin-offs, listings by companies with VIE arrangements, the first listing of HDRs, Fast Retailing's listing under the JPS and Econtext Asia's listing.

The HKEx and the Securities and Futures Commission of Hong Kong (the SFC) issued a new joint policy statement on the listing of overseas companies (the JPS) in September 2013 which, together with the Hong Kong Listing Rules, are the primary rules governing the listing of overseas companies in Hong Kong. The first company to list under the JPS was Fast Retailing, one of Japan's leading companies and the global operator of the UNIQLO brand. On the back of this precedent-setting transaction, and with the Shanghai-Hong Kong Stock Connect program widely expected to result in a boost to liquidity in Hong Kong-listed securities from China-based investors, we set out below some of the specific issues that Japanese companies planning a listing on the HKEx need to consider.

Going all the Way or Not: Primary or Secondary Listing?

A primary listing is where the company anticipates the HKEx being the principal market for trade in its securities and to be bound by all of the Hong Kong Listing Rules. Alternatively, a company already listed on the Tokyo Stock Exchange (TSE) can apply for a secondary listing if the dominant market for trade in its securities will remain the TSE. TSE-listed companies applying for a secondary listing that (a) have a market capitalisation in excess of US$400 million, (b) have a five-year track record of regulatory compliance on the TSE and (c) have a "centre of gravity" outside Greater China are eligible to receive "automatic" waivers and seek "common" waivers from various Listing Rules, which can help ensure that post-listing compliance is relatively hassle-free.

In its initial phase the Shanghai-Hong Kong Stock Connect will only allow China-based investor to trade in constituent stocks of the Hang Seng Composite LargeCap Index and Hang Seng Composite MidCap Index, which both exclude secondary listed companies. However, should the program prove successful it may be extended in the future, subject to the various necessary regulatory approvals.

Choose your Security: Shares or Hong Kong Depositary Receipts (HDRs)?

Due to potential differences in settlement systems and laws and regulations between Hong Kong and Japan, TSE-listed companies need to list their securities by way of HDRs, which will necessitate the appointment of a depositary who will issue HDRs supported by shares held in Japan by a custodian. It is possible for unlisted companies to list shares, although they may nevertheless still choose to list HDRs to benefit from the convenience of having a depositary carry out various investor-related administrative tasks. A further option for either TSE-listed companies or private companies is to restructure the businesses to be listed into an entity incorporated outside of Japan, such as in the case of Econtext Asia where TSE-listed Digital Garage restructured its pan-Asia payment division under a Hong Kong incorporated entity and listed that entity.

Don't Forget to Consider

Amendment of Articles

Japanese companies may need to amend their articles of incorporation in order to provide shareholders a level of protection comparable to that provided under Hong Kong law. This may not be practicable for TSE-listed companies, necessitating waiver applications to the HKEx from strict compliance with these requirements.

Disclosure requirements and forward-looking guidance

The Hong Kong Listing Rules and related guidance have a number of specific content requirements that differ from typical Japanese disclosure practices. For example, the aggregate of directors' emoluments, as well as the aggregate of emoluments of the five individuals whose emoluments are the highest in the company or the listing group for each of the three preceding financial years will need to be disclosed. Many documents, including the prospectus / listing document, must also be prepared in both English and Chinese.

Subject to adopting certain safeguards and waivers from the HKEx, it is possible for TSE-listed companies with long-standing practices of providing forward looking guidance in accordance with TSE Guidelines to continue to adopt such practices. It is important to note, however, that Hong Kong regulators adopt a more conservative view towards profit forecasts.

Voting of Interested Shareholders

Under the Hong Kong Listing Rules, shareholders with a material interest in a transaction are required to abstain from voting on the transaction. To address the differences between the requirements under Japanese laws and the Listing Rules, the HKEx will expect companies to adopt a voluntary abstention process when approving any transaction that is subject to independent shareholders' approval under the Listing Rules and in which a shareholder has a material interest.

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In Need of Some Capital? Methods of Listing

While it is true that TSE-listed companies with an existing shareholder base seeking a secondary listing need not raise new capital when listing on the HKEx, it is also open to them to raise capital new capital in conjunction with a secondary listing. Unlisted companies will need to conduct a public offer of shares (which may be either new or old shares) in conjunction with a listing in order to achieve the minimum required percentage of shares in public hands of 25%. The 25% public float requirement can be reduced for companies with market capitalisation in excess of HK$10 billion.

Synergies in Financial Disclosure - Japanese GAAP Financial Statements

TSE-listed companies may continue to prepare and publish financial statements in accordance with Japanese Generally Accepted Accounting Principles, subject to obtaining a waiver from the HKEx. Unlisted Japanese companies seeking a listing in Hong Kong will need to prepare their financial information in accordance with IFRS or HKFRS.

As with many things, advance planning is the key. For companies that are uncertain about any particular issues, the HKEx welcomes confidential written submissions in advance of a listing application to clear up any areas of uncertainty.

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Don't Forget to Consider

Corporate governance requirements

The HKEx requires the boards of listed companies to be comprised of a minimum one-third independent non-executive directors (INEDs), subject to a minimum of three, and at least one of the INEDs must have appropriate professional qualifications or accounting or related financial management expertise. Companies must establish an audit committee and a remuneration committee. Under the Corporate Governance Code, they should also establish a nomination committee and adopt a number of other corporate governance measures. Compliance with the Corporate Governance Code is not mandatory, but any deviation from the code provisions must be disclosed in the company's annual and interim reports together with considered reasons for the deviation. Many of the ongoing corporate governance requirements are waived for secondary listing applicants.

Confidential filings

Both the English and Chinese language versions of the draft prospectus submitted at the time of the listing application (the Application Proof) will be publicly available on the website of the HKEx. However, TSE-listed companies with large market capitalisation that have been listed for at least five years are entitled to make confidential filings of their Application Proofs. Confidential filings may also be possible where the listing applicant is a company being spun-off from a TSE-listed parent company.

Eligibility for Listing under *the Joint Policy Statement regarding the Listing of Overseas Companies (Sep 2013) ("JPS")*

- **Requirements on jurisdiction of incorporation**: an overseas company needs to
  - be incorporated in one of the "Recognised Jurisdictions" (Hong Kong, the PRC, the Cayman Islands and Bermuda); ***or***
  - be incorporated in one of the 21 "Acceptable Jurisdictions" and adopt the arrangements set out in each Country Guide accordingly; ***or***
  - demonstrates to the SFC/HKEx that it meets key shareholder protection standards that are at least equivalent to those in Hong Kong
- **Requirements on regulatory cooperation**: the statutory securities regulator in an overseas company's jurisdiction of incorporation and place of central management and control (if different) must
  - be a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("IOSCO MMOU"); ***or***
  - have entered into a bi-lateral agreement with the SFC which provides adequate arrangements with the SFC for mutual assistance and exchange of information for the purpose of enforcing and securing compliance with the laws and regulations of that jurisdiction and Hong Kong

For full contents of the JPS, please see http://www.hkex.com.hk/eng/rulesreg/listrules/listsptop/listoc/Documents/new_jps_0927.pdf