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# Stock Exchange And SFC Announce Joint Policy Statement Regarding The Listing Of Overseas Companies

On 7th March 2007, the Stock Exchange of Hong Kong Limited (**SEHK**) and the Securities and Futures Commission (**SFC**) published a Joint Policy Statement Regarding the Listing of Overseas Companies (**Policy Statement**).

The opening of Hong Kong's equity listing regime to issuers from more overseas jurisdictions is one of the key policy issues for the SEHK and SFC as they seek to consolidate Hong Kong's position as an international finance centre in Asia.

## Policy objectives

The aims of the Policy Statement are:

1. to facilitate the listing of overseas companies by clarifying the requirements of the Listing Rules; and
2. to give clear guidance and assistance to companies incorporated outside Hong Kong or the recognised jurisdictions (the People's Republic of China, the Cayman Islands and Bermuda (the **Recognised Jurisdictions**)) when seeking a primary listing on the Main Board or the Growth Enterprise Market (**GEM**).

## Current Position

Under the current Listing Rules, the SEHK will accept applications for listing from companies incorporated outside Hong Kong and the Recognised Jurisdictions. Such applications are assessed on a case-by-case basis and applicants are required to demonstrate that the standards of shareholder protection in their jurisdiction of incorporation are at least equivalent to those provided under Hong Kong law. In the case of companies seeking a secondary listing on the Main Board of the SEHK, they are additionally required to show that the standard of regulatory oversight offered by the exchange of the company's primary listing is at least equivalent to that provided by the SEHK. In practice, the SEHK requires the listing applicant, through its legal advisers, to prove that its place of incorporation and, in the case of a secondary listing, the venue of its primary listing, are acceptable for the purposes of the Listing Rules. The SEHK requires the listing applicant's submission to include, as a minimum:

* an analysis of its constitutive documents against the articles requirements of the Listing Rules;
* an overview of the foreign regulatory regime, including its securities laws and, in the case of a secondary listing, its stock exchange rules; and
* a comparative analysis of the foreign and Hong Kong laws (including the Companies Ordinance, Securities and Futures Ordinance and the Codes on Takeovers and Mergers) governing areas relevant to investor protection.

Recent listing decisions have also indicated that on the submission of the company's application for listing, its sponsor is required to submit confirmation to the SEHK that all material areas regarding shareholder protection have been considered and reviewed by the sponsor in connection with its due diligence review pursuant to Practice Note 21 and that it is independently satisfied with the conclusion that the standard of shareholder protection in the relevant jurisdiction is at least equivalent to that provided in Hong Kong.

A major disadvantage of the above requirements is that, without any detailed guidance, it renders the outcome of applications uncertain, even for applicants from well-developed legal jurisdictions. Another downside is the time and cost implications of satisfying the requirements.

The clarifications set out in the Policy Statement are intended to provide positive assistance to applicants and to make the listing process less burdensome for overseas issuers.

As reported in our January 2007 Newsletter, the Listing Committee of the SEHK recently approved Australia and Canada (British Columbia) as acceptable jurisdictions. The UK and Ontario, Canada have also been approved in the past. In the case of listing applicants incorporated in jurisdictions which have already been approved by the Listing Committee as acceptable jurisdictions, our understanding from the SEHK is that listing applicants incorporated in those jurisdictions will not be required to make further submissions to the SEHK as to the equivalence of shareholder protection standards in that jurisdiction. The SEHK will instead accept confirmation from the sponsor that there has been no significant change to the standards of shareholder protection.

## Clarifying the Listing Rules

The general framework applicable to all overseas companies seeking a listing on SEHK's markets is provided in Chapter 19 of the Main Board Listing Rules (**Main Board Rules**) and Chapter 24 of the GEM Listing Rules (**GEM Rules**).

The principal issue which SEHK considers in determining an overseas application is shareholder protection standards. Main Board Rule 19.05(1)(b) and GEM Rule 24.05(1)(b) specify that an overseas applicant is required to establish that the shareholder protection standards of its home jurisdiction are at least equivalent to those provided in Hong Kong. Where there is any deficiency in the standards of the applicant's home jurisdiction, the applicant may still be listed in Hong Kong if it compensates for such deficiencies by making appropriate changes to its constitutional documents.

It has always been accepted that complying with these requirements can be challenging. Accordingly, Main Board Rule 19.03 and GEM Rule 24.03 provide that SEHK will assist in guiding overseas applicants on compliance matters and that SEHK will consider waivers and modifications based on the facts and circumstances of each applicant's case.

## SEHK's approach to listing overseas companies

The SEHK has apparently established a uniform approach for the review of shareholder protection standards with respect to overseas listing applicants to ensure consistent interpretation of the relevant Rules. The attachment to the Policy Statement sets out the key requirements necessary to establish the required standard of shareholder protection which have been distilled from the SEHK's existing approach.

In order to determine whether an overseas applicant is subject to appropriate shareholder protection standards, the applicant is expected to evidence substantial comparability between Hong Kong and the overseas jurisdiction on the following matters:

### A. Adoption of a corporate structure that clearly protects principal shareholder rights

* Any change to the company's constitutional document should require shareholders' approval on terms comparable to those required of a Hong Kong company (i.e. a 75% majority vote in general meeting)
* Modification of rights attaching to shares should requires a 75% majority vote in general meeting, subject to the rights of holders of not less than 10% of the nominal value of the issued shares to petition the court to cancel the variation;
* Changes to the company's constitution to increase a shareholder's liability to the company must be agreed by the shareholder in writing;
* Voluntary winding up of a company must be approved by shareholders on terms comparable to those required of a Hong Kong incorporated company (currently a 75% majority vote in general meeting is required);
* Appointment, removal and remuneration of auditors must be approved by shareholders on terms comparable to those required of a Hong Kong company (currently a majority vote in general meeting);
* The branch register of shareholders in Hong Kong must be open for inspection. Closure of the register on terms comparable to the current provisions of Hong Kong law will be allowed;
* The circumstances in which minority shareholders may be bought out or may require an offeror to buy out their interests after a takeover or share repurchase must be clearly stated.

### B. Adoption of fair proceedings for general meetings of shareholders

* The company must hold an annual general meeting (**AGM**) each year with no more than 15 months between each meeting;
* Shareholders who have 5% or more of the paid up capital may require the company to convene an extraordinary general meeting (**EGM**) and can request the circulation of a resolution proposed by the requisitionists;
* An AGM or an EGM at which a resolution requiring a 75% majority approval will be proposed must be convened on at least 21 days' written notice while other general meetings should be convened on 14 days' notice;
* Adoption of general provisions regarding meetings and votes on terms comparable to those required of a Hong Kong company;
* Proxies can be appointed by a recognised clearing house for attending general meetings and creditors meetings on terms comparable to those allowed under Hong Kong law and the proxies must enjoy statutory rights such as speaking in meetings;
* The right of shareholders to demand a poll.

### C. Adoption of corporate governance measures to ensure that the powers of directors are reasonably contained and subject to reasonable scrutiny

* Appointment of directors must be voted on individually. Unanimous shareholder approval is required to pass a resolution permitting appointment of two or more directors by a single resolution;
* A director must disclose any material interest in a contract at the earliest meeting of the board;
* In notices of its intention to move a resolution, the company must include particulars of any director’s interest in the matter;
* The circumstances in which an overseas company may make loans (including quasi loans and credit transactions) to a director must be confined to situations no less limited than those permitted in the case of a Hong Kong company;
* Approval of shareholders is required for any payment of compensation for a director's loss of office or retirement from office.

### D. Ensuring that the concept of capital maintenance is enshrined in its corporate structure

* Majority approval of shareholders should be required to alter the share capital
* Any reduction of share capital should be subject to confirmation by the court and require shareholders' approval by a 75% majority in general meeting;
* Shares may only be redeemed out of distributable profits or fresh proceeds from a new issue of shares (or under other permitted circumstances);
* The assets of the company can only be distributed to its shareholders out of realised profits or, if out of assets, the remaining net assets must not be less than the share capital plus undistributable reserves;
* The circumstances in which a company may provide financial assistance for the acquisition of its own shares must be clearly stated.

### E. Incorporation in a jurisdiction which ensures reasonable regulatory cooperation between the statutory securities regulators of its home jurisdiction and those in Hong Kong

* The company must state whether the statutory securities regulator in its home jurisdiction is (i) a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (**IOSCO MMOU**) or (ii) has entered into a bi-lateral agreement with the SFC to provide 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;
* If neither of the above applies, the company should explain what other regulatory co-operation exists between the securities regulators in Hong Kong and its home jurisdiction. The applicant must make specific disclosure against each of these criteria.

## Factors affecting eligibility

### Exchange of information and assistance between statutory regulators

It is important that Hong Kong's regulators have reasonable access to information relating to the conduct of a listed overseas company in its home or governing jurisdiction to facilitate the taking of any regulatory action against a non-complying listed overseas company. Accordingly, one of the practical factors which the SEHK ordinarily views favourably in considering applications from overseas listing applicants, is whether the Hong Kong securities regulator and the corresponding statutory securities regulator in the applicant's place of incorporation have adequate arrangements for mutual assistance and exchange of information. Although not necessarily a determinative factor, incorporation in a jurisdiction of which the statutory securities regulator is either a full signatory of the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information or has entered into an adequately comprehensive bi-lateral agreement with the SFC, will be viewed favourably.

The full signatories to the IOSCO MMOU are Alberta, Australia, Belgium, British Columbia, the Czech Republic, Denmark, Dubai, France, Germany, Greece, Hong Kong, Hungary, India, Isle of Man, Israel, Italy, Jersey, Lithuania, Malta, Mexico, New Zealand, Nigeria, Norway, Ontario, Poland, Portugal, Quebec, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Turkey, United Kingdom and United States of America.

### Nexus between place of incorporation and business operations

When assessing the reasonableness of the regulatory co-operation arrangements, the SEHK will consider whether a listing applicant's jurisdiction of incorporation is reasonably related to its principal business operations, including the location of its principal trading activities, its principal assets and its principal executive offices. A jurisdiction of incorporation which demonstrate only a distant nexus between the applicant's place of incorporation and its operations will be subject to a greater scrutiny by the SEHK. In certain circumstances, a jurisdiction of incorporation which is completely unrelated to an applicant's principal business operations may cause an applicant to be considered unsuitable for listing, except in the case of one of the Recognised Jurisdictions.

## Additional requirements may be stipulated

According to Main Board Rule 2.04 and GEM Rule 2.07, the Listing Rules may be expanded or modified according to the facts and circumstances of an applicant's case. For example, modifications may be necessary if the overseas applicant can demonstrate to the satisfaction of the SEHK that compliance with the Listing Rules is contrary to the law of the country of its incorporation.

## Notification of adverse company laws

Under the Listing Rules the directors and sponsor of an overseas company are required to notify the SEHK where there are significant provisions of the company law of the company's jurisdiction of incorporation which may have a material and negative impact on the value and rights/privileges of the shares being offered. This mandatory requirement to notify SEHK is included in the general disclosure obligations under Main Board Rule 2.13 and GEM Rule 2.18 and in the specific disclosure obligations under Appendix 1 Part A to the Main Board Rules and GEM Rules respectively and Chapter 19 of the Main Board Rules and Chapter 24 of the GEM Rules.

## Recognised Jurisdictions: Existing Listing Rules continue to apply

The Listing Rules current requirements in relation to the listing of companies incorporated in the Recognised Jurisdictions of the People's Republic of China, Bermuda and the Cayman Islands will continue unchanged.

The above is a summary only of the provisions of the Joint Policy Statement, the full text of which is available on the SFC's website at [www.sfc.hk](http://www.sfc.hk/web/EN/index.html).

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