



Hong Kong

November 2019

HKEX ENHANCES GUIDANCE FOR OVERSEAS LISTING APPLICANTS

Enhanced guidance materials aimed at improving overseas companies' access to the Hong Kong markets and to facilitate the HKEx listing application process were published on 29 October 2019 by the Stock Exchange of Hong Kong Limited (**HKEx**), Hong Kong Securities Clearing Company Limited, and their parent company, Hong Kong Exchanges and Clearing Limited.

The new guidance materials comprise:

1. Alternative Procedures¹ for companies offering securities subject to Regulation S of the U.S. Securities Act;
2. A Standardised Template² for listing applicants from jurisdictions new to listing in Hong Kong to assist them in demonstrating that the key shareholder protection standards of their home jurisdiction are at least equivalent to those provided in Hong Kong; and
3. Updated CCASS Information Materials³ explaining the requirements for admission of securities to the Central Clearing and Settlement System (**CCASS**) and its clearing and settlement processes. The updated CCASS information materials include:

1 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/procedure_reg_s.pdf?la=en

2 https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/template_aja.pdf?la=en

3 https://www.hkex.com.hk/News/News-Release/2019/191029news?sc_lang=en

- a) simplified CCASS-related information;
- b) revised CCASS admission forms; and
- c) Frequently Asked Questions on CCASS⁴ admission criteria, services and shareholding structure.

Alternative Procedures for U.S. 'Domestic Issuers' that are not 'Reporting Issuers' Listing on HKEx

U.S. "domestic issuers" within the meaning of Regulation S (**Regulation S**) under the United States Securities Act of 1933 (the **U.S. Securities Act**) who wish to offer their equity securities in "offshore transactions" within the meaning of, and in reliance on the safe harbour provided by Regulation S (**Regulation S Securities**), must meet certain requirements. These include requirements for purchaser certification and purchaser agreements regarding sale, and legending and stop-transfer requirements as set out in Regulation S. For further information on Regulation S and the requirements for reliance on the Regulation S safe harbour, please see the Appendix to this newsletter.

The way in which securities are traded and settled on the HKEx means that it is not feasible for U.S. "domestic issuers" and their underwriters to comply strictly with the Regulation S Category 3 Requirements⁵ on a listing of Regulation S Securities on the HKEx. Such issuers are unable to comply with the requirements for purchaser certifications, purchaser

4 https://www.hkex.com.hk/Services/Settlement-and-Depository/Securities-Admission-into-CCASS/FAQ?sc_lang=en

5 Rules 903(a) and 903(b) of Regulation S.

agreements regarding sale, legending and stop-transfer, distribution notification and dealer notification requirements. These requirements could only be met if Regulation S Securities listed on the HKEx were held in physical, certificated form. However, that is incompatible with both: (i) the multilateral order-matching system operated by the Orion Trading Platform – Securities Market, the electronic stock trading system of HKEx (**OTP-C**); and (ii) CCASS, the automated book-entry clearing and settlement system used by HKEx.

The HKEx has therefore formulated Alternative Procedures⁶ to address the underlying policy concerns in connection with a listing of Regulation S Securities on HKEx. They are for use by U.S. “domestic issuers” that are not “reporting issuers” within the meaning of Regulation S, and are based on previous no-action relief granted by the SEC to other securities exchanges. The key alternative procedures are summarised below.

1. Deemed Representations for Regulation S Issuers on HKEx

The prospectus and listing application forms relating to an offering of a Regulation S Security must prominently disclose that all purchasers of the securities will be deemed to have:

- represented that they are not U.S. persons and are not acquiring the Regulation S Securities for the account or benefit of any U.S. person;
- agreed to resell the Regulation S Securities only in accordance with the provisions of Regulation S, pursuant to registration under the U.S. Securities Act, or pursuant to an available exemption from registration; and
- agreed not to engage in hedging transactions with regard to the Regulation S Securities unless in compliance with the U.S. Securities Act.

These deemed representations address the problems that OTP-C and CCASS do not have facilities that allow Regulation S Securities to obtain transaction-by-transaction representations from purchasers.

2. Regulation S Requirements for HKEx Participants (EPs)

In connection with the admission to trading of any Regulation S Securities, at least three trading days prior to the initiation of trading in any Regulation S Securities, the HKEx will advise its EPs via a circular that, during the one-year distribution compliance period:

- no EP may execute a transaction on the HKEx in Regulation S Securities if such EP has knowledge that the buyer is a U.S. person (as defined in Regulation S) or is acting for the account or benefit of a U.S. person;
- to the extent an EP is purchasing Regulation S Securities on behalf of its customer that is not an EP, the EP making such purchase must make reasonable efforts to ascertain that its customer is not a U.S. person and is not acting for the account or benefit of a U.S. person; and
- EPs must implement measures designed to assure reasonable compliance with the foregoing requirements.

This procedure is intended to facilitate HKEx-listed Regulation S Securities to comply with Regulation S restrictions that are calibrated to prevent securities under Category 3 transactions flowing back into the United States.

3. Legending Requirements for Regulation S Issuers on HKEx

The 1998 amendments to Regulation S⁷ contemplated the development of “measures like those required in Category 3”, and specifically permit “[n]otices of the restrictions to investors on the confirmation or allotment telex, use of global securities held in a depository, and restrictions on trading in the United States through the use of restricted CUSIP numbers”, as alternatives sufficient to satisfy the legending requirements of Regulation S. The HKEx has thus adopted the following alternative methods to the legending requirements of Regulation S:

1) *Regulation S Securities held in global form*

Equity securities of U.S. domestic issuers issued pursuant to Regulation S that are to be traded on the HKEx will be held in certificated, registered form directly by HKSCC Nominees Limited and reflected in the share register maintained by each issuer. Typically, these certificates will be “global” certificates - i.e., each certificate will represent a large number of shares

⁶ https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/procedure_reg_s.pdf?la=en

⁷ 1998 Amending Release, 63 FR at 9636.

the beneficial interests in which will be held by many investors. Offshore purchasers will hold interests in the global security through an entity which is a participant of HKSCC.

2) Restrictive legends on Regulation S certificated securities; certifications

Any certificated securities, including global securities, certificates into which global certificates may be subdivided, and any physical certificated securities issued to holders prior to the expiration of the distribution compliance period, will bear the restrictive legend required by Regulation S.⁸ This condition will apply to the global certificate deposited directly with HKSCC Nominees Limited. These certificated securities will also bear a restrictive legend to the extent required by Rule 144. In addition, any definitive securities issued during the distribution compliance period must satisfy all the requirements of Rule 903(b)(3)(iii)(B), including the legending and certification requirements.

3) Stock codes and indicator of restricted status for HKEx-listed Regulation S Securities

The HKEx will assign Regulation S Securities to a special range of stock codes indicating their status as restricted under the U.S. Securities Act. It will also add an “RS” indicator to the name of any issuer of Regulation S Securities on the HKEx website to alert readers of the restricted nature of such securities. HKEx will also add the indicator “RS” to the stock short name of each of the Registration S Securities in its OTP-C trading system during the distribution compliance period to indicate that such securities are subject to restrictions under the U.S. Securities Act.

HKEx will additionally require that statements or communications confirming or summarising the terms of any new issue of Regulation S Securities by a U.S. domestic issuer or managing underwriters to publishers of publicly available databases (e.g. the BLOOMBERG service) will include a statement that the securities have not been registered under the U.S. Securities Act and are subject to Regulation S.

4) Restricted CUSIP/ISIN Numbers for HKEx-listed Regulation S Securities

The HKEx will require the issuer and/ or domestic underwriters to ensure that the security description associated with the International Securities Identification Number (**ISIN**) and the CUSIP International Numbering System (**CINS**) number of any

⁸ Rule 903(b)(3)(iii)(B)(3) of Regulation S.

Regulation S Securities indicate that such securities are subject to restrictions under the U.S. Securities Act. Therefore, any person accessing the ISIN/ CINS database will be aware that transfers of the securities to purchasers in the United States are restricted and must qualify under an available exemption.

4. Issuer Instructions to Registrar and Transfer Agent for HKEx-listed Regulation S Securities

The HKEx will require issuers of Regulation S Securities to provide assurances that no securities in certificated form bearing the legend required by Rule 903(b)(3)(iii)(B)(3) will be transferred by the issuer’s transfer agent without a favourable opinion of counsel or other assurance that the transfer fully complies with the U.S. Securities Act.

5. Regulation S Issuer Notifications to Shareholders

Issuers of Regulation S Securities will also be required to provide to their security holders notification of the Regulation S status of their securities on their website, in their annual, interim and quarterly reports (as applicable), in dividend notices and notices of shareholder meetings.

Template for HKEx Acceptable Jurisdiction Applications

The Joint Policy Statement regarding the Listing of Overseas Companies⁹ (**JPS**) issued by the Securities and Futures Commission (**SFC**) and the HKEx (last updated in April 2018) provides guidance for overseas companies seeking to list in Hong Kong. The JPS, among other things, provides that overseas listing applicants incorporated in jurisdictions which have not yet been accepted for listing in Hong Kong (**New Jurisdictions**) must demonstrate that their domestic laws, rules and regulations, amongst others, meet the key shareholder protection standards provided by Hong Kong’s laws and regulations (**Acceptable Jurisdiction**).

To assist overseas applicants in comparing and ensuring that their home jurisdictions provide the key shareholder protection standards to a standard at least equivalent to that provided in Hong Kong, the HKEx has published a standardised template¹⁰ (**Template**) to assist listing applicants from New Jurisdictions in preparing an application for recognition of

⁹ https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/Understanding-the-Risks-of-Investing-in-Overseas-Issuers/jps_20180430.pdf?la=en

¹⁰ https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Other-Resources/Listing-of-Overseas-Companies/template_aja.pdf?la=en

the relevant jurisdiction as an Acceptable Jurisdiction. New Jurisdiction listing applicants need to specify in the Template the key shareholder protection standards provided in their home jurisdiction which are equivalent to those available in Hong Kong. Where shareholder protection standards in the home jurisdiction fall short of, or conflict with, the standard provided under Hong Kong's legal and regulatory framework, listing applicants are required to propose actions, such as amendments to their constitutional documents, to ensure equivalence.

New Jurisdiction listing applicants must specify whether the statutory securities regulator in their home jurisdiction is a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information or has entered into an appropriate bi-lateral arrangement with the SFC for mutual assistance and exchange of information. They must also briefly describe the regulatory framework in the New Jurisdiction governing corporate and securities activities and the rights of shareholders of companies incorporated in the jurisdiction, including the key shareholder protection standards set out in Section 1 of the JPS including:

1. a super-majority vote of members being required to approve: (a) changes to the rights attached to any class of shares of an overseas company; (b) material changes to an overseas company's constitutive documents; and (c) voluntary winding-up of an overseas company;
2. any alteration in any overseas company's constitutional document to increase an existing member's liability to the company having to be agreed by such member in writing;
3. the appointment, removal and remuneration of auditors must be subject to the approval of a majority of an overseas company's members or other body that is independent of the board of directors, for example the supervisory board in systems that have a two-tier board structure;
4. an overseas company must be required to hold a general meeting each year as its annual general meeting. Generally not more than 15 months should elapse between the date of one annual general meeting of the overseas company and the next;
5. an overseas company must give its members reasonable written notice of its general meetings;

6. members must have the right to speak and vote at a shareholder meeting except where a member is required, by the Hong Kong Listing Rules, to abstain from voting to approve the transaction or arrangement (e.g. the member has a material interest in the transaction or arrangement);
7. members holding a minority stake in an overseas company must be allowed to convene an extraordinary general meeting and add resolutions to a meeting agenda. The minimum level of members' support required to convene a meeting must be no higher than 10%;
8. a recognised Hong Kong clearing house must be entitled to appoint proxies or corporate representatives to attend general meetings and creditors meetings. These proxies/corporate representatives must enjoy statutory rights comparable to those of other shareholders, including the right to speak and vote; and
9. where the laws of an overseas jurisdiction prohibit a recognised clearing house from appointing proxies/corporate representatives, the overseas company must make the necessary arrangements with HKSCC Nominees to ensure that Hong Kong investors holding shares through HKSCC Nominees enjoy the rights to vote, attend (personally or by proxy) and speak at general meetings.

Updated CCASS Information Materials

For a New Jurisdiction to be accepted as an Acceptable Jurisdiction, the listing applicant must also demonstrate to the HKEx and HKSCC that the securities sought to be listed in Hong Kong are eligible for admission to CCASS. To assist overseas applicants in understanding the clearing and settlement processes and CCASS requirements for admission of securities, HKEx has prepared:

- Simplified CCASS related information and revised CCASS admission forms available on the HKEx website¹¹; and

¹¹ https://www.hkex.com.hk/Services/Settlement-and-Depository/Securities-Admission-into-CCASS?sc_lang=en

- Frequently Asked Questions¹² on Securities Admission into CCASS on CCASS services, the shareholding structure within CCASS and CCASS admission criteria.

Appendix

Further Information regarding Regulation S and the Requirements for U.S. “Domestic Issuers” offering shares in offshore transactions

What is Regulation S?

Regulation S provides an exclusion from the Section 5 registration requirements of the U.S. Securities Act for offerings made outside the United States by both U.S. and foreign issuers. The Regulation S safe harbours are non-exclusive, meaning that an issuer that attempts to comply with Regulation S may claim the availability of another applicable exemption from registration.

Conditions that must be satisfied to rely on Regulation S

The availability of Regulation S safe harbours is contingent on two general conditions:

- the offer or sale must be made in an offshore transaction; and
- no “directed selling efforts” may be made by the issuer, a distributor, any of their respective affiliates, or any person acting on their behalf.

“Offshore transaction”

Rule 902(h) of Regulation S states that any offer, sale, and resale is part of an “offshore transaction” if:

- no offer is made to a person in the United States; and
- either:
 1. at the time the buy order is originated, the buyer is (or is reasonably believed to be by the seller) physically outside the United States; or

2. the transaction is executed on a physical trading floor of an established foreign securities exchange, or on a “designated offshore securities market” and the seller is not aware that the transaction has been pre-arranged with a U.S. purchaser.

A buyer is generally deemed to be outside the United States if the buyer (as opposed to the buyer’s agent) is physically located outside the United States. However, if the buyer is a corporation or investment company, the buyer is deemed to be outside the United States when an authorised agent places the buy order while physically situated outside the United States. In addition, offers and sales of securities made to persons excluded from the definition of “U.S. person”, even if physically present in the United States, are deemed to be made in offshore transactions.

“Designated offshore securities market” refers to: (1) various foreign securities exchanges, which include the HKEx’s Main Board and GEM; and (2) any foreign securities exchange or non-exchange market designated by the United States Securities and Exchange Commission (**SEC**). Factors that the SEC may consider in determining whether to designate an offshore securities market include, among others:

- organisation under foreign law;
- association with a generally recognised community of brokers, dealers, banks, or other professional intermediaries with an established operating history;
- oversight by a governmental or self-regulatory body;
- oversight standards set by an existing body of law;
- reporting of securities transactions on a regular basis to a governmental or self-regulatory body;
- a system for exchange of price quotations through common communications media; and
- an organised clearance and settlement system.

“Directed selling efforts”

“Directed selling efforts” are defined by Rule 902(c) as “any activity undertaken for the purpose of, or that could be reasonably expected to result in, conditioning the U.S. market for the relevant securities.”

¹² https://www.hkex.com.hk/Services/Settlement-and-Depository/Securities-Admission-into-CCASS/FAQ?sc_lang=en

The following activities constitute “directed selling efforts” targeted at U.S. persons:

- advertising the offering in publications with a “general circulation” in the United States;
- mailing printed materials to U.S. investors;
- conducting promotional seminars in the United States;
- placing advertisements with radio or television stations that broadcast in the United States; and
- making offers directed at identifiable groups of U.S. citizens in a foreign country, such as members of the U.S. military.

“U.S. person”

“U.S. persons” are defined by Rule 902(k)(1) to include, but are not limited to:

- any natural person resident in the United States;
- any partnership or corporation organised or incorporated under the laws of the United States; or
- any agency or branch of a U.S. person located outside the United States.

Offers and sales of securities made to persons excluded from the definition of “U.S. person,” even if physically present in the United States, are deemed to be made in offshore transactions for the purpose of Rule 902(h).

Eligible Transactions

Rule 903 distinguishes three categories of transactions based on the type of securities being offered and sold, whether the issuer is domestic or foreign, whether the issuer is a “reporting issuer”, and whether there is a “substantial U.S. market interest” (**SUSMI**). An issuer is a “reporting issuer” if it is subject to the Securities Exchange Act of 1934 (**the Exchange Act**) and is required to file periodic reports with the SEC.

1. Category 1 Transactions

Category 1 transactions include offerings of:

- securities by foreign issuers who reasonably believe at the commencement of the offering that there is no SUSMI in certain securities;
- securities by either a foreign issuer or, in the case of non-convertible debt securities, a U.S. issuer, in an “overseas directed offering”;
- securities backed by the full faith and credit of a foreign government or sovereign; and
- securities by foreign issuers pursuant to an employee benefit plan established under foreign law.

Since Category 1 transactions are those in which the securities are least likely to flow back into the United States, the only restrictions are that the transaction must be an “offshore transaction” and that there be no “directed selling efforts” in the United States.

2. Category 2 Transactions

Category 2 transactions include offerings of:

- equity securities of a reporting foreign issuer;
- debt securities of a reporting U.S. or foreign issuer; and
- debt securities of a non-reporting foreign issuer.

If an offering falls within Category 2, Regulation S imposes certain additional requirements beyond the offshore transaction requirement and the prohibition on directed selling efforts. All Category 2 securities are subject to a 40-day “distribution compliance period” during which distributors may not offer or sell the securities to, or for the account or benefit of, a U.S. person (other than the distributor).

Category 2 also requires that “offering restrictions” be implemented. Offering restrictions require that:

- each distributor agree in writing that all offers and sales of the securities before the end of the distribution compliance period be made only in accordance with Regulation S, pursuant to registration of the securities under the Securities Act or pursuant to an exemption therefrom; and

- all offering materials other than press releases used in connection with the offering before the end of the distribution compliance period include a statement to the effect that the securities have not been registered under the U.S. Securities Act, and may not be offered or sold in the United States or to U.S. persons unless exemptions apply.

In addition, Category 2 imposes a notice requirement whereby each distributor selling the securities prior to the end of the 40-day distribution compliance period must send a confirmation or other notice to each purchaser informing it that it is subject to the same restrictions on offers and sales that apply to the distributor.

3. *Category 3 Transactions*

Category 3 is the residual safe harbour because it applies to all transactions not eligible for the Category 1 or Category 2 safe harbours. Category 3 transactions include:

- debt or equity offerings by non-reporting U.S. issuers;
- equity offerings by U.S. reporting issuers; and
- equity offerings by non-reporting foreign issuers for which there is a substantial U.S. market interest.

The risk of flow back into the United States is highest for securities that fall within Category 3. Consequently, Regulation S imposes all the requirements of Category 2, as well as certain additional requirements which are:

- 1). Under the offering restrictions requirement, for offers and sales of equity securities of U.S. issuers, distributors must agree in writing not to engage in hedging transactions with regard to the securities before the end of the distribution compliance period except in compliance with the U.S. Securities Act;
- 2). The securities must be represented by a temporary global note that is not exchangeable for definitive securities until the expiration of the 40-day distribution compliance period and, for persons other than distributors, until certification of beneficial ownership of the securities by a non-U.S. person or a U.S. person that acquired the securities in a transaction not requiring registration under the U.S. Securities Act; and

- 3). in the case of an equity offering, the distribution compliance period is lengthened to one year (or six months if the issuer is a current Securities Exchange Act-reporting issuer), and any offers or sales made prior to the end of this period must satisfy the following conditions:

- a) the purchaser (other than a distributor) certifies that it is: (i) not a U.S. person and is not acquiring the securities for the account or benefit of any U.S. person; or (ii) a U.S. person that acquired the securities in a transaction not requiring registration under the U.S. Securities Act;
- b) the purchaser agrees to resell the securities only in accordance with the provisions of Regulation S or pursuant to registration under the Securities Act or an available exemption, and agrees not to engage in hedging activities with regard to the securities, unless in compliance with the U.S. Securities Act;
- c) the securities of a domestic issuer contain a legend indicating that transfer is prohibited except in accordance with the provisions of Regulation S or pursuant to registration under the U.S. Securities Act or an available exemption, and that hedging transactions involving the securities may not be conducted, unless in compliance with the U.S. Securities Act; and
- d) the issuer, either by contract or a provision in its organisational documents, refuses to register any transfer of the securities not made in accordance with Regulation S or pursuant to registration under the U.S. Securities Act or an available exemption therefrom, provided that if the securities are in bearer form or foreign law prevents the issuer from refusing to register such transfers, other reasonable procedures are implemented to prevent impermissible transfers.

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