



Hong Kong Law

February 2018

HK Stock Exchange Consults on Listings of Emerging and Innovative Companies

Introduction

On 23 February 2018, the Hong Kong Stock Exchange (the “**Stock Exchange**”) released a [Consultation Paper on a Listing Regime for Companies from Emerging and Innovative Sectors](#) (the “**Consultation Paper**”), setting out proposals to allow the listing of a broader range of companies on the Main Board of the Stock Exchange.

In the Consultation Paper, the Stock Exchange is calling for comments on proposals and amendments to the Listing Rules to:

1. allow the listing of Biotech Companies that do not satisfy any of the financial eligibility tests under Listing Rule 8.05, including companies that do not have any revenue or profit (proposed new Chapter 18A);
2. allow high growth and innovative companies with weighted voting rights (“**WVR**”) structures to list on the Main Board (proposed new Chapter 8A); and
3. provide a concessionary route to secondary listing on the Main Board for companies primary listed on NYSE, NASDAQ or the “premium listing” segment of LSE’s Main Market (proposed new Chapter 19C).

The Consultation Paper follows a previous consultation on a proposed new board in 2017.

In the December 2017 [Consultation Conclusions to the New Board Concept Paper](#), the Stock Exchange indicated that it planned to extend the Hong Kong listing regime to allow companies from emerging and innovative sectors to list on the Main Board, rather than creating a separate new board as initially proposed. The 2018 Consultation Paper builds on the 2017 consultation and includes proposals to give effect to those conclusions. For a summary of proposals set out in the [New Board Concept Paper](#) and the [Consultation Conclusions](#), please see Charltons’ [June 2017](#) and [December 2017](#) newsletters, respectively.

The Stock Exchange invites comments to be submitted by 23 March 2018.

Biotech Companies

The Hong Kong Stock Exchange proposes that Biotech Companies will be able to list without satisfying the usual financial eligibility tests under Listing Rule 8.05 (the profit test, the market capitalisation/revenue/cash flow test or the market capitalisation/revenue test). At the same time, the Stock Exchange will implement new investor protection measures under a proposed new Chapter 18A in the Listing Rules. This will be supplemented by Stock Exchange guidance concerning the eligibility and suitability of Biotech Companies for listing where they do not satisfy the

financial eligibility tests.

Biotech will be defined as “the application of science and technology to produce commercial products with a medical or other biological application”. Biotech Companies are companies primarily engaged in the research and development (“R&D”), application and commercialisation of Biotech products, processes or technologies. In the United States, Biotech Companies dominate early stage listings, and such companies are thus unable to satisfy any of the financial eligibility requirements at that early stage of their development. Investors in Biotech Companies rely upon decisions made by internationally recognised bodies including the US Food and Drug Administration (the “FDA”) so as to assess the development progress of such companies, given the absence of quantitative factors including revenue and profit.

The requirements for Biotech listings as set out below will apply in addition to the Chapter 8 requirements (excluding Listing Rule 8.05).

Suitability to list

A company seeking to list under Chapter 18A will be required to demonstrate to the Hong Kong Stock Exchange’s satisfaction that it is both eligible and suitable for listing as a Biotech Company. It is proposed that it should demonstrate the following characteristics in order to be considered suitable for Chapter 18A listing, in addition to the general suitability requirement of Listing Rule 8.04:

1. development of at least one Core Product beyond the concept stage;
2. primary engagement in R&D for developing its Core Product(s);
3. engagement in the R&D of its Core Products for a minimum of 12 months prior to listing;
4. primary reason for listing is the raising of finance for R&D to bring its Core Product(s) to commercialisation;
5. durable patents, registered patents, patent applications and/or intellectual property in relation to its Core Product(s);

6. in the case of pharmaceutical (small molecule drugs) products or biological products, there must be a pipeline of potential products; and
7. prior meaningful third party investment (being more than just a token investment) from at least one sophisticated investor at least six months before the proposed listing, and that investment continuing at listing.

The above factors are not exhaustive, with the Stock Exchange empowered to take into account all relevant circumstances in assessing an applicant’s suitability. The Stock Exchange has the discretion to find that an applicant is not suitable for listing, even if it has satisfied the above factors.

An important definition under the proposed new Listing Rules’ Chapter 18A is that of a Core Product – a Biotech product, process or technology that is required by laws, rules or regulations to be approved by a Competent Authority based on data derived from human clinical trials before being marketed and sold in the market regulated by the Competent Authority, and which forms the basis of a Biotech Company’s listing application. Under draft Chapter 18A, Competent Authorities are defined as the US FDA, the China Food and Drug Administration and the European Medicines Agency. However, under the Stock Exchange’s proposals, Competent Authorities may also include other national and supranational authorities recognised as Competent Authorities by the Stock Exchange following the SFC’s consent of such recognition.

Expected market capitalisation

Biotech Companies will be required to have a minimum expected market capitalisation of HK\$1.5 billion at listing.

Track record

An applicant must have a track record of operating in its current line of business for at least two financial years prior to listing under substantially the same management.

Working capital requirements

An applicant must have available working capital to cover at least 125% of the group’s costs for at

least twelve months from the date of publication of the listing document (after taking into account the IPO proceeds). These costs should substantially consist of general, administrative and operating costs, as well as R&D costs. It is expected by the Hong Kong Stock Exchange that a substantive portion of the IPO proceeds will be applied to these costs.

Enhanced disclosure requirements

In addition to the disclosure requirements applicable to all companies seeking primary listing for equity securities as set out in Appendix 1A to the Listing Rules, the applicant must provide enhanced risk disclosure in its listing document, including information relating to:

1. the phases of development for its Core Product(s);
2. material communications with all Competent Authorities concerning its Core Products (except where disclosure is restricted by law or applicable regulations or at the direction of the Competent Authority);
3. all material safety data relating to its Core Product(s);
4. patents granted, registered and applied for and other intellectual properties relating to the Core Product(s) (unless the Stock Exchange is satisfied that such disclosure would involve the disclosure of highly sensitive commercial information);
5. its rights and obligations in respect of any in-licensed Core Products;
6. the R&D experience of management; and
7. disclosure of operating costs, capital expenditure and working capital including details of spending on R&D.

Biotech Companies will also be required to include a prominent warning statement that a Core Product may not ultimately be successfully developed and marketed.

There will also be continuous disclosure requirements for issuers' interim and annual reports of details of their R&D activities.

Restriction on cornerstones

It is proposed that shares allocated to cornerstone investors will not be taken into account when assessing whether a company has met the minimum initial public float requirement under Listing Rule 8.08(1) at its initial listing and up to the expiry of the six-month lock up period for cornerstone investors.

Where an existing shareholder does not satisfy the conditions under current guidance to subscribe for shares in an IPO, it is proposed that such shareholder may participate in the IPO of a Biotech Company as a cornerstone investor. Shares subscribed by existing shareholders in the IPO will not count towards the public float. However, shares subscribed by existing shareholders before the IPO where such shareholders are not core connected persons or otherwise not recognised as a member of the public by the Exchange pursuant to Listing Rule 8.24, will count towards the public float.

Measures to manage risks associated with Biotech Companies

In order to address concerns that listed Biotech Companies will become shell companies if they do not achieve their business plans and thus will be the subject of targeted attempts to list new assets or businesses in circumvention of the listing requirements for new applicants, the following measures are proposed:

1. Listed Biotech Companies will be restricted from effecting any acquisition, disposal or other transaction or arrangement that would result in a fundamental change to its principal business, without the Stock Exchange's prior consent. Such consent will normally be given where the Stock Exchange is satisfied that the company is engaging in a legitimate business expansion or diversification that forms part of its business strategies;
2. Listed Biotech Companies will be governed by the current delisting rules. An exception would apply where Biotech Companies do not satisfy the continuing obligation to maintain sufficient operations or assets pursuant to Listing Rule

13.24, so that they may be given up to 12 months to re-comply with this rule. Their listing will be cancelled if they fail to re-comply.

A listed Biotech Companies must have a stock marker “B” at the end of its name.

Once a listed Biotech Company is able to satisfy the financial eligibility tests under Listing Rule 8.05, it will no longer be required to comply with these measures (i.e. material changes, sufficient operations and stock marker requirements).

Issuers with WVR Structures

Although the Hong Kong Stock Exchange is of the opinion that the “one share, one vote” principle is the best mechanism to empower shareholders and align their interests in a company, it is proposing to expand listings in Hong Kong to include WVR-structured companies so as to attract good quality and high growth companies from innovative sectors to list in Hong Kong. This will be done through a proposed new Chapter 8A of the Listing Rules, which will set out the qualifications for listing of WVR-structured companies and the necessary safeguards to protect investors. The Stock Exchange will consider all factors in exercising its discretion to find an applicant suitable to list with a WVR structure.

Weighted voting rights are defined under the proposed new chapter as the voting power attached to a share of a particular class that is greater or superior to the voting power attached to an ordinary share, or other governance right or arrangement disproportionate to the beneficiary’s economic interest in the equity securities of the issuer. Thus, the definition encompasses both share-based structures (for example, dual class shares) and non-share based structures (for example, board control structures).

Companies suitable to list with a WVR structure

A listing applicant with a WVR structure must demonstrate to the Hong Kong Stock Exchange that it is both eligible and suitable for listing, with the Stock Exchange publishing guidance on eligibility and suitability factors for listing of such structured companies. It is proposed that a WVR-structured company would usually be regarded as suitable

for listing where it demonstrates the following characteristics:

1. Nature of the company: the applicant is required to be an “innovative” company, that is a company that would normally exhibit more than one of the following characteristics:
 - (a) its success is attributable to the application of new technologies, innovations, and/or a new business model to the company’s core business, which differentiates the company from existing players;
 - (b) R&D is a significant contributor of its expected value and constitutes a major activity and expense;
 - (c) its success is attributable to its unique features or intellectual property; and/or
 - (d) it has an outsized market capitalisation/intangible asset value relative to its tangible asset value.

The Stock Exchange acknowledges that what is regarded as “innovative” will depend on the state of the relevant industry and market, which may change as technology, industries and markets develop and change. This means that a WVR-structured company may qualify for listing where it has a new and “innovative” business model or technology; but such business model or technology may cease to be “innovative” when adopted by numerous industry players over time, so that WVR-structured companies adopting the same business model or technology in the future may not necessarily qualify for listing. Further, where a retail business merely develops an online sales platform, this would not be suitable for listing with a WVR structure unless it demonstrates other distinctive features.

2. Success of the company: the applicant must have a track record of high business growth, as objectively measured by operational metrics such as business operations, users,

customers, unit sales, revenue, profits and/or market value (as appropriate), and it is expected that its high growth trajectory will continue;

3. Contribution of WVR beneficiaries: each WVR beneficiary should have been materially responsible for the growth of the business, through his/her skills, knowledge and/or strategic direction in circumstances where the value of the company is largely attributable or attached to intangible human capital;
4. Role of WVR beneficiaries: each WVR beneficiary is required to be a director at listing, and must be an individual who has an active executive role within the business and has materially contributed to the ongoing growth of the business; and
5. External validation: the applicant must have previously received meaningful third party investment (not merely a token investment) from at least one sophisticated investor, with such investor(s) retaining an aggregate 50% of their investment at listing and until at least six months after listing (there are exceptions for de minimis investments by specific investors provided that the main investors are in compliance). Where an applicant is a spin-off from the parent company, it would not normally be required to demonstrate that it has received third party investment.

However, even where a company demonstrates any or all of the above characteristics, this may be insufficient to satisfy the suitability criteria. Further, the Stock Exchange has absolute discretion to reject an application, including the right to reject an applicant if its WVR structure is “an extreme case of non-conformance with governance norms”, for example if ordinary shares carry no voting rights.

Expected market capitalisation

Applicants will be required to have an expected market capitalisation of at least HK\$10 billion at listing. An applicant with an expected market capitalisation of less than HK\$40 billion at listing must have at least HK\$1 billion of revenue in its most recent financial year.

Ring-fencing and anti-avoidance

The listing of WVR-structured companies is restricted to new applicants. The Hong Kong Stock Exchange has the discretion to reject a listing application where it believes that the company has acted intentionally to avoid this restriction or in a manner which has the effect of avoiding this restriction. Further, any circumvention of or non-compliance with Chapter 8A requirements may constitute a contravention of the Securities and Futures (Stock Market Listing) Rules (Cap. 571V) (“SMLR”), and consequently, the SFC may exercise its powers under the SMLR in relation to the listing applicant/issuer.

WVR-structured issuers will be restricted from increasing the proportion of WVR shares in issue to above the proportion in issue at listing or from issuing further WVR shares. WVR beneficiaries will have a limited right of pre-emption in the case of a pro rata offering to all shareholders or a pro rata issue of securities by way of scrip dividends or a stock split or similar transaction, provided that the proportion of WVRs in issue afterwards is not higher than that in issue immediately prior to the corporate action.

Issuers may not change the terms of a class of its shares carrying WVRs to increase the WVRs carried by that class, but may reduce the WVRs with the Stock Exchange’s approval.

Where an issuer plans to reduce the number of shares in issue, WVR beneficiaries must reduce their WVRs proportionately, if the reduction in shares in issue would otherwise result in an increase in the proportion of issuer’s shares that carry WVRs.

Minimum and maximum economic interest at listing

All beneficiaries of a WVR-structured listed company must collectively beneficially own between 10% and 50% (inclusive) of the underlying economic interest in the applicant’s total issued share capital at listing. However, this requirement will not continue after listing. The Hong Kong Stock Exchange may accept a shareholding percentage lower than 10% on an individual case

basis, where such percentage is a very high amount in absolute dollars terms, for example where its market capitalisation is above HK\$80 billion.

Ongoing requirements for WVR beneficiaries

WVR beneficiaries must be natural persons who are directors at and after listing. The WVRs attached to shares will cease in certain circumstances: where the WVR beneficiary dies or ceases to be a director; where the Hong Kong Stock Exchange deems the WVR beneficiary to be incapacitated or no longer meets the Listing Rules requirements of a director. The WVRs attached to a WVR beneficiary's shares will lapse permanently if a WVR beneficiary transfers his/her beneficial interest or economic interest in the WVR shares, or the voting rights attached to such shares, to another person (subject to limited exceptions in the case of trust and other structures for estate and/or tax planning purposes).

Limits on WVR power

The WVR structure must be attached to a specific share class or classes, which must be unlisted. The WVRs may confer to a beneficiary only enhanced voting power on resolutions tabled at general meetings (other than those decided on a one-share one-vote basis as set out below under "Protecting non-WVR shareholders' rights to vote"). The rights attached to WVR shares must be the same in all other respects to those attached to the issuer's ordinary shares (other than in relation to voting rights). The voting power attached to WVR shares is to be capped at ten times the voting power of ordinary shares.

Protecting non-WVR shareholders' rights to vote

The WVR structure must permit non-WVR shareholders to cast at least 10% of the votes that are eligible to be cast on resolutions at general meetings. There is also a requirement that non-WVR shareholders holding at least 10% of the voting rights on a one-share one-vote basis (or such lower threshold as required by the laws of the issuer's jurisdiction of incorporation), have the power to convene a general meeting and to add

resolutions to the meeting agenda.

Decisions on the following matters may only be made on a one-share one-vote basis and WVR beneficiaries will not be able to exercise WVRs on these matters:

- any changes to the issuer's constitutional documents, however framed;
- variation of rights attached to any class of shares;
- the appointment or removal of an independent non-executive director;
- the appointment or removal of auditors; and
- the voluntary winding-up of the issuer.

Conversion of WVR shares into ordinary shares

A WVR beneficiary may convert his/her shares into ordinary shares on a voluntary basis or as mandated by the Listing Rules, with such conversions taking place on a one-to-one ratio.

As part of their initial listing application and whenever new WVR shares are to be issued (e.g. as part of a pro rata offer to prevent the dilution of a WVR beneficiary's holdings), issuers must obtain approval from the Hong Kong Stock Exchange for (i) the issue of WVR shares, and (ii) the listing of shares that are issuable upon conversion of the WVR shares.

There is a requirement for disclosure in listing documents and interim and annual reports in relation to any dilution impact of a potential conversion of WVR shares into ordinary shares.

Enhanced disclosure

A WVR-structured issuer will be identified through a stock marker "W" at the end of its stock name. Such issuers will also be required to disclose prominently on the front page of all listing documents, periodic financial reports, circulars, notifications and announcements, a warning ("a company controlled through weighted voting rights") and must describe the WVR structure, its rationale and risks for shareholders.

WVR beneficiaries must be identified in listing documents and interim and annual reports.

Enhanced corporate governance

WVR-structured issuers must establish a Corporate Governance Committee (“CGC”), consisting of a majority of independent non-executive directors (“INEDs”) and be chaired by an INED so as to ensure that the issuer is operated and managed for the benefit of all shareholders and that the issuer complies with the Listing Rules. The CGC is responsible for performing the corporate governance duties specified in the terms of reference of Code Provision D.3.1 of the Corporate Governance Code and Corporate Governance Report (Appendix 14 to the Listing Rules), as well as on the following terms:

- to review and monitor whether the listed issuer is operated and managed for the benefit of all its shareholders;
- to confirm annually that the WVR beneficiaries have been directors throughout the year;
- to review and monitor the management of conflicts of interests;
- to review and monitor all risks related to the issuer’s WVR structure, including compliance with requirements on connected transactions;
- to seek to ensure effective and on-going communication between the issuer and its shareholders, especially in relation to requirements concerning the issuer’s shareholder communication policy (which will be mandatory for WVR-structured issuers); and
- to report on the work of the CGC on at least a half-yearly and annual basis covering all areas of its terms of reference.

A summary of the CGC’s work and disclosure on any significant events must be included in the Corporate Governance Report in an issuer’s half-yearly and annual reports.

The Stock Exchange will mandate certain provisions of the Corporate Governance Code

and Corporate Governance Report governing the role of INEDs, the establishment of a nomination committee to be comprised of a majority of INEDs and chaired by an INED responsible for making recommendations to the board on the nomination of INEDs, and the retirement of INEDs by rotation at least once every three years.

A compliance adviser must be permanently engaged by the issuer from the date of listing. The issuer should consult with, and if necessary, seek advice from the adviser in the circumstances specified in Listing Rule 3A.23, as well as on any matters related to the WVR structure, transactions in which the WVR beneficiaries have an interest, and where there is a potential conflict of interest between non-WVR shareholders and WVR beneficiaries.

An applicant’s directors, senior management, company secretary and advisers must undertake training on WVR Listing Rules and WVR associated risks.

Enforcement

A WVR-structured company’s breach of the Listing Rules will be enforced in the same manner as any other listed company’s breach of the Listing Rules, which may include taking appropriate action against relevant parties and/or referring matters to other regulatory authorities. The Hong Kong Stock Exchange may suspend dealings or cancel the listing where an issuer materially fails to comply with the Listing Rules. Further, a breach of the Listing Rules by a WVR beneficiary may result in disciplinary proceedings under Chapter 2A. Where there is a possible breach of the WVR safeguards or the triggering of a circumstance in which WVRs may be lost, the normal due process requirements will be applied by the Stock Exchange.

The Stock Exchange is proposing to supplement its current powers to impose or issue a sanction against a non-compliant WVR beneficiary. The Listing Committee may be requested to issue directions for remedial action, which may include the WVR beneficiary giving up his/her WVRs.

Where a company or a WVR beneficiary does not

comply with the requirements of Chapter 8A, the Stock Exchange may, in its discretion, direct a trading halt, suspend dealings, cancel the listing, impose disciplinary sanctions, or withhold approval for a listing application or the issuance of a circular.

Any circumvention or non-compliance with Chapter 8A requirements may constitute a contravention of the SMLR, and consequently, the SFC may exercise its powers under the SMLR in relation to the listing applicant/issuer.

Constitutional backing and legal remedies

Companies must give effect to the safeguards under Chapter 8A (including ring-fencing, minimum and maximum economic interest at listing, ongoing requirements for WVR beneficiaries, limits on WVR powers, protecting non-WVR shareholders' rights to vote, conversion of WVR shares into ordinary shares, enhanced corporate governance and enhanced disclosure set out above) by including them in their constitutional documents. This would enable shareholders to take civil action against the issuer so as to enforce the WVR safeguards.

WVR beneficiaries will be required to give an undertaking to the issuer that they will comply with the relevant WVR safeguards.

Grandfathering

Existing Hong Kong listed issuers with WVR structures would not be subject to the new proposed rules.

Corporate WVR beneficiaries

Since the publication of the New Board Concept Paper Conclusions, the Exchange has engaged in discussions with stakeholders and received feedback that it should allow corporate entities to benefit from WVRs. The Exchange acknowledges that this would be a major new development from the proposals set out in the New Board Concept Paper Conclusions. It is therefore proposed that if the new Chapter 8A is implemented, whether in its existing or a modified form, the Exchange will launch a further consultation within three months from the date of the implementation of the new Rules to explore the option of allowing corporate entities to hold WVRs. That

further consultation will propose requirements and safeguards applicable to corporate WVR beneficiaries which would aim to balance legitimate commercial and competitive concerns with investor protection.

Secondary Listing of Qualifying Issuers

A company incorporated or otherwise established outside of Hong Kong, known as an "Overseas Issuer", which is already listed on another exchange, may apply for secondary listing in Hong Kong. The jurisdiction where the company is primarily listed will be primarily responsible for its regulation. The Hong Kong Stock Exchange would expect that the dominant market in the company's securities is on the exchange of such jurisdiction. In these circumstances, the Stock Exchange exempts or waives certain requirements of the Listing Rules for such Overseas Issuers. Alternatively, an Overseas Issuer may choose a dual-primary listing so that it is subject to all requirements in Hong Kong (with some exceptions) and the other jurisdiction.

There are a number of large PRC and non-PRC companies in emerging and innovative industries which have primary listings in the United States and on other major exchanges.

It is proposed to add a new Chapter 19C to the Listing Rules and make amendments to the 2013 SFC and Exchange Joint Policy Statement regarding the Listing of Overseas Companies ("**2013 JPS**") to create a new concessionary route to secondary listing for companies primary listed on a Qualifying Exchange, that is, NYSE, NASDAQ or the "premium listing" segment of LSE's Main Market ("**Qualifying Issuers**"). At the same time, the most important investor protections in Hong Kong will be maintained under the proposals. Chapter 19C would apply to both Overseas Issuers and Hong Kong incorporated issuers primary listed on a Qualifying Exchange.

Qualifications for listing

A Qualifying Issuer must be both eligible and suitable for listing. A Qualifying Issuer would normally be considered suitable for secondary listing where it is an innovative company as set

out above under ‘Companies suitable to list with a WVR structure – 1. Nature of the company’.

A Qualifying Issuer is also required to:

1. have a good record of compliance for at least two full financial years on a Qualifying Exchange; and
2. have an expected market capitalisation at the time of secondary listing in Hong Kong of at least HK\$10 billion. A secondary listing applicant (i) with a WVR structure; and/or (ii) which is a Greater China Issuer (an issuer with a “centre of gravity” in Greater China) will also be required to have at least HK\$1 billion of revenue in its most recent audited financial year if it has an expected market capitalisation at the time of its secondary listing in Hong Kong of less than HK\$40 billion.

Centre of gravity

Under the 2013 JPS, a secondary listing application from an Overseas Issuer with its “centre of gravity” in the Greater China region will not be approved. The Exchange proposes that Greater China Issuers that are eligible and suitable for listing and are innovative companies by reference to the factors set out under “Companies suitable to list with a WVR structure” above, will not be subject to the “centre of gravity” limitation and may be permitted to apply for a secondary listing in Hong Kong.

Automatic waivers

The waivers in the Listing Rules which are currently automatically granted by the Hong Kong Stock Exchange to eligible listed companies seeking secondary listing under the 2013 JPS will be codified, such as requirements concerning connected transactions, notifiable transactions and the Corporate Governance Code. Qualifying Issuers seeking a secondary listing under Chapter 19C would enjoy the benefit of these codified waivers.

Equivalence requirement

The Exchange now proposes that Non-Greater China Issuers (an issuer that does not have its “centre of gravity” in Greater China) and

Grandfathered Greater China Issuers (Greater China Issuers with a primary listing on a Qualifying Exchange on or before 15 December 2017) must demonstrate, to the Hong Kong Stock Exchange’s satisfaction, how key shareholder protection standards as set out in the 2013 JPS are met by a combination of applicable domestic laws, rules and regulations as well as its constitutional documents. The Stock Exchange may require the issuer to amend its constitutional documents to provide them. There will be a requirement to prominently disclose in listing documents any provisions in a Qualifying Issuer’s constitutional documents relating to its governance that are “unusual” compared with normal practices in Hong Kong and are specific to the issuer (rather than a consequence of the laws and regulations to which it is subject), as well as how such provisions affect its members’ rights. Examples of such provisions include, but are not limited to, “poison pill” arrangements and provisions setting quorums for board meetings.

VIE structures

Variable Interest Entity (“VIE”) structures allow a foreign company to control and receive the economic benefits of a company owning assets or operating in an industry sector that is subject to foreign investment restrictions under PRC law.

Under the proposals, Grandfathered Greater China Issuers will be able to secondary list with their existing VIE structure. The Hong Kong Stock Exchange will require a PRC legal opinion confirming that the VIE structure complies with PRC laws, rules and regulations. These issuers will also be required to meet VIE Guidance disclosure requirements.

Foreign Private Issuers

An applicant that applies to list under the new secondary listing route that is classified in the United States as a Foreign Private Issuer under the US Securities Act of 1933 and the US Securities Exchange Act of 1934 must clearly disclose in its Hong Kong listing document the exemptions from US obligations that it enjoys arising from its status as a Foreign Private Issuer, and that, for this reason, investors should exercise care when

investing in the listed shares of the issuer.

Qualifying issuers, including Foreign Private Issuers applying to secondary list under the new concessionary route would also be required by the 2013 JPS to disclose a summary of the provisions in the laws and regulations in their home jurisdiction and primary market that are different to those required by Hong Kong law.

WVR companies

Qualifying Issuers with a WVR structure seeking a secondary listing under the new concessionary route must satisfy the eligibility, suitability and market capitalisation requirements referred to above under 'Issuers with WVR Structures'. The Exchange will exercise its discretion to find a Qualifying Issuer with a WVR structure suitable to list only where appropriate and where the applicant fits the targeted profile.

Non-Greater China Issuers and Grandfathered Greater China Issuers will not be required to comply with ongoing WVR safeguards except for the enhanced disclosure requirements (including ring-fencing, minimum and maximum economic interest at listing, ongoing requirements for WVR beneficiaries, limits on WVR powers, protecting non-WVR shareholders' rights to vote, conversion of WVR shares into ordinary shares, enhanced corporate governance and enhanced disclosure set out above). Under these circumstances, such issuers may not be subject to Hong Kong WVR safeguards such as the restriction not to increase the number or proportion of WVR shares after the date of listing nor to comply with the requirement for certain resolutions to be subject to voting on a one vote per share basis.

Non-Grandfathered Greater China Issuers

Greater China Issuers that primary list on a Qualifying Exchange after 15 December 2017, known as Non-Grandfathered Greater China Issuers, will not be granted the concessions for the equivalence requirement, VIE structures or WVR companies as set out above, so as to deter issuers from listing on a Qualifying Exchange and then seeking a secondary listing in Hong Kong to avoid Hong Kong's primary listing requirements.

For secondary listings in Hong Kong, Non-Grandfathered Greater China Issuers are required to amend their constitutional documents to satisfy the key shareholder protection standards, and ensure that their WVR structure and VIE structure comply with primary listing requirements, including ongoing WVR safeguards and the Stock Exchange's VIE Guidance.

Below is a table from the Consultation Paper summarising the proposals in relation to automatic waivers, equivalent shareholder protection requirements and WVR safeguards.

Migration of the bulk of trading to Hong Kong

The new concessionary route to secondary listing will allow Greater China Issuers to secondary list in Hong Kong. Given investors' interest in such companies in Hong Kong, it is possible that in the future the bulk of trading in the shares of these companies will migrate from the company's primary exchange to Hong Kong. The proposed Listing Rule amendments provide that where the majority of trading in a Greater China Issuer's shares does migrate to Hong Kong on a permanent basis, the Stock Exchange will regard the issuer as having a dual-primary listing in Hong Kong.

Automatic waivers

Where the bulk of trading in shares of companies migrates to Hong Kong, it is proposed that the codified waivers automatically granted to Greater China Issuers ('Automatic Waivers' above) will no longer apply. Instead, such companies would be granted waivers, albeit on a case-by-case basis, in situations where such waivers are commonly granted to dual-primary listed issuers.

Where the bulk of trading of a Greater China Issuer migrates to Hong Kong, and such issuer has continuing transactions subject to automatic waivers, it is proposed that there be an exemption for such transactions from having to comply with the Listing Rules for three years from the date of the Hong Kong Stock Exchange's notice of its decision that the issuer is regarded as having a dual-primary listing.

In relation to Non-Greater China Issuers, where their bulk of trading migrates to Hong Kong, such

Table 1: Table from the Consultation Paper summarising the proposals in relation to automatic waivers, equivalent shareholder protection requirements and WVR safeguards

	Grandfathered Greater China Issuers	Non-Grandfathered Greater China Issuers	Non- Greater China Issuers
Automatic Waivers	Apply		
Equivalent Shareholder Protection Requirements	Required to demonstrate compliance with the key shareholder protection standards	Required to change constitutional documents (as necessary) in accordance with the existing Listing Rules	Required to demonstrate compliance with the key shareholder protection standards
WVR Safeguards (if applicable)	No need to meet WVR safeguards (except on disclosure) nor change WVR structure to meet primary listing requirements	Must meet WVR safeguards and WVR structure must conform with primary listing requirements	No need to meet WVR safeguards (except on disclosure) nor change WVR structure to meet primary listing requirements

issuers would continue to benefit from automatic waivers granted under the new concessionary route.

WVR safeguards

After the migration of the bulk of trading to Hong Kong, a Non-Greater China Issuer with a WVR structure or a Grandfathered Greater China Issuer with a WVR structure will not need to comply with the Hong Kong WVR safeguards applicable to primary listings (other than WVR safeguards that are disclosure requirements). This would mean that, in these circumstances, a Non-Greater China Issuer with a WVR structure or a Grandfathered Greater China Issuer with a WVR structure may not be subject to Hong Kong WVR safeguards such as the restriction not to increase the number or proportion of WVR shares after the listing date, nor will they be required to comply with the requirement that certain resolutions are subject to voting on a one share one vote basis.

VIE structures

Grandfathered Greater China Issuers will not be required to amend their VIE structures if the bulk of trading in their securities moves to the Exchange. This exemption will also apply to Non-Greater China Issuers if they have VIE structures.

Grace period for compliance

Affected issuers will have a twelve month grace period to comply with the relevant Listing Rules governing the migration of bulk of trading to Hong Kong.

Takeovers Code

If the Hong Kong Stock Exchange's proposals are adopted, the SFC proposes that the Code on Takeovers and Mergers and Share Buy-backs would not apply to secondary listings of Grandfathered Greater China Issuer in so far as they might be considered as "public companies in Hong Kong" for the purposes of the Takeovers Code; however, if the bulk of trading of shares moves to Hong Kong so that the company is regarded as having a dual primary listing in Hong Kong, the Takeovers Code would apply at that point.

CHARLTONS

Boutique Transactional Law Firm of the Year 2017
Asian Legal Business Awards

This newsletter is for information purposes only.

Its contents do not constitute legal advice and it should not be regarded as a substitute for detailed advice in individual cases.

Transmission of this information is not intended to create and receipt does not constitute a lawyer-client relationship between Charltons and the user or browser.

Charltons is not responsible for any third party content which can be accessed through the website.

If you do not wish to receive this newsletter please let us know by emailing us at unsubscribe@charltonslaw.com

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