

HKEx LISTING DECISION
HKEx-LD111-1 (November 2010)

Parties	Company A - a corporation incorporated in the State of California proposing to list on the Main Board
Issues	Whether the Exchange would consider the State of California an acceptable jurisdiction under Chapter 19 of the Main Board Listing Rules
Listing Rules and Regulations	<ol style="list-style-type: none"> 1. Chapter 19 of the Main Board Listing Rules (Rules) 2. Joint Policy Statement Regarding the Listing of Overseas Companies of 7 March 2007 (JPS) 3. Listing Decisions HKEx-LD65-1; HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1 and HKEx-LD84-1 4. Guidance Letter HKEx-GL12-09
Decision	<p>The State of California is an acceptable jurisdiction of an issuer's place of incorporation under Chapter 19 of the Rules if potential Californian applicants make certain revisions to their constitutive documents</p> <p>Future Californian applicants may follow the streamlined procedures set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS</p>

FACTS

1. Company A is a corporation incorporated and with its headquarters in the State of California, the United States of America. Before filing a listing application, Company A enquired whether the State of California would be an acceptable jurisdiction under Chapter 19.
2. It submitted that:
 - a. the legal system of the USA comprises the laws of the federal government and the laws of each individual state. A business corporation is chartered under the laws of an individual state, and the laws of that state generally govern the corporation's existence and affairs. In California, corporations are governed by the California General Corporation Law, a division of the California Corporations Code;
 - b. the Securities and Exchange Commission, the national securities regulator in the USA, is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information and has also entered into a Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws with the Securities and Futures Commission of Hong Kong.

3. Company A provided a comparison table of the Hong Kong Companies Ordinance (**HKCO**) and Californian laws and regulations, mainly the California Corporations Code, on shareholder protection matters based on the framework in the JPS as supplemented by Guidance Letter HKEx-GL12-09.

APPLICABLE RULES, REGULATIONS AND PRINCIPLES

4. All listing applicants must ensure that they are able to and will comply with the Rules, the Securities and Futures Ordinance and the Hong Kong Codes on Takeovers and Mergers and Share Repurchases (**Takeovers Codes**).
5. Chapter 19 provides a general framework for overseas companies seeking a listing on the Exchange. In particular, under Rule 19.05(1)(b), when considering primary listing of securities of an overseas issuer the Exchange may refuse the listing if it is not satisfied that the overseas issuer is incorporated in a jurisdiction which offers at least equivalent standards of shareholder protection to Hong Kong.
6. Where the Exchange believes that overseas issuer's jurisdiction of incorporation does not provide shareholder protection standards equivalent to those in Hong Kong, it may approve the listing of the overseas issuer if it makes the variations to its constitutive document the Exchange requires (see Note to Rule 19.05(1)).
7. The JPS formalised this process by setting out a list of shareholder protection areas the Exchange takes into account.
8. The standards in the JPS were compared against the standards of different overseas jurisdictions in Listing Decisions HKEx-LD65-1, HKEx-LD65-2, HKEx-LD65-3, HKEx-LD71-1, HKEx-LD80-1 and HKEx-LD84-1.
9. Guidance Letter HKEx-GL12-09 sets out streamlined procedures for listing overseas companies. Under it, a potential applicant can benchmark the shareholder protection standards in its home jurisdiction to any one of the recognised or accepted jurisdictions, instead of benchmarking to Hong Kong.

ANALYSIS

10. Where an applicant proposes to change its corporate practices (e.g., by amending its constitutive document or administrative procedures) to achieve equivalence with the shareholder protection standards of Hong Kong, there may be more than one acceptable way to do so. The Exchange does not prescribe the method used.

Matters under the JPS

11. Company A submitted that, for the purpose of the JPS, where Hong Kong laws appear to provide a higher level of shareholder protection than under the laws of the State of California, it would amend its constitutive documents to address the differences, except where:

- a. it considered that the shortfall in shareholder protection was not material (**Immaterial Shortfall**); and
 - b. the shortfalls in shareholder protection could not be remedied by amending its constitutive documents (**Legal Impossibilities**).
12. Where the JPS requires only disclosure of regulatory differences (e.g., Items 1(g) and 4(e) of the JPS), it would make the relevant disclosures in its listing document.
 13. Company A demonstrated that there was a reasonable nexus between its place of incorporation and its operations: it has its headquarters in California, maintains certain key offices in the United States and has a long operating history there.
 14. It submitted that the Californian laws as supplemented by the proposed amendments to its constitutive documents and the proposed disclosure in the listing document would provide a shareholder protection level comparable to Hong Kong or any one of the recognised or accepted jurisdictions.

Immaterial Shortfall: Item 3(d) of the JPS – Loans to directors

15. Under the HKCO a public company generally must not make loans to its directors and their associates. Under the Californian laws a corporation may make a loan to a director if the transaction is approved by a simple majority of shareholders entitled to vote on it, unless the bylaws provide otherwise. Company A's bylaws allow granting loans to Company A's directors or their associates subject to full disclosure of the matter and a prior approval by disinterested shareholders in a general meeting. Company A submitted that this alternative treatment would provide sufficient protection to its public shareholders.

Legal Impossibility 1: Item 1 (b) of the JPS – Court petition for cancellation of class rights variation

16. Under the HKCO where a resolution to vary class rights is proposed, members holding at least 10% of the nominal value of the issued shares of that class may petition the court to cancel the variation. However, this petition is generally not available in a Californian court.
17. Under the Californian laws shareholders generally may institute actions in a court of competent jurisdiction in California to enforce their rights as shareholders, and a “shareholder derivative action”, i.e., an action brought by any of the shareholders on behalf of a corporation against any third party, including directors and corporate officers.
18. Company A submitted that there was no shareholder right to petition to court to have the class rights variation cancelled in Germany, an accepted jurisdiction under Chapter 19 of the Rules.

Legal Impossibility 2: Item 4 (b) of the JPS – Court confirmation of share capital reduction

19. Unlike the HKCO, the Californian laws do not require the court to confirm any share capital reduction, if it is proposed by a corporation.
20. Company A's constitutive documents would require a three-quarter majority vote of the outstanding shares entitled to vote on it:
 - a. to convene a general meeting to approve the share capital reduction;
 - b. to move a motion to approve the share capital reduction; and
 - c. to effect the share capital reduction.

Company A submitted that, due to these approval procedures, the absence of the court confirmation requirement for the share capital reduction would not significantly deprive shareholders of their rights. In addition, individual shareholders may institute actions in Californian courts to protect their rights or those of the corporation.

21. Company A submitted that there was no court confirmation requirement for the share capital reduction in other recognised or accepted jurisdictions, e.g., the PRC, Bermuda, Germany and Luxembourg.

CONCLUSION

22. Based on the submission, the Exchange considered that the State of California is an acceptable overseas jurisdiction if the potential listing applicant makes certain revisions to its constitutive documents and demonstrates a reasonable nexus with the State of California when it submits its formal application.
23. It would be required to submit at the time of filing its listing application:
 - a. a confirmation from the sponsor that it has considered and reviewed all material shareholder protection areas in its due diligence review under Practice Notice 21 to the Rules and that it is independently satisfied that the shareholder protection offered in the State of California is at least equivalent to that in Hong Kong; and
 - b. a legal opinion and the sponsor's confirmation that the Company's constitutive documents do not contain provisions which will prevent it from complying with the Rules, the Securities and Futures Ordinance – Part XV and the Takeovers Codes, to the extent they apply.
24. Future applicants incorporated in the State of California may follow the streamlined procedures set out in Guidance Letter HKEx-GL12-09 and need not complete a detailed line-by-line comparison with the JPS.

NOTES TO ISSUERS AND MARKET PRACTITIONERS

For any questions relating to this Listing Decision please feel free to contact the Listing Division.