

# COUNTRY GUIDE –

## The State of California, the United States of America

(20 December 2013, last updated in January 2022)

**Important notes:** *This guide does not override the Rules and is not a substitute for legal, regulatory, tax, financial or any other advice from qualified professional advisers. If there is any conflict or inconsistency between this guide and the Rules, the Rules prevail. You may consult the Listing Division on a confidential basis for an interpretation of the Rules, or this guide.*

*The information contained in this guide on foreign laws, regulations and market practices is based on that provided to us by potential listing applicants, listing applicants, listed issuers, their respective advisers or officials from the relevant jurisdiction. We have not separately verified this information nor have we updated this information since its receipt.*

### ***Subsequent Development (Updated in January 2022)***

*In November 2021, the Exchange introduced a new listing regime for overseas issuers which covers, among other things, that all issuers are required to comply with the core shareholder protection standards under a revised Appendix 3 of the Main Board and GEM Listing Rules (where applicable) (the “**Core Shareholder Protection Standards**”). The amended Listing Rules are effective as from 1 January 2022. Information in this country guide may be outdated upon the introduction of such listing regime. Issuers and their advisers are advised to exercise caution when reading the guidance in this country guide.*

***A new applicant that is incorporated in the jurisdiction of this country guide should refer to the revised Appendix 3 of the Main Board and GEM Listing Rules (where applicable) for the expected Core Shareholder Protection Standards required by the Exchange<sup>1</sup>. Should there be any changes in the laws, regulations and market practices described in this guide which might or would adversely affect a new applicant’s compliance with the expected Core Shareholder Protection Standards or any applicable Listing Rules, such new applicant should inform the Exchange of any such changes.. A new applicant is also encouraged to consult the Exchange at the earliest opportunity if there is any enquiry on the guidance or requirements in this country guide.***

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<sup>1</sup> Including codification with modification of certain requirements under the Joint Policy Statement regarding the Listing of Overseas Companies, which was superseded and no longer effective as from 1 January 2022.

## Purpose of this Guide

This guide is one of a series that gives guidance on our treatment of listing applications from overseas issuers incorporated in a particular jurisdiction. The aim of this guide is to enhance applicants' understanding of our expectations, practices, procedures and the criteria we consider when applying the Rules for overseas issuers.

**This guide should be read in conjunction with Listing Rules, in particular, the Core Shareholder Protection Standards, Chapter 19 of the Main Board Rules (Chapter 24 of the GEM Rules) (for primary listing applicants), Chapter 19C of the Main Board Rules (for secondary listing applicants). All issuers incorporated in California can apply for one or more “common waivers”<sup>2</sup> and those with, or seeking, a secondary listing do not need to apply for waivers of certain Rules which are automatically waived for them<sup>3</sup> (*Updated in January 2022*).**

### Summary of our Approach

California incorporated companies must demonstrate how the California laws and regulations and their constitutional documents, in combination, provide the Core Shareholder Protection Standards (*Updated in January 2022*).

The statutory securities regulator in California, namely, US Securities and Exchange Commission, is a full signatory to the IOSCO MMOU<sup>4</sup> and California meets our international regulatory co-operation requirements because it already has adequate measures in place with Hong Kong's Securities and Futures Commission (*Updated in January 2022*).

We are prepared to accept financial statements that conform to the United States Generally Accepted Accounting Principles from issuers with, or seeking, a dual primary or secondary listing in the US and on the Exchange. These must contain a reconciliation statement setting out the financial effect of the material differences (if any) from either Hong Kong Financial Reporting Standards or International Financial Reporting Standards<sup>5</sup>. (*Updated in January 2022*).

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<sup>2</sup> Primary listing: Main Board Rule 19.58 (GEM Rule 24.25); Secondary listing: Main Board Rule 19C.11B

<sup>3</sup> Main Board Rule 19C.11

<sup>4</sup> IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information

<sup>5</sup> Please refer to Guidance for Overseas Issuers (HKEX-GL-111-22) for transitional arrangements in respect of the use of United States Generally Accepted Accounting Principles (“US GAAP”) for secondary listing.

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## **1. Background**

1.1 California's equivalent to the Hong Kong Companies Ordinance (Cap. 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) is the California General Corporation Law, a division of the California Corporation Code, which sets requirements for California incorporated companies. Public companies<sup>6</sup> incorporated in California must also comply with the US securities laws. The US Securities and Exchange Commission ("SEC") is the statutory securities regulator in the United States (*Updated in April 2014*).

1.2 A California incorporated company has yet to be listed on the Exchange.

## **2. Application of this Country Guide**

2.1 This Country Guide applies to primary and secondary Main Board listing applicants and primary GEM listing applicants incorporated in California. We do not accept applications for secondary listing on GEM.

## **3. International Regulatory Co-operation Measures**

3.1 Main Board Rule 8.02A states that each of the statutory securities regulator of an issuer's jurisdiction of incorporation and the statutory securities regulator of the place of central management and control must be a full signatory to the IOSCO MMOU. This is to enable the Securities and Futures Commission (the "SFC") to seek regulatory assistance and information from overseas statutory securities regulators to facilitate the SFC's investigations and enforcement actions where an issuer has its records, business operations, assets and management outside Hong Kong. This requirement is met for issuers who are public companies incorporated in California as the SEC is a full signatory to the IOSCO MMOU, and has also entered into a Memorandum of Understanding Concerning Cooperation of Securities Laws with the SFC (*Updated in January 2022*).

3.2 If a listing applicant is incorporated in California but its place of central management and control<sup>7</sup> is elsewhere outside the US, the statutory securities regulator of that jurisdiction must also be a full signatory to the IOSCO MMOU (*Updated in January 2022*).

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<sup>6</sup> A public company in the United States is a company whose securities are registered with the US Securities and Exchange Commission when either (i) its securities are listed on a US securities exchange or (ii) it has assets exceeding US\$1,000,000 and more than 500 shareholders, regardless of where those shareholders are located. Accordingly, a California corporation held by non-US shareholders (e.g. upon a Hong Kong listing), even if it is not listed in the US, must register with the US Securities and Exchange Commission and would, thus, be a public company subject to its oversight, if it has more than 500 shareholders of record and total assets exceeding US\$1,000,000.

<sup>7</sup> Main Board Rule 8.02A

## 4. Core Shareholder Protection Standards

- 4.1 California incorporated issuers must demonstrate how the domestic laws, rules and regulations to which they are subject and their constitutional documents, in combination, provide the Core Shareholder Protection Standards.

Based on submissions by a potential applicant, we have set out below details of the differences between practices in California and the then requirements in the Joint Policy Statement Regarding the Listing of Overseas Companies (“JPS”) (repealed as of 1 January 2022). Where we have in the past accepted a practice and it is still relevant for assessment under the new listing regime for overseas issuers, we have stated this below. California incorporated applicants should amend their constitutional documents to address the shortfall in compliance with the Core Shareholder Protection Standards (*Updated in January 2022*).

The information contained in this guide on California laws, regulations and market practices is based on previous submissions by a potential applicant. We have neither separately verified this information nor have we updated this information since its receipt. Issuers and their advisers are advised to exercise caution when reading the guidance in this country guide. Should there be any changes in the laws, regulations and market practices described in this country guide which might or would adversely affect a new applicant’s compliance with the expected Core Shareholder Protection Standards or any applicable Listing Rules, such new applicant should inform the Exchange of any such changes. (*Added in January 2022*)

### *Appointment, removal and remuneration of auditors*

- 4.2 Under the then JPS, the appointment, removal and remuneration of auditors must be approved by a majority of an overseas company’s members or other body that is independent of the board of directors.

California law contains no such requirement, unless Sarbanes-Oxley-Act of 2002 applies.

### *Subsequent Development since 1 January 2022*

The requirement comparable to the then JPS requirement was codified in paragraph 17 of the revised Appendix 3 of the Listing Rules. A California incorporated applicants must demonstrate how they will comply with this requirement, which may necessitate an amendment to their constitutional documents (*Added in January 2022*).

### *Proceedings at general meetings*

- 4.3 Timing of an annual general meeting: Under the then JPS, an overseas company is required to hold a general meeting each year as its annual general meeting,

and generally no more than 15 months should elapse between the date of one annual general meeting and the next. A California corporation must hold an annual general meeting for the election of directors on a date in accordance with its bylaw.

*Subsequent Development since 1 January 2022*

This then JPS requirement was codified with modification in paragraph 14(1) of the revised Appendix 3 of the Listing Rules, which provides that an issuer must hold a general meeting for each financial year as its annual general meeting and generally, an issuer must hold its annual general meeting within six months after the end of its financial year. A California incorporated applicants must demonstrate how they will comply with this requirement, which may necessitate an amendment to their constitutional documents (***Added in January 2022***).

- 4.4 Notice of general meetings: Under the then JPS, an overseas company must give its members reasonable written notice of its general meeting (***Updated in January 2022***).

Under California law, provisions regarding notice of a general meeting are contained in the bylaws of a California corporation.

*Our approach prior to 1 January 2022*

The Exchange has previously accepted the notice requirement in the constitutional documents of a California incorporated applicant for convening general meetings upon a written notice of at least 14 and nor more than 60 days before the proposed date of the general meeting, and provided that if there is any resolution proposed to be passed that requires the affirmative vote of the holders of not less than three-quarter of the then outstanding shares entitled to vote the notice shall not be at least 21 days.

*Subsequent Development since 1 January 2022*The requirement comparable to the then JPS requirement was codified with modification in paragraph 14(2) of the revised Appendix 3 of the Listing Rules as a Core Shareholder Protection Standard. California incorporated applicants must demonstrate how they will comply with this requirement, which may necessitate an amendment to their constitutional documents (***Added in January 2022***).

- 4.5 Right of members holding a minority stake to convene a general meeting: Under the then JPS, 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. Under California law, provisions regarding time, place and manner of calling and conducting a general meeting are contained in the bylaws of a California corporation (***Updated in January 2022***).

#### *Subsequent Development since 1 January 2022*

The requirement comparable to the then JPS requirement was codified in paragraphs 14(5) of the revised Appendix 3 of the Listing Rules. A California incorporated applicants must demonstrate how they will comply with this requirement, which may necessitate an amendment to their constitutional documents (*Added in January 2022*).

- 4.6 Right to speak and vote at general meetings: The then JPS requires that all members must have the right to speak and vote at a general meeting, except in cases where members having a material interest in a transaction or arrangement are required, by the Rules, to abstain from voting to approve the transaction or arrangement. California incorporated applicants must address whether they are able to comply with this requirement, which may necessitate an amendment to their constitutional documents (*Updated in January 2022*).

#### *Subsequent Development since 1 January 2022*

The requirement comparable to the then JPS requirement was codified in paragraphs 14(3) and 14(4) of the revised Appendix 3 of the Listing Rules. A California incorporated applicants must demonstrate how they will comply with this requirement, which may necessitate an amendment to their constitutional documents (*Added in January 2022*).

#### ***Other Core Shareholder Protection Standards***

- 4.7 Compared to the then JPS and the previous Appendix 3<sup>8</sup> to the Listing Rules, two new shareholder protection standards, namely, members' right to appoint proxies and corporate representatives<sup>9</sup> and inspect Hong Kong Branch Register<sup>10</sup> are added to require applicants to demonstrate conformity. Applicants incorporated in California might not meet these two new Core Shareholder Protection Standards and may have to amend their constitutional documents accordingly. Issuers and their advisors should refer to the revised Appendix 3 of the Main Board and GEM Listing Rules for the complete set of Core Shareholder Protection Standards (*Added in January 2022*).

## **5. Practical and Operational Matters**

- 5.1 Reference is made to the Guidance for Overseas Issuers (HKEX-GL111-22) which contains guidance on an overseas issuer's ability to comply with Hong Kong's rules and regulations; the eligibility of securities; cross-border clearing and settlement; Hong Kong depositary receipts, taxation and stock name

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<sup>8</sup> The previous version of Appendix 3 of the Listing Rules that was in effective on or prior to 31 December 2021

<sup>9</sup> Appendix 3, paragraph 18

<sup>10</sup> Appendix 3, paragraph 20

identification. Applicants are encouraged to notify the Listing Division if they envisage difficulties in complying with such matters, where applicable (*Updated in January 2022*).

## **6. Constitutional Documents**

- 6.1 Applicants should contact Listing Division if California law or the applicants' constitutional documents cannot meet the Core Shareholder Protection Standards (*Updated in January 2022*).

## **7. Accounting and Auditing Related Requirements**

- 7.1 We normally require the accountants' reports and financial statements of overseas issuers seeking a primary or a secondary listing on the Exchange to conform to the Hong Kong Financial Reporting Standards ("**HKFRS**") or the International Financial Reporting Standards ("**IFRS**")<sup>11</sup>. Issuers with, or seeking, a dual primary or secondary listing in the US and on the Exchange can use United States Generally Accepted Accounting Principles ("**US GAAP**")<sup>12</sup>, provided that the issuer includes a reconciliation statement setting out the financial effect of the material differences (if any) between the US GAAP financial statements and financial statements prepared using HKFRS/IFRS in its accountants' reports and subsequent financial statements<sup>13</sup>. Please refer to paragraphs 34 and 35 of Guidance for Overseas Issuers (HKEX-GL-111-22) for transitional arrangements in respect of the use of US GAAP for secondary listing (*Updated in January 2022*).

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<sup>11</sup> Main Board Rules 4.11 to 4.13, 19.13, 19.25A, 19C.10D, 19C.23 and Note 2.1 to paragraph 2 of Appendix 16 (GEM Rules 7.12, 18.04 and 24.18A)

<sup>12</sup> A list of alternative overseas financial reporting standards that are considered comparable to HKFRS and IFRS is published on the Exchange's website, as amended from time to time.

<sup>13</sup> Primary listing: Main Board Rule 19.14 and GEM Rule 7.14 (accountants' reports) and Main Board Rule 19.25A and GEM Rule 24.18A (annual/ interim/ quarterly financial statements). Secondary listing: Main Board Rules 19C.10D (accountants' reports) and 19C.23 (annual/ interim financial statements).